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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2008

MARCH 9 THROUGH JUNE 9, 2009

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 2014

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.[1]
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

ERIC H. HOLDER, JR., ATTORNEY GENERAL.[2]
EDWIN S. KNEEDLER, ACTING SOLICITOR GENERAL.[3]
ELENA KAGAN, SOLICITOR GENERAL.[4]
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] JUSTICE SOUTER announced his retirement on May 1, 2009, effective "[w]hen the Court rises for the summer recess."

[2] Attorney General Holder was presented to the Court on April 22, 2009. See *post*, p. IX.

[3] Acting Solicitor General Kneedler resigned effective March 20, 2009.

[4] The Honorable Elena Kagan, of Massachusetts, was nominated by President Obama on January 26, 2009, to be Solicitor General; the nomination was confirmed by the Senate on March 19, 2009; she was commissioned on the same date and took the oath of office on March 20, 2009. She was presented to the Court on March 23, 2009. See *post*, p. VII.

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 February 1, 2006, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, SAMUEL A. ALITO, JR., Associate Justice.

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

For the Federal Circuit, JOHN G. ROBERTS, JR., Chief Justice.

February 1, 2006.

(For next previous allotment, see 546 U. S., p. v.)

PRESENTATION OF THE SOLICITOR GENERAL

Supreme Court of the United States

MONDAY, MARCH 23, 2009

Present: Chief Justice Roberts, Justice Stevens, Justice Scalia, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, Justice Breyer, and Justice Alito.

The Chief Justice said:

The Court recognizes Deputy Solicitor General Kneedler.

Mr. Kneedler, the Court wishes to note for the record that you have served as Acting Solicitor General since January 20, 2009. On behalf of my colleagues, I thank you for a job well done.

Deputy Solicitor General Kneedler said:

Thank you, Mr. Chief Justice. Mr. Chief Justice, and may it please the Court. I have the honor to present to the Court, the Solicitor General of the United States, Elena Kagan of Massachusetts.

The Chief Justice said:

General Kagan, the Court welcomes you to the performance of the important office that you have assumed, to represent the government of the United States before this Court. We wish you well in your office.

The Solicitor General said:

Thank you, Mr. Chief Justice, it will be an honor to serve.

PRESENTATION OF THE ATTORNEY GENERAL

Supreme Court of the United States

WEDNESDAY, APRIL 22, 2009

Present: Chief Justice Roberts, Justice Stevens, Justice Scalia, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, Justice Breyer, and Justice Alito.

The Chief Justice said:

The Court now recognizes the Solicitor General of the United States.

General Kagan said:

Mr. Chief Justice, and may it please the Court. I have the honor to present to the Court the Eighty-second Attorney General of the United States, the Honorable Eric H. Holder, Jr., of Washington, DC.

The Chief Justice said:

General Holder, on behalf of the Court, I welcome you as the Chief Law Enforcement Officer of the United States Government and as an officer of this Court. We recognize the very important duties that will rest upon you by virtue of your position, and we wish you well in your new office.

Attorney General Holder said:

Thank you Mr. Chief Justice.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2008

BARTLETT, EXECUTIVE DIRECTOR OF NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL. *v.* STRICKLAND ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 07–689. Argued October 14, 2008—Decided March 9, 2009

Despite the North Carolina Constitution's "Whole County Provision" prohibiting the General Assembly from dividing counties when drawing its own legislative districts, in 1991 the legislature drew House District 18 to include portions of four counties, including Pender County, for the asserted purpose of satisfying §2 of the Voting Rights Act of 1965. At that time, District 18 was a geographically compact majority-minority district. By the time the district was to be redrawn in 2003, the African-American voting-age population in District 18 had fallen below 50 percent. Rather than redrawing the district to keep Pender County whole, the legislators split portions of it and another county. District 18's African-American voting-age population is now 39.36 percent. Keeping Pender County whole would have resulted in an African-American voting-age population of 35.33 percent. The legislators' rationale was that splitting Pender County gave African-American voters the potential to join with majority voters to elect the minority group's candidate of choice, while leaving Pender County whole would have violated §2 of the Voting Rights Act.

Pender County and others filed suit, alleging that the redistricting plan violated the Whole County Provision. The state-official defendants answered that dividing Pender County was required by §2. The

Syllabus

trial court first considered whether the defendants had established the three threshold requirements for § 2 liability under *Thornburg* v. *Gingles*, 478 U. S. 30, 51, only the first of which is relevant here: whether the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." The court concluded that although African-Americans were not a majority of District 18's voting-age population, the district was a "de facto" majority-minority district because African-Americans could get enough support from crossover majority voters to elect their preferred candidate. The court ultimately determined, based on the totality of the circumstances, that § 2 required that Pender County be split, and it sustained District 18's lines on that rationale. The State Supreme Court reversed, holding that a minority group must constitute a numerical majority of the voting-age population in an area before § 2 requires the creation of a legislative district to prevent dilution of that group's votes. Because African-Americans did not have such a numerical majority in District 18, the court ordered the legislature to redraw the district.

Held: The judgment is affirmed.

361 N. C. 491, 649 S. E. 2d 364, affirmed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded that § 2 does not require state officials to draw election-district lines to allow a racial minority that would make up less than 50 percent of the voting-age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice. Pp. 10–25.

1. As amended in 1982, § 2 provides that a violation "is established if, based on the totality of circumstances, it is shown that the [election] processes . . . in the State or political subdivision are not equally open to participation by members of a [protected] class [who] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b). Construing the amended § 2 in *Gingles*, *supra*, at 50–51, the Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable vote dilution. It later held that those requirements apply equally in § 2 cases involving single-member districts. *Growe* v. *Emison*, 507 U. S. 25, 40–41. Only when a party has established the requirements does a court proceed to analyze whether a § 2 violation has occurred based on the totality of the circumstances. See, *e. g.*, *Johnson* v. *De Grandy*, 512 U. S. 997, 1013. Pp. 10–12.

2. Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met. Pp. 12–25.

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(a) A party asserting §2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent. The Court has held both that §2 can require the creation of a "majority-minority" district, in which a minority group composes a numerical, working majority of the voting-age population, see, *e. g.*, *Voinovich* v. *Quilter*, 507 U. S. 146, 154–155, and that §2 does not require the creation of an "influence" district, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected, see *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 445 *(LULAC)*. This case involves an intermediate, "crossover" district, in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate. Petitioners' theory that such districts satisfy the first *Gingles* requirement is contrary to §2, which requires a showing that minorities "have less opportunity than other members of the electorate to . . . elect representatives of their choice," 42 U. S. C. §1973(b). Because they form only 39 percent of District 18's voting-age population, African-Americans standing alone have no better or worse opportunity to elect a candidate than any other group with the same relative voting strength. Recognizing a §2 claim where minority voters cannot elect their candidate of choice based on their own votes and without assistance from others would grant special protection to their right to form political coalitions that is not authorized by the section. Nor does the reasoning of this Court's cases support petitioners' claims. In *Voinovich*, for example, the Court stated that the first *Gingles* requirement "would have to be modified or eliminated" to allow crossover-district claims. 507 U. S., at 158. Indeed, mandatory recognition of such claims would create serious tension with the third *Gingles* requirement, that the majority votes as a bloc to defeat minority-preferred candidates, see 478 U. S., at 50–51, and would call into question the entire *Gingles* framework. On the other hand, the plurality finds support for the clear line drawn by the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. By contrast, if §2 required crossover districts, determining whether a §2 claim would lie would require courts to make complex political predictions and tie them to race-based assumptions. Heightening these concerns is the fact that because §2 applies nationwide to every jurisdiction required to draw election-district lines under state or local law, crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local elections. Unlike any of the standards proposed to

allow crossover claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? Given § 2's text, the Court's cases interpreting that provision, and the many difficulties in assessing § 2 claims without the restraint and guidance provided by the majority-minority rule, all of the Federal Courts of Appeals that have interpreted the first *Gingles* factor have required a majority-minority standard. The plurality declines to depart from that uniform interpretation, which has stood for more than 20 years. Because this case does not involve allegations of intentional and wrongful conduct, the Court need not consider whether intentional discrimination affects the *Gingles* analysis. Pp. 12–20.

(b) Arguing for a less restrictive interpretation, petitioners point to § 2's guarantee that political processes be "equally open to participation" to protect minority voters' "opportunity . . . to elect representatives of their choice," 42 U. S. C. § 1973(b), and assert that such "opportunit[ies]" occur in crossover districts and require protection. But petitioners emphasize the word "opportunity" at the expense of the word "equally." The statute does not protect any possible opportunity through which minority voters could work with other constituencies to elect their candidate of choice. Section 2 does not guarantee minority voters an electoral advantage. Minority groups in crossover districts have the same opportunity to elect their candidate as any other political group with the same relative voting strength. The majority-minority rule, furthermore, is not at odds with § 2's totality-of-the-circumstances test. See, *e. g.*, *Growe*, *supra*, at 40. Any doubt as to whether § 2 calls for this rule is resolved by applying the canon of constitutional avoidance to steer clear of serious constitutional concerns under the Equal Protection Clause. See *Clark* v. *Martinez*, 543 U. S. 371, 381–382. Such concerns would be raised if § 2 were interpreted to require crossover districts throughout the Nation, thereby "unnecessarily infus[ing] race into virtually every redistricting." *LULAC*, *supra*, at 446. Pp. 20–23.

(c) This holding does not consider the permissibility of crossover districts as a matter of legislative choice or discretion. Section 2 allows States to choose their own method of complying with the Voting Rights Act, which may include drawing crossover districts. See *Georgia* v. *Ashcroft*, 539 U. S. 461, 480–482. Moreover, the holding should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. See, *e. g.*, *Miller* v. *Johnson*, 515 U. S. 900. Such districts are only required if all three *Gingles* factors are met and if § 2 applies based on the totality of the circumstances. A claim similar to petitioners' assertion that the

majority-minority rule is inconsistent with § 5 was rejected in *LULAC*, *supra*, at 446. Pp. 23–25.

JUSTICE THOMAS, joined by JUSTICE SCALIA, adhered to his view in *Holder* v. *Hall*, 512 U. S. 874, 891, 893 (opinion concurring in judgment), that the text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district. The *Thornburg* v. *Gingles*, 478 U. S. 30, framework for analyzing such claims has no basis in § 2's text and "has produced . . . a disastrous misadventure in judicial policymaking," *Holder*, *supra*, at 893. P. 26.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 26. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 26. GINSBURG, J., *post*, p. 44, and BREYER, J., *post*, p. 44, filed dissenting opinions.

Christopher G. Browning, Jr., argued the cause for petitioners. With him on the briefs were *Roy Cooper*, Attorney General of North Carolina, *Grayson G. Kelley*, *Tiare B. Smiley*, *Alexander McC. Peters*, *Susan K. Nichols*, *Walter Dellinger*, *Sri Srinivasan*, and *Irving L. Gornstein*.

Carl W. Thurman III argued the cause and filed a brief for respondents.

Daryl Joseffer argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Becker*, *Kannon K. Shanmugam*, *Diana K. Flynn*, and *Angela M. Miller*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Edmund G. Brown, Jr.*, of California, *Richard Blumenthal* of Connecticut, *Thurbert E. Baker* of Georgia, *Stephen N. Six* of Kansas, *Jack Conway* of Kentucky, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, and *Nancy H. Rogers* of Ohio; for the Campaign Legal Center by

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

This case requires us to interpret §2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. §1973 (2000 ed.). The question is whether the statute can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn. To use election-law terminology: In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can §2 require the district to be drawn to accommodate this potential?

I

The case arises in a somewhat unusual posture. State authorities who created a district now invoke the Voting Rights

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J. Gerald Hebert, *Paul S. Ryan*, and *Tara Malloy;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Matthew M. Hoffman*, *Stephen J. Pollak*, *William F. Sheehan*, *John Townsend Rich*, *Jon M. Greenbaum*, *John Payton*, *Jacqueline A. Berrien*, *Debo P. Adegbile*, *Ryan P. Haygood*, and *Brenda Wright;* for the League of Women Voters of the United States by *Sam Hirsch* and *Lloyd Leonard;* for the National Association for the Advancement of Colored People et al. by *Anita S. Earls*, *Laughlin McDonald*, *Steven R. Shapiro*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Thomas C. Goldstein;* and for Sanford D. Bishop, Jr., et al. by *Jeh Charles Johnson.*

Briefs of *amici curiae* urging affirmance were filed for the Florida House of Representatives by *Bill McCollum*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Craig D. Feiser*, Deputy Solicitor General; for the American Legislative Exchange Council et al. by *E. Marshall Braden* and *Clark H. Bensen;* and for the Pacific Legal Foundation et al. by *Sharon L. Browne.*

Briefs of *amici curiae* were filed for the Mexican American Legal Defense and Educational Fund et al. by *Lois D. Thompson* and *Nina Perales;* and for Nathaniel Persily et al. by *Mr. Persily, pro se*, and *Michael B. de Leeuw.*

Act as a defense. They argue that §2 required them to draw the district in question in a particular way, despite state laws to the contrary. The state laws are provisions of the North Carolina Constitution that prohibit the General Assembly from dividing counties when drawing legislative districts for the State House and Senate. Art. II, §§3, 5. We will adopt the term used by the state courts and refer to both sections of the State Constitution as the Whole County Provision. See *Pender County* v. *Bartlett*, 361 N. C. 491, 493, 649 S. E. 2d 364, 366 (2007) (case below).

It is common ground that state election-law requirements like the Whole County Provision may be superseded by federal law—for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution. See *Reynolds* v. *Sims*, 377 U. S. 533 (1964). Here the question is whether §2 of the Voting Rights Act requires district lines to be drawn that otherwise would violate the Whole County Provision. That, in turn, depends on how the statute is interpreted.

We begin with the election district. The North Carolina House of Representatives is the larger of the two chambers in the State's General Assembly. District 18 of that body lies in the southeastern part of North Carolina. Starting in 1991, the General Assembly drew District 18 to include portions of four counties, including Pender County, in order to create a district with a majority African-American voting-age population and to satisfy the Voting Rights Act. Following the 2000 census, the North Carolina Supreme Court, to comply with the Whole County Provision, rejected the General Assembly's first two statewide redistricting plans. See *Stephenson* v. *Bartlett*, 355 N. C. 354, 375, 562 S. E. 2d 377, 392, stay denied, 535 U. S. 1301 (2002) (Rehnquist, C. J., in chambers); *Stephenson* v. *Bartlett*, 357 N. C. 301, 314, 582 S. E. 2d 247, 254 (2003).

District 18 in its present form emerged from the General Assembly's third redistricting attempt, in 2003. By that

time the African-American voting-age population had fallen below 50 percent in the district as then drawn, and the General Assembly no longer could draw a geographically compact majority-minority district. Rather than draw District 18 to keep Pender County whole, however, the General Assembly drew it by splitting portions of Pender and New Hanover counties. District 18 has an African-American voting-age population of 39.36 percent. App. 139. Had it left Pender County whole, the General Assembly could have drawn District 18 with an African-American voting-age population of 35.33 percent. *Id.*, at 73. The General Assembly's reason for splitting Pender County was to give African-American voters the potential to join with majority voters to elect the minority group's candidate of its choice. *Ibid.* Failure to do so, state officials now submit, would have diluted the minority group's voting strength in violation of §2.

In May 2004, Pender County and the five members of its board of commissioners filed the instant suit in North Carolina state court against the Governor of North Carolina, the Director of the State Board of Elections, and other state officials. The plaintiffs alleged that the 2003 plan violated the Whole County Provision by splitting Pender County into two House districts. *Id.*, at 5–14. The state-official defendants answered that dividing Pender County was required by §2. *Id.*, at 25. As the trial court recognized, the procedural posture of this case differs from most §2 cases. Here the defendants raise §2 as a defense. As a result, the trial court stated, they are "in the unusual position" of bearing the burden of proving that a §2 violation would have occurred absent splitting Pender County to draw District 18. App. to Pet. for Cert. 90a.

The trial court first considered whether the defendant state officials had established the three threshold requirements for §2 liability under *Thornburg* v. *Gingles*, 478 U. S. 30, 50–51 (1986)—namely, (1) that the minority group "is suf-

ficiently large and geographically compact to constitute a majority in a single-member district," (2) that the minority group is "politically cohesive," and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

As to the first *Gingles* requirement, the trial court concluded that, although African-Americans were not a majority of the voting-age population in District 18, the district was a "de facto" majority-minority district because African-Americans could get enough support from crossover majority voters to elect the African-Americans' preferred candidate. The court ruled that African-Americans in District 18 were politically cohesive, thus satisfying the second requirement. And later, the plaintiffs stipulated that the third *Gingles* requirement was met. App. to Pet. for Cert. 102a–103a, 130a. The court then determined, based on the totality of the circumstances, that §2 required the General Assembly to split Pender County. The court sustained the lines for District 18 on that rationale. *Id.*, at 116a–118a.

Three of the Pender County Commissioners appealed the trial court's ruling that the defendants had established the first *Gingles* requirement. The Supreme Court of North Carolina reversed. It held that a "minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 . . . requires the creation of a legislative district to prevent dilution of the votes of that minority group." 361 N. C., at 502, 649 S. E. 2d, at 371. On that premise the State Supreme Court determined District 18 was not mandated by §2 because African-Americans do not "constitute a numerical majority of citizens of voting age." *Id.*, at 507, 649 S. E. 2d, at 374. It ordered the General Assembly to redraw District 18. *Id.*, at 510, 649 S. E. 2d, at 376.

We granted certiorari, 552 U. S. 1256 (2008), and now affirm.

II

Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote. Though the Act as a whole was the subject of debate and controversy, § 2 prompted little criticism. The likely explanation for its general acceptance is that, as first enacted, § 2 tracked, in part, the text of the Fifteenth Amendment. It prohibited practices "imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437; cf. U. S. Const., Amdt. 15 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"); see also S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19–20 (1965). In *Mobile* v. *Bolden*, 446 U. S. 55, 60–61 (1980), this Court held that § 2, as it then read, "no more than elaborates upon . . . the Fifteenth Amendment" and was "intended to have an effect no different from that of the Fifteenth Amendment itself."

In 1982, after the *Mobile* ruling, Congress amended § 2, giving the statute its current form. The original Act had employed an intent requirement, prohibiting only those practices "imposed or applied . . . to deny or abridge" the right to vote. 79 Stat. 437. The amended version of § 2 requires consideration of effects, as it prohibits practices "imposed or applied . . . in a manner which results in a denial or abridgment" of the right to vote. 96 Stat. 134, 42 U. S. C. § 1973(a) (2000 ed.). The 1982 amendments also added a subsection, § 2(b), providing a test for determining whether a § 2 violation has occurred. The relevant text of the statute now states:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or

> applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or membership in a language minority group], as provided in subsection (b) of this section.
>
> "(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973.

This Court first construed the amended version of § 2 in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986). In *Gingles*, the plaintiffs were African-American residents of North Carolina who alleged that multimember districts diluted minority voting strength by submerging black voters into the white majority, denying them an opportunity to elect a candidate of their choice. The Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable vote dilution under § 2: (1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*, at 50–51.

The Court later held that the three *Gingles* requirements apply equally in § 2 cases involving single-member districts, such as a claim alleging vote dilution because a geographically compact minority group has been split between two or more single-member districts. *Growe* v. *Emison*, 507 U. S. 25, 40–41 (1993). In a § 2 case, only when a party has estab-

lished the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances. *Gingles, supra,* at 79; see also *Johnson* v. *De Grandy,* 512 U. S. 997, 1013 (1994).

III

A

This case turns on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district. The parties agree on all other parts of the *Gingles* analysis, so the dispositive question is: What size minority group is sufficient to satisfy the first *Gingles* requirement?

At the outset the answer might not appear difficult to reach, for the *Gingles* Court said the minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U. S., at 50. This would seem to end the matter, as it indicates the minority group must demonstrate it can constitute "a majority." But in *Gingles* and again in *Growe* the Court reserved what it considered to be a separate question—whether, "when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice." *Growe, supra,* at 41, n. 5; see also *Gingles, supra,* at 46–47, n. 12. The Court has since applied the *Gingles* requirements in §2 cases but has declined to decide the minimum size minority group necessary to satisfy the first requirement. See *Voinovich* v. *Quilter,* 507 U. S. 146, 154 (1993); *De Grandy, supra,* at 1009; *League of United Latin American Citizens* v. *Perry,* 548 U. S. 399, 443 (2006) *(LULAC)* (opinion of KENNEDY, J.). We must consider the minimum-size question in this case.

It is appropriate to review the terminology often used to describe various features of election districts in relation to the requirements of the Voting Rights Act. In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, §2 can require the creation of these districts. See, *e. g.*, *Voinovich*, *supra*, at 154 ("Placing black voters in a district in which they constitute a sizeable and therefore 'safe' majority ensures that they are able to elect their candidate of choice"); but see *Holder* v. *Hall*, 512 U. S. 874, 922–923 (1994) (THOMAS, J., concurring in judgment). At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. This Court has held that §2 does not require the creation of influence districts. *LULAC*, *supra*, at 445 (opinion of KENNEDY, J.).

The present case involves an intermediate type of district—a so-called crossover district. Like an influence district, a crossover district is one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. 361 N. C., at 501–502, 649 S. E. 2d, at 371 (case below). This Court has referred sometimes to crossover districts as "coalitional" districts, in recognition of the necessary coalition between minority and crossover majority voters. See *Georgia* v. *Ashcroft*, 539 U. S. 461, 483 (2003); see also Pildes, Is Voting Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N. C. L. Rev. 1517, 1539 (2002) (hereinafter Pildes). But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. See, *e. g.*, *Nixon* v. *Kent County*, 76 F. 3d 1381, 1393 (CA6 1996) (en banc). We do not address that type of coali-

tion district here. The petitioners in the present case (the state officials who were the defendants in the trial court) argue that § 2 requires a crossover district, in which minority voters might be able to persuade some members of the majority to cross over and join with them.

Petitioners argue that although crossover districts do not include a numerical majority of minority voters, they still satisfy the first *Gingles* requirement because they are "effective minority districts." Under petitioners' theory keeping Pender County whole would have violated § 2 by cracking the potential crossover district that they drew as District 18. See *Gingles*, *supra*, at 46, n. 11 (vote dilution "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters"). So, petitioners contend, § 2 required them to override state law and split Pender County, drawing District 18 with an African-American voting-age population of 39.36 percent rather than keeping Pender County whole and leaving District 18 with an African-American voting-age population of 35.33 percent. We reject that claim.

First, we conclude, petitioners' theory is contrary to the mandate of § 2. The statute requires a showing that minorities "have less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U. S. C. § 1973(b) (2000 ed.). But because they form only 39 percent of the voting-age population in District 18, African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength. That is, African-Americans in District 18 have the opportunity to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidate. They cannot, however, elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters "a right to preserve their strength for the purposes

of forging an advantageous political alliance." *Hall* v. *Virginia*, 385 F. 3d 421, 431 (CA4 2004); see also *Voinovich*, 507 U. S., at 154 (minorities in crossover districts "could not dictate electoral outcomes independently"). Nothing in § 2 grants special protection to a minority group's right to form political coalitions. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U. S., at 1020.

Although the Court has reserved the question we confront today and has cautioned that the *Gingles* requirements "cannot be applied mechanically," *Voinovich*, *supra*, at 158, the reasoning of our cases does not support petitioners' claims. Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters. In setting out the first requirement for § 2 claims, the *Gingles* Court explained that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U. S., at 50, n. 17. The *Growe* Court stated that the first *Gingles* requirement is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." 507 U. S., at 40. Without such a showing, "there neither has been a wrong nor can be a remedy." *Id.*, at 41. There is a difference between a racial minority group's "own choice" and the choice made by a coalition. In *Voinovich*, the Court stated that the first *Gingles* requirement "would have to be modified or eliminated" to allow crossover-district claims. 507 U. S., at 158. Only once, in dicta, has this Court framed the first *Gingles* requirement as anything other than a majority-minority rule. See *De Grandy*, 512 U. S., at 1008 (requiring "a sufficiently large minority population to elect candidates of its choice"). And in the same case, the Court rejected the proposition, inherent in petitioners' claim here, that § 2 enti-

tles minority groups to the maximum possible voting strength:

> "[R]eading §2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *Id.*, at 1016–1017.

Allowing crossover-district claims would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our §2 jurisprudence. Mandatory recognition of claims in which success for a minority depends upon crossover majority voters would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates. It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate. (We are skeptical that the bloc-voting test could be satisfied here, for example, where minority voters in District 18 cannot elect their candidate of choice without support from almost 20 percent of white voters. We do not confront that issue, however, because for some reason respondents conceded the third *Gingles* requirement in state court.)

As the *Gingles* Court explained, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." 478 U. S., at 49, n. 15. Were the Court to adopt petitioners' theory and dispense with the majority-minority requirement, the ruling would call in question the *Gingles* framework the Court has applied under §2. See *LULAC*, 548 U. S., at 490, n. 8. (SOUTER, J., concurring in part and dissenting in part) ("All aspects of our established analysis for majority-minority districts in *Gingles* and

its progeny may have to be rethought in analyzing ostensible coalition districts"); cf. *Metts* v. *Murphy*, 363 F. 3d 8, 12 (CA1 2004) (en banc) *(per curiam)* (allowing influence-district claim to survive motion to dismiss but noting "there is tension in this case for plaintiffs in any effort to satisfy both the first and third prong of *Gingles*").

We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2. Determining whether a § 2 claim would lie—*i. e.*, determining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The Judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term. For example, courts would be required to pursue these inquiries: What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same? Those questions are speculative, and the answers (if they could be supposed) would prove elusive. A requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purpose of § 2. Though courts are capable of making refined and exacting factual inquiries, they "are inherently ill-equipped" to "make decisions based on highly political judgments" of the sort that crossover-district claims would require. *Holder*, 512 U. S., at 894

(THOMAS, J., concurring in judgment). There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions. The statutory mandate petitioners urge us to find in § 2 raises serious constitutional questions. See *infra*, at 21–23.

Heightening these concerns even further is the fact that § 2 applies nationwide to every jurisdiction that must draw lines for election districts required by state or local law. Crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local jurisdictions that often feature more than two parties or candidates. Under petitioners' view courts would face the difficult task of discerning crossover patterns in nonpartisan contests for a city commission, a school board, or a local water authority. The political data necessary to make such determinations are nonexistent for elections in most of those jurisdictions. And predictions would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role.

Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2. See *LULAC, supra*, at 485 (opinion of SOUTER, J.) (recognizing need for "clear-edged rule"). Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect

a candidate of choice is a present and discernible wrong that is not subject to the high degree of speculation and prediction attendant upon the analysis of crossover claims. Not an arbitrary invention, the majority-minority rule has its foundation in principles of democratic governance. The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.

Given the text of § 2, our cases interpreting that provision, and the many difficulties in assessing § 2 claims without the restraint and guidance provided by the majority-minority rule, no federal court of appeals has held that § 2 requires creation of coalition districts. Instead, all to consider the question have interpreted the first *Gingles* factor to require a majority-minority standard. See *Hall*, 385 F. 3d, at 427–430 (CA4 2004), cert. denied, 544 U. S. 961 (2005); *Valdespino* v. *Alamo Heights Independent School Dist.*, 168 F. 3d 848, 852–853 (CA5 1999), cert. denied, 528 U. S. 1114 (2000); *Cousin* v. *Sundquist*, 145 F. 3d 818, 828–829 (CA6 1998), cert. denied, 525 U. S. 1138 (1999); *Sanchez* v. *Colorado*, 97 F. 3d 1303, 1311–1312 (CA10 1996), cert. denied, 520 U. S. 1229 (1997); *Romero* v. *Pomona*, 883 F. 2d 1418, 1424, n. 7, 1425–1426 (CA9 1989), overruled on other grounds, 914 F. 2d 1136, 1141 (CA9 1990); *McNeil* v. *Springfield Park Dist.*, 851 F. 2d 937, 947 (CA7 1988), cert. denied, 490 U. S. 1031 (1989). Cf. *Metts*, *supra*, at 11 (expressing unwillingness "at the complaint stage to foreclose the *possibility*" of influence-district claims). We decline to depart from the uniform interpretation of § 2 that has guided federal courts and state and local officials for more than 20 years.

To be sure, the *Gingles* requirements "cannot be applied mechanically and without regard to the nature of the claim." *Voinovich*, 507 U. S., at 158. It remains the rule, however, that a party asserting § 2 liability must show by a preponder-

ance of the evidence that the minority population in the potential election district is greater than 50 percent. No one contends that the African-American voting-age population in District 18 exceeds that threshold. Nor does this case involve allegations of intentional and wrongful conduct. We therefore need not consider whether intentional discrimination affects the *Gingles* analysis. Cf. Brief for United States as *Amicus Curiae* 14 (evidence of discriminatory intent "tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality-of-the-circumstances analysis"); see also *Garza* v. *County of Los Angeles*, 918 F. 2d 763, 771 (CA9 1990). Our holding does not apply to cases in which there is intentional discrimination against a racial minority.

B

In arguing for a less restrictive interpretation of the first *Gingles* requirement petitioners point to the text of § 2 and its guarantee that political processes be "equally open to participation" to protect minority voters' "opportunity . . . to elect representatives of their choice." 42 U. S. C. § 1973(b) (2000 ed.). An "opportunity," petitioners argue, occurs in crossover districts as well as majority-minority districts; and these extended opportunities, they say, require § 2 protection.

But petitioners put emphasis on the word "opportunity" at the expense of the word "equally." The statute does not protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice. Section 2 does not guarantee minority voters an electoral advantage. Minority groups in crossover districts cannot form a voting majority without crossover voters. In those districts minority voters have the same opportunity to elect their candidate as any other political group with the same relative voting strength.

The majority-minority rule, furthermore, is not at odds with §2's totality-of-the-circumstances test. The Court in *De Grandy* confirmed "the error of treating the three *Gingles* conditions as exhausting the enquiry required by §2." 512 U. S., at 1013. Instead the *Gingles* requirements are preconditions, consistent with the text and purpose of §2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a §2 violation. See *Growe*, 507 U. S., at 40 (describing the "*Gingles* threshold factors").

To the extent there is any doubt whether §2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause. See *Clark* v. *Martinez*, 543 U. S. 371, 381–382 (2005) (canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). Of course, the "moral imperative of racial neutrality is the driving force of the Equal Protection Clause," and racial classifications are permitted only "as a last resort." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 518, 519 (1989) (KENNEDY, J., concurring in part and concurring in judgment). "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw* v. *Reno*, 509 U. S. 630, 657 (1993). If §2 were interpreted to require crossover districts throughout the Nation, "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U. S., at 446 (opinion of KENNEDY, J.); see also *Ashcroft*, 539 U. S., at 491 (KENNEDY, J., concurring). That interpretation would result in a substantial increase in the number of mandatory

districts drawn with race as "the predominant factor motivating the legislature's decision." *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995).

On petitioners' view of the case courts and legislatures would need to scrutinize every factor that enters into districting to gauge its effect on crossover voting. Injecting this racial measure into the nationwide districting process would be of particular concern with respect to consideration of party registration or party influence. The easiest and most likely alliance for a group of minority voters is one with a political party, and some have suggested using minority voters' strength within a particular party as the proper yardstick under the first *Gingles* requirement. See, *e. g.*, *LULAC*, *supra*, at 485–486 (opinion of SOUTER, J.) (requiring only "that minority voters . . . constitute a majority of those voting in the primary of . . . the party tending to win in the general election"). That approach would replace an objective, administrable rule with a difficult "judicial inquiry into party rules and local politics" to determine whether a minority group truly "controls" the dominant party's primary process. McLoughlin, *Gingles* in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N. Y. U. L. Rev. 312, 349 (2005). More troubling still is the inquiry's fusion of race and party affiliation as a determinant when partisan considerations themselves may be suspect in the drawing of district lines. See *Vieth* v. *Jubelirer*, 541 U. S. 267, 317 (2004) (STEVENS, J., dissenting); *id.*, at 316 (KENNEDY, J., concurring in judgment); see also Pildes 1565 (crossover-district requirement would essentially result in political party "entitlement to . . . a certain number of seats"). Disregarding the majority-minority rule and relying on a combination of race and party to presume an effective majority would involve the law and courts in a perilous enterprise. It would rest on judicial predictions, as a matter of law, that race and party would hold together as an effective majority over time—at least for the decennial apportion-

ment cycles and likely beyond. And thus would the relationship between race and party further distort and frustrate the search for neutral factors and principled rationales for districting.

Petitioners' approach would reverse the canon of avoidance. It invites the divisive constitutional questions that are both unnecessary and contrary to the purposes of our precedents under the Voting Rights Act. Given the consequences of extending racial considerations even further into the districting process, we must not interpret § 2 to require crossover districts.

C

Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more. And as the Court has noted in the context of § 5 of the Voting Rights Act, "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or [crossover] districts." *Ashcroft*, 539 U. S., at 482. Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts. See *id.*, at 480–483. When we address the mandate of § 2, however, we must note it is not concerned with maximizing minority voting strength, *De Grandy*, *supra*, at 1022; and, as a statutory matter, § 2 does not mandate creating or preserving crossover districts.

Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that,

too, could pose constitutional concerns. See *Miller* v. *Johnson*, *supra; Shaw* v. *Reno*, 509 U. S. 630. States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. See *supra*, at 16. In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate. See Pildes 1567 ("Districts could still be designed in such places that encouraged coalitions across racial lines, but these districts would result from legislative choice, not . . . obligation"). States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third *Gingles* factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis. And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments. See *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 481–482 (1997); Brief for United States as *Amicus Curiae* 13–14. There is no evidence of discriminatory intent in this case, however. Our holding recognizes only that there is no support for the claim that § 2 can require the creation of crossover districts in the first instance.

Petitioners claim the majority-minority rule is inconsistent with § 5, but we rejected a similar argument in *LULAC*, 548 U. S., at 446 (opinion of KENNEDY, J.). The inquiries under §§ 2 and 5 are different. Section 2 concerns minority

groups' opportunity "to elect representatives of their choice," 42 U. S. C. § 1973(b) (2000 ed.), while the more stringent § 5 asks whether a change has the purpose or effect of "denying or abridging the right to vote," § 1973c. See *LULAC, supra,* at 446; *Bossier Parish, supra,* at 476–480. In *LULAC,* we held that although the presence of influence districts is relevant for the § 5 retrogression analysis, "the lack of such districts cannot establish a § 2 violation." 548 U. S., at 446 (opinion of KENNEDY, J.); see also *Ashcroft,* 539 U. S., at 482–483. The same analysis applies for crossover districts: Section 5 "leaves room" for States to employ crossover districts, *id.,* at 483, but § 2 does not require them.

IV

Some commentators suggest that racially polarized voting is waning—as evidenced by, for example, the election of minority candidates where a majority of voters are white. See Note, The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting, 116 Harv. L. Rev. 2208, 2209 (2003); see also *id.,* at 2216–2222; Pildes 1529–1539; Bullock & Dunn, The Demise of Racial Districting and the Future of Black Representation, 48 Emory L. J. 1209 (1999). Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress.

It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a "statute meant to hasten the waning of racism in American politics." *De Grandy,* 512 U. S., at 1020. Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of § 2 to require, by force of

law, the voluntary cooperation our society has achieved. Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met.

The judgment of the Supreme Court of North Carolina is affirmed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

I continue to adhere to the views expressed in my opinion in *Holder* v. *Hall*, 512 U. S. 874, 891 (1994) (opinion concurring in judgment). The text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district. See 42 U. S. C. § 1973(a) (2000 ed.) (permitting only a challenge to a "voting qualification or prerequisite to voting or standard, practice, or procedure"); see also *Holder*, *supra*, at 893 (stating that the terms "'standard, practice, or procedure'" "reach only state enactments that limit citizens' access to the ballot"). I continue to disagree, therefore, with the framework set forth in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), for analyzing vote dilution claims because it has no basis in the text of § 2. I would not evaluate any Voting Rights Act claim under a test that "has produced such a disastrous misadventure in judicial policymaking." *Holder*, *supra*, at 893. For these reasons, I concur only in the judgment.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question in this case is whether a minority with under 50% of the voting population of a proposed voting district can ever qualify under § 2 of the Voting Rights Act of 1965 (VRA) as residents of a putative district whose minority vot-

ers would have an opportunity "to elect representatives of their choice." 42 U. S. C. § 1973(b) (2000 ed.). If the answer is no, minority voters in such a district will have no right to claim relief under § 2 from a statewide districting scheme that dilutes minority voting rights. I would hold that the answer in law as well as in fact is sometimes yes: a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.

In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity "to elect representatives of their choice." This is incorrect as a factual matter if the statutory phrase is given its natural meaning; minority voters in districts with minority populations under 50% routinely "elect representatives of their choice." The effects of the plurality's unwillingness to face this fact are disturbing by any measure and flatly at odds with the obvious purpose of the VRA. If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States' obligation to provide equal electoral opportunity under § 2, States will be required under the plurality's rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation. The object of the VRA will now be promoting racial blocs, and the role of race in districting decisions as a proxy for political identification will be heightened by any measure.

I

Recalling the basic premises of vote-dilution claims under § 2 will show just how far astray the plurality has gone.

Section 2 of the VRA prohibits districting practices that "resul[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 42 U. S. C. §1973(a). A denial or abridgment is established if, "based on the totality of circumstances," it is shown that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." §1973(b).

Since §2 was amended in 1982, 96 Stat. 134, we have read it to prohibit practices that result in "vote dilution," see *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), understood as distributing politically cohesive minority voters through voting districts in ways that reduce their potential strength. See *id.*, at 47–48. There are two classic patterns. Where voting is racially polarized, a districting plan can systemically discount the minority vote either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters" or from "the concentration of blacks into districts where they constitute an excessive majority," so as to eliminate their influence in neighboring districts. *Id.*, at 46, n. 11. Treating dilution as a remediable harm recognizes that §2 protects not merely the right of minority voters to put ballots in a box, but to claim a fair number of districts in which their votes can be effective. See *id.*, at 47.

Three points follow. First, to speak of a fair chance to get the representation desired, there must be an identifiable baseline for measuring a group's voting strength. *Id.*, at 88 (O'Connor, J., concurring in judgment) ("In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates §2, . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength"). Several baselines can be imagined; one could, for example, compare a minority's voting strength under a particular districting plan with the maximum strength possi-

ble under any alternative.[1] Not surprisingly, we have conclusively rejected this approach; the VRA was passed to guarantee minority voters a fair game, not a killing. See *Johnson* v. *De Grandy*, 512 U. S. 997, 1016–1017 (1994). We have held that the better baseline for measuring opportunity to elect under §2, although not dispositive, is the minority's rough proportion of the relevant population. *Id.*, at 1013–1023. Thus, in assessing §2 claims under a totality of the circumstances, including the facts of history and geography, the starting point is a comparison of the number of districts where minority voters can elect their chosen candidate with the group's population percentage. *Ibid.;* see also *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 436 (2006) *(LULAC)* ("We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are [minority] opportunity districts with the [minority] share of the citizen voting-age population").[2]

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[1] We have previously illustrated this in stylized fashion:

"Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts." *Johnson* v. *De Grandy*, 512 U. S. 997, 1016 (1994).

[2] Of course, this does not create an entitlement to proportionate minority representation. Nothing in the statute promises electoral success. Rather, §2 simply provides that, subject to qualifications based on a totality of circumstances, minority voters are entitled to a practical chance to compete in a roughly proportionate number of districts. *Id.*, at 1014, n. 11. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Id.*, at 1020.

Second, the significance of proportionality means that a §2 claim must be assessed by looking at the overall effect of a multidistrict plan. A State with one congressional seat cannot dilute a minority's congressional vote, and only the systemic submergence of minority votes where a number of single-member districts could be drawn can be treated as harm under §2. So a §2 complaint must look to an entire districting plan (normally, statewide), alleging that the challenged plan creates an insufficient number of minority-opportunity districts in the territory as a whole. See *id.*, at 436–437.

Third, while a §2 violation ultimately results from the dilutive effect of a districting plan as a whole, a §2 plaintiff must also be able to place himself in a reasonably compact district that could have been drawn to improve upon the plan actually selected. See, *e. g.*, *De Grandy*, *supra*, at 1001–1002. That is, a plaintiff must show both an overall deficiency and a personal injury open to redress.

Our first essay at understanding these features of statutory vote dilution was *Thornburg* v. *Gingles*, which asked whether a multimember district plan for choosing representatives by at-large voting deprived minority voters of an equal opportunity to elect their preferred candidates. In answering, we set three now-familiar conditions that a §2 claim must meet at the threshold before a court will analyze it under the totality of circumstances:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U. S., at 50–51.

As we have emphasized over and over, the *Gingles* conditions do not state the ultimate standard under § 2, nor could they, since the totality of the circumstances standard has been set explicitly by Congress. See *LULAC*, *supra*, at 425–426; *De Grandy*, *supra*, at 1011. Instead, each condition serves as a gatekeeper, ensuring that a plaintiff who proceeds to plenary review has a real chance to show a redressable violation of the ultimate § 2 standard. The third condition, majority racial bloc voting, is necessary to establish the premise of vote-dilution claims: that the minority as a whole is placed at a disadvantage owing to race, not the happenstance of independent politics. *Gingles*, 478 U. S., at 51. The second, minority cohesion, is there to show that minority voters will vote together to elect a distinct representative of choice. *Ibid.* And the first, a large and geographically compact minority population, is the condition for demonstrating that a dilutive plan injures the § 2 plaintiffs by failing to draw an available remedial district that would give them a chance to elect their chosen candidate. *Growe* v. *Emison*, 507 U. S. 25, 40–41 (1993); *Gingles*, *supra*, at 50.

II

Though this case arose under the Constitution of North Carolina, the dispositive issue is one of federal statutory law: whether a district with a minority population under 50%, but large enough to elect its chosen candidate with the help of majority voters disposed to support the minority favorite, can ever count as a district where minority voters have the opportunity "to elect representatives of their choice" for purposes of § 2. I think it clear from the nature of a vote-dilution claim and the text of § 2 that the answer must be yes. There is nothing in the statutory text to suggest that Congress meant to protect minority opportunity to elect solely by the creation of majority-minority districts. See *Voinovich* v. *Quilter*, 507 U. S. 146, 155 (1993) ("[Section 2]

says nothing about majority-minority districts"). On the contrary, § 2 "focuses exclusively on the consequences of apportionment," *ibid.*, as Congress made clear when it explicitly prescribed the ultimate functional approach: a totality of the circumstances test. See 42 U. S. C. § 1973(b) ("[a] violation . . . is established if, based on the totality of circumstances, it is shown . . . "). And a functional analysis leaves no doubt that crossover districts vindicate the interest expressly protected by § 2: the opportunity to elect a desired representative.

It has been apparent from the moment the Court first took up § 2 that no reason exists in the statute to treat a crossover district as a less legitimate remedy for dilution than a majority-minority one (let alone to rule it out). See *Gingles*, *supra*, at 90, n. 1 (O'Connor, J., concurring in judgment) ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably . . . enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice"); see also Pildes, Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N. C. L. Rev. 1517, 1553 (2002) (hereinafter Pildes) ("What should be so magical, then, about whether there are enough black voters to become a formal majority so that a conventional 'safe' district can be created? If a safe and a coalitional district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates?").

As these earlier comments as much as say, whether a district with a minority population under 50% of the CVAP may redress a violation of § 2 is a question of fact with an obvious answer: of course minority voters constituting less than 50% of the voting population can have an opportunity to elect the

candidates of their choice, as amply shown by empirical studies confirming that such minority groups regularly elect their preferred candidates with the help of modest crossover by members of the majority. See, *e. g.*, *id.*, at 1531–1534, 1538. The North Carolina Supreme Court, for example, determined that voting districts with a black voting age population of as little as 38.37% have an opportunity to elect black candidates, *Pender Cty.* v. *Bartlett*, 361 N. C. 491, 494–495, 649 S. E. 2d 364, 366–367 (2007), a factual finding that has gone unchallenged and is well supported by electoral results in North Carolina. Of the nine House districts in which blacks make up more than 50% of the voting age population (VAP), all but two elected a black representative in the 2004 election. See App. 109. Of the 12 additional House districts in which blacks are over 39% of the VAP, all but one elected a black representative in the 2004 election. *Ibid.* It would surely surprise legislators in North Carolina to suggest that black voters in these 12 districts cannot possibly have an opportunity to "elect [the] representatives of their choice."

It is of course true that the threshold population sufficient to provide minority voters with an opportunity to elect their candidates of choice is elastic, and the proportions will likely shift in the future, as they have in the past. See Pildes 1527–1532 (explaining that blacks in the 1980s required well over 50% of the population in a district to elect the candidates of their choice, but that this number has gradually fallen to well below 50%); *id.*, at 1527, n. 26 (stating that some courts went so far as to refer to 65% "as a 'rule of thumb' for the black population required to constitute a safe district"). That is, racial polarization has declined, and if it continues downward the first *Gingles* condition will get easier to satisfy.

But this is no reason to create an arbitrary threshold; the functional approach will continue to allow dismissal of claims for districts with minority populations too small to demon-

strate an ability to elect, and with "crossovers" too numerous to allow an inference of vote dilution in the first place. No one, for example, would argue based on the record of experience in this case that a district with a 25% black population would meet the first *Gingles* condition. And the third *Gingles* requirement, majority-bloc voting, may well provide an analytical limit to claims based on crossover districts. See *LULAC*, 548 U. S., at 490, n. 8 (SOUTER, J., concurring in part and dissenting in part) (noting the interrelationship of the first and third *Gingles* factors); see also *post*, at 44–48 (BREYER, J., dissenting) (looking to the third *Gingles* condition to suggest a mathematical limit to the minority population necessary for a cognizable crossover district). But whatever this limit may be, we have no need to set it here, since the respondent state officials have stipulated to majority-bloc voting, App. to Pet. for Cert. 130a. In sum, § 2 addresses voting realities, and for practical purposes a 39%-minority district in which we know minorities have the potential to elect their preferred candidate is every bit as good as a 50%-minority district.

In fact, a crossover district is better. Recognizing crossover districts has the value of giving States greater flexibility to draw districting plans with a fair number of minority-opportunity districts, and this in turn allows for a beneficent reduction in the number of majority-minority districts with their "quintessentially race-conscious calculus," *De Grandy*, 512 U. S., at 1020, thereby moderating reliance on race as an exclusive determinant in districting decisions, cf. *Shaw* v. *Reno*, 509 U. S. 630 (1993). See also Pildes 1547–1548 ("In contrast to the Court's concerns with bizarrely designed safe districts, it is hard to see how coalitional districts could 'convey the message that political identity is, or should be, predominantly racial.' . . . Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U. S. Constitution" (quoting *Bush* v. *Vera*, 517 U. S. 952, 980 (1996))). A cross-

over is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions.

III

A

The plurality's contrary conclusion that §2 does not recognize a crossover claim is based on a fundamental misunderstanding of vote-dilution claims, a mistake epitomized in the following assessment of the crossover district in question:

> "[B]ecause they form only 39 percent of the voting-age population in District 18, African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength [in District 18]." *Ante*, at 14.

See also *ante*, at 20 ("[In crossover districts,] minority voters have the same opportunity to elect their candidate as any other political group with the same relative voting strength").

The claim that another political group in a particular district might have the same relative voting strength as the minority if it had the same share of the population takes the form of a tautology: the plurality simply looks to one district and says that a 39% group of blacks is no worse off than a 39% group of whites would be. This statement might be true, or it might not be, and standing alone it demonstrates nothing.

Even if the two 39% groups were assumed to be comparable in fact because they will attract sufficient crossover (and so should be credited with satisfying the first *Gingles* condition), neither of them could prove a §2 violation without looking beyond the 39% district and showing a disproportionately small potential for success in the State's overall configuration of districts. As this Court has explained before, the ultimate question in a §2 case (that is, whether the

minority group in question is being denied an equal opportunity to participate and elect) can be answered only by examining the broader pattern of districts to see whether the minority is being denied a roughly proportionate opportunity. See *LULAC*, *supra*, at 436–437. Hence, saying one group's 39% equals another's, even if true in particular districts where facts are known, does not mean that either, both, or neither group could show a §2 violation. The plurality simply fails to grasp that an alleged §2 violation can only be proved or disproved by looking statewide.

B

The plurality's more specific justifications for its counterfactual position are no more supportable than its 39% tautology.

1

The plurality seems to suggest that our prior cases somehow require its conclusion that a minority population under 50% will never support a §2 remedy, emphasizing that *Gingles* spoke of a majority and referred to the requirement that minority voters have "'the *potential* to elect'" their chosen representatives. *Ante*, at 15 (quoting *Gingles*, 478 U. S., at 50, n. 17). It is hard to know what to make of this point since the plurality also concedes that we have explicitly and repeatedly reserved decision on today's question. See *LULAC*, *supra*, at 443 (plurality opinion); *De Grandy*, *supra*, at 1009; *Voinovich*, 507 U. S., at 154; *Growe*, 507 U. S., at 41, n. 5; *Gingles*, *supra*, at 46–47, n. 12. In fact, in our more recent cases applying §2, Court majorities have formulated the first *Gingles* prong in a way more consistent with a functional approach. See *LULAC*, *supra*, at 430 ("[I]n the context of a challenge to the drawing of district lines, 'the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice'" (quoting *De Grandy*, *supra*, at

1008)). These Court majorities get short shrift from today's plurality.

In any event, even if we ignored *Gingles*'s reservation of today's question and looked to *Gingles*'s "*potential* to elect" as if it were statutory text, I fail to see how that phrase dictates that a minority's ability to compete must be single-handed in order to count under § 2. As explained already, a crossover district serves the same interest in obtaining representation as a majority-minority district; the potential of 45% with a 6% crossover promises the same result as 51% with no crossover, and there is nothing in the logic of § 2 to allow a distinction between the two types of district.

In fact, the plurality's distinction is artificial on its own terms. In the past, when black voter registration and black voter turnout were relatively low, even black voters with 55% of a district's CVAP would have had to rely on crossover voters to elect their candidate of choice. See Pildes 1527–1528. But no one on this Court (and, so far as I am aware, any other court addressing it) ever suggested that reliance on crossover voting in such a district rendered minority success any less significant under § 2, or meant that the district failed to satisfy the first *Gingles* factor. Nor would it be any answer to say that black voters in such a district, assuming unrealistic voter turnout, theoretically had the "potential" to elect their candidate without crossover support; that would be about as relevant as arguing in the abstract that a black CVAP of 45% is potentially successful, on the assumption that black voters could turn out en masse to elect the candidate of their choice without reliance on crossovers if enough majority voters stay home.

2

The plurality is also concerned that recognizing the "potential" of anything under 50% would entail an exponential expansion of special minority districting; the plurality goes so far as to suggest that recognizing crossover districts as possible minority-opportunity districts would inherently "en-

titl[e] minority groups to the maximum possible voting strength." *Ante,* at 15–16. But this conclusion again reflects a confusion of the gatekeeping function of the *Gingles* conditions with the ultimate test for relief under §2. See *ante,* at 14 ("African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength").

As already explained, *supra,* at 31, the mere fact that all threshold *Gingles* conditions could be met and a district could be drawn with a minority population sufficiently large to elect the candidate of its choice does not require drawing such a district. This case simply is about the first *Gingles* condition, not about the number of minority-opportunity districts needed under §2, and accepting Bartlett's position would in no way imply an obligation to maximize districts with minority voter potential. Under any interpretation of the first *Gingles* factor, the State must draw districts in a way that provides minority voters with a fair number of districts in which they have an opportunity to elect candidates of their choice; the only question here is which districts will count toward that total.

3

The plurality's fear of maximization finds a parallel in the concern that treating crossover districts as minority-opportunity districts would "create serious tension" with the third *Gingles* prerequisite of majority-bloc voting. *Ante,* at 16. The plurality finds "[i]t . . . difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Ibid.*

It is not difficult to see. If a minority population with 49% of the CVAP can elect the candidate of its choice with crossover by 2% of white voters, the minority "by definition" relies on white support to elect its preferred candidate. But this fact alone would raise no doubt, as a matter of definition

or otherwise, that the majority-bloc-voting requirement could be met, since as much as 98% of the majority may have voted against the minority's candidate of choice. As explained above, *supra*, at 34, the third *Gingles* condition may well impose an analytical floor to the minority population and a ceiling on the degree of crossover allowed in a crossover district; that is, the concept of majority-bloc voting requires that majority voters tend to stick together in a relatively high degree. The precise standard for determining majority-bloc voting is not at issue in this case, however; to refute the plurality's 50% rule, one need only recognize that racial cohesion of 98% would be bloc voting by any standard.[3]

4

The plurality argues that qualifying crossover districts as minority-opportunity districts would be less administrable than demanding 50%, forcing courts to engage with the various factual and predictive questions that would come up in determining what percentage of majority voters would provide the voting minority with a chance at electoral success. *Ante*, at 17. But claims based on a State's failure to draw majority-minority districts raise the same issues of judicial judgment; even when the 50% threshold is satisfied, a court will still have to engage in factually messy enquiries about

[3] This case is an entirely inappropriate vehicle for speculation about a more exact definition of majority-bloc voting. See *supra*, at 34. The political science literature has developed statistical methods for assessing the extent of majority-bloc voting that are far more nuanced than the plurality's 50% rule. See, *e. g.*, Pildes 1534–1535 (describing a "falloff rate" that social scientists use to measure the comparative rate at which whites vote for black Democratic candidates compared to white Democratic candidates and noting that the falloff rate for congressional elections during the 1990s in North Carolina was 9%). But this issue was never briefed in this case and is not before us, the respondents having stipulated to the existence of majority-bloc voting, App. to Pet. for Cert. 130a, and there is no reason to attempt to accomplish in this case through the first *Gingles* factor what would actually be a quantification of the third.

the "potential" such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote dilution under a totality of the circumstances. See *supra*, at 30–31, 33–34. The plurality's rule, therefore, conserves an uncertain amount of judicial resources, and only at the expense of ignoring a class of § 2 claims that this Court has no authority to strike from the statute's coverage.

5

The plurality again misunderstands the nature of § 2 in suggesting that its rule does not conflict with what the Court said in *Georgia* v. *Ashcroft*, 539 U. S. 461, 480–482 (2003): that crossover districts count as minority-opportunity districts for the purpose of assessing whether minorities have the opportunity "to elect their preferred candidates of choice" under § 5 of the VRA, 42 U. S. C. § 1973c(b) (2006 ed.). While the plurality is, of course, correct that there are differences between the enquiries under §§ 2 and 5, *ante*, at 24, those differences do not save today's decision from inconsistency with the prior pronouncement. A districting plan violates § 5 if it diminishes the ability of minority voters to "elect their preferred candidates of choice," § 1973c(b), as measured against the minority's previous electoral opportunity, *Ashcroft*, *supra*, at 477. A districting plan violates § 2 if it diminishes the ability of minority voters to "elect representatives of their choice," 42 U. S. C. § 1973(b) (2000 ed.), as measured under a totality of the circumstances against a baseline of rough proportionality. It makes no sense to say that a crossover district counts as a minority-opportunity district when comparing the past and the present under § 5, but not when comparing the present and the possible under § 2.

6

Finally, the plurality tries to support its insistence on a 50% threshold by invoking the policy of constitutional avoidance, which calls for construing a statute so as to avoid a

possibly unconstitutional result. The plurality suggests that allowing a lower threshold would "require crossover districts throughout the Nation," *ante*, at 21, thereby implicating the principle of *Shaw* v. *Reno* that districting with an excessive reliance on race is unconstitutional ("excessive" now being equated by the plurality with the frequency of creating opportunity districts). But the plurality has it precisely backwards. A State will inevitably draw some crossover districts as the natural byproduct of districting based on traditional factors. If these crossover districts count as minority-opportunity districts, the State will be much closer to meeting its §2 obligation without any reference to race, and fewer minority-opportunity districts will, therefore, need to be created purposefully. But if, as a matter of law, only majority-minority districts provide a minority seeking equality with the opportunity to elect its preferred candidates, the State will have much further to go to create a sufficient number of minority-opportunity districts, will be required to bridge this gap by creating exclusively majority-minority districts, and will inevitably produce a districting plan that reflects a greater focus on race. The plurality, however, seems to believe that any reference to race in districting poses a constitutional concern, even a State's decision to reduce racial blocs in favor of crossover districts. A judicial position with these consequences is not constitutional avoidance.

IV

More serious than the plurality opinion's inconsistency with prior cases construing §2 is the perversity of the results it portends. Consider the effect of the plurality's rule on North Carolina's districting scheme. Black voters make up approximately 20% of North Carolina's VAP[4] and are dis-

[4] Compare Dept. of Commerce, Bureau of Census, 2000 Voting Age Population and Voting-Age Citizens (PHC–T–31) (Table 1–1), online at http://www.census.gov/population/www/cen2000/briefs/phc-t31/index.html (as visited Mar. 5, 2009, and available in Clerk of Court's case file) (total

tributed throughout 120 State House districts, App. to Pet. for Cert. 58a. As noted before, black voters constitute more than 50% of the VAP in 9 of these districts and over 39% of the VAP in an additional 12. *Supra*, at 33. Under a functional approach to §2, black voters in North Carolina have an opportunity to elect (and regularly do elect) the representative of their choice in as many as 21 House districts, or 17.5% of North Carolina's total districts. See App. 109–110. North Carolina's districting plan is therefore close to providing black voters with proportionate electoral opportunity. According to the plurality, however, the remedy of a crossover district cannot provide opportunity to minority voters who lack it, and the requisite opportunity must therefore be lacking for minority voters already living in districts where they must rely on crossover. By the plurality's reckoning, then, black voters have an opportunity to elect representatives of their choice in, at most, nine North Carolina House districts. See *ibid.* In the plurality's view, North Carolina must have a long way to go before it satisfies the §2 requirement of equal electoral opportunity.[5]

VAP in North Carolina is 6,087,996), with *id.*, Table 1–3 (black or African-American VAP is 1,216,622).

[5] Under the same logic, North Carolina could fracture and submerge in majority-dominated districts the 12 districts in which black voters constitute between 35% and 49% of the voting population and routinely elect the candidates of their choice without ever implicating §2, and could do so in districts not covered by §5 without implicating the VRA at all. The untenable implications of the plurality's rule do not end there. The plurality declares that its holding "does not apply to cases in which there is intentional discrimination against a racial minority." *Ante*, at 20. But the logic of the plurality's position compels the absurd conclusion that the invidious and intentional fracturing of crossover districts in order to harm minority voters would not state a claim under §2. After all, if the elimination of a crossover district can never deprive minority voters in the district of the opportunity "to elect representatives of their choice," minorities in an invidiously eliminated district simply cannot show an injury under §2.

A State like North Carolina faced with the plurality's opinion, whether it wants to comply with §2 or simply to avoid litigation, will, therefore, have no reason to create crossover districts. Section 2 recognizes no need for such districts, from which it follows that they can neither be required nor be created to help the State meet its obligation of equal electoral opportunity under §2. And if a legislature were induced to draw a crossover district by the plurality's encouragement to create them voluntarily, *ante,* at 24, it would open itself to attack by the plurality based on the pointed suggestion that a policy favoring crossover districts runs counter to *Shaw.* The plurality has thus boiled §2 down to one option: the best way to avoid suit under §2, and the only way to comply with §2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process.

Perhaps the plurality recognizes this aberrant implication, for it eventually attempts to disavow it. It asserts that "§2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts. . . . [But] §2 does not mandate creating or preserving crossover districts." *Ante,* at 23. See also *ante,* at 24 (crossover districts "can be evidence . . . of equal political opportunity . . . "). But this is judicial fiat, not legal reasoning; the plurality does not even attempt to explain how a crossover district can be a minority-opportunity district when assessing the compliance of a districting plan with §2, but cannot be one when sought as a remedy to a §2 violation. The plurality cannot have it both ways. If voluntarily drawing a crossover district brings a State into compliance with §2, then requiring creation of a crossover district must be a way to remedy a violation of §2, and eliminating a crossover district must in some cases take a State out of compliance with the statute. And when the elimination of a crossover district does cause a violation of

§ 2, I cannot fathom why a voter in that district should not be able to bring a claim to remedy it.

In short, to the extent the plurality's holding is taken to control future results, the plurality has eliminated the protection of § 2 for the districts that best vindicate the goals of the statute, and has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics.

I respectfully dissent.

JUSTICE GINSBURG, dissenting.

I join JUSTICE SOUTER's powerfully persuasive dissenting opinion, and would make concrete what is implicit in his exposition. The plurality's interpretation of § 2 of the Voting Rights Act of 1965 is difficult to fathom and severely undermines the statute's estimable aim. Today's decision returns the ball to Congress' court. The Legislature has just cause to clarify beyond debate the appropriate reading of § 2.

JUSTICE BREYER, dissenting.

I join JUSTICE SOUTER's opinion in full. I write separately in light of the plurality's claim that a bright-line 50% rule (used as a *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), gateway) serves administrative objectives. In the plurality's view, that rule amounts to a relatively simple administrative device that will help separate at the outset those cases that are more likely meritorious from those that are not. Even were that objective as critically important as the plurality believes, however, it is not difficult to find other numerical gateway rules that would work better.

Assume that a basic purpose of a gateway number is to separate (1) districts where a minority group can "elect representatives of their choice," from (2) districts where the minority, because of the need to obtain majority crossover votes, can only "elect representatives" that are consensus candidates. 42 U. S. C. § 1973(b) (2000 ed.); *League of*

United Latin American Citizens v. *Perry*, 548 U. S. 399, 445 (2006) (plurality opinion). At first blush, one might think that a 50% rule will work in this respect. After all, if a 50% minority population votes as a bloc, can it not always elect the candidate of its choice? And if a minority population constitutes less than 50% of a district, is not any candidate elected from that district always a consensus choice of minority and majority voters? The realities of voting behavior, however, make clear that the answer to both these questions is "no." See, *e. g.*, Brief for Nathaniel Persily et al. as *Amici Curiae* 5–6 ("Fifty percent is seen as a magic number by some because under conditions of complete racial polarization and equal rates of voting eligibility, registration, and turnout, the minority community will be able to elect its candidate of choice. *In practice, such extreme conditions are never present.* . . . [S]ome districts must be more than 50% minority, while others can be less than 50% minority, in order for the minority community to have an equal opportunity to elect its candidate of choice" (emphasis added)); see also *ante*, at 32–33 (SOUTER, J., dissenting).

No voting group is 100% cohesive. Except in districts with overwhelming minority populations, some crossover votes are often necessary. The question is how likely it is that the need for crossover votes will force a minority to reject its "preferred choice" in favor of a "consensus candidate." A 50% number does not even try to answer that question. To the contrary, it includes, say, 51% minority districts, where imperfect cohesion may, in context, prevent election of the "minority-preferred" candidate, while it excludes, say, 45% districts where a smaller but more cohesive minority can, with the help of a small and reliable majority crossover vote, elect its preferred candidate.

Why not use a numerical gateway rule that looks more directly at the relevant question: Is the minority bloc large enough, is it cohesive enough, is the necessary majority crossover vote small enough, so that the minority (tending

to vote cohesively) can likely vote its preferred candidate (rather than a consensus candidate) into office? See *ante*, at 33 (SOUTER, J., dissenting) ("[E]mpirical studies confir[m] that . . . minority groups" constituting less than 50% of the voting population "regularly elect their preferred candidates with the help of modest crossover by members of the majority"); see also Pildes, Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N. C. L. Rev. 1517, 1529–1535 (2002) (reviewing studies showing small but reliable crossover voting by whites in districts where minority voters have demonstrated the ability to elect their preferred candidates without constituting 50% of the population in that district). We can likely find a reasonably administrable mathematical formula more directly tied to the factors in question.

To take a possible example: Suppose we pick a numerical ratio that requires the minority voting age population to be twice as large as the percentage of majority crossover votes needed to elect the minority's preferred candidate. We would calculate the latter (the percentage of majority crossover votes the minority voters need) to take account of both the percentage of minority voting age population in the district and the cohesiveness with which they vote. Thus, if minority voters account for 45% of the voters in a district and 89% of those voters tend to vote cohesively as a group, then the minority needs a crossover vote of about 20% of the majority voters to elect its preferred candidate. (Such a district with 100 voters would have 45 minority voters and 55 majority voters; 40 minority voters would vote for the minority group's preferred candidate at election time; the minority voters would need 11 more votes to elect their preferred candidate; and 11 is about 20% of the majority's 55.) The larger the minority population, the greater its cohesiveness, and thus the smaller the crossover vote needed to assure success, the greater the likelihood that the minority can

elect its preferred candidate and the smaller the likelihood that the cohesive minority, in order to find the needed majority crossover vote, must support a consensus, rather than its preferred, candidate.

In reflecting the reality that minority voters can elect the candidate of their choice when they constitute less than 50% of a district by relying on a small majority crossover vote, this approach is in no way contradictory to, or even in tension with, the third *Gingles* requirement. Since *Gingles* itself, we have acknowledged that the requirement of majority-bloc voting can be satisfied even when some small number of majority voters cross over to support a minority-preferred candidate. See 478 U. S., at 59 (finding majority-bloc voting where the majority group supported African-American candidates in the general election at a rate of between 26% and 49%, with an average support of one-third). Given the difficulty of obtaining totally accurate statistics about cohesion, or even voting age population, the district courts should administer the numerical ratio flexibly, opening (or closing) the *Gingles* gate (in light of the probable merits of a case) where only small variances are at issue (*e. g.*, where the minority group is 39% instead of 40% of a district). But the same is true with a 50% number (*e. g.*, where the minority group is 49% instead of 50% of a district). See, *e. g.*, Brief for United States as *Amicus Curiae* 15.

I do not claim that the 2-to-1 ratio is a perfect rule; I claim only that it is better than the plurality's 50% rule. After all, unlike 50%, a 2-to-1 ratio (of voting age minority population to necessary nonminority crossover votes) focuses directly upon the problem at hand, better reflects voting realities, and consequently far better separates at the gateway likely sheep from likely goats. See *Gingles*, *supra*, at 45 (The §2 inquiry depends on a " 'functional' view of the political process" and " 'a searching practical evaluation of the past and present reality' " (quoting S. Rep. No. 97–417, p. 30, and n. 120 (1982))); *Gingles*, *supra*, at 94–95 (O'Connor, J.,

concurring in judgment) ("[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions . . . "). In most cases, the 50% rule and the 2-to-1 rule would have roughly similar effects. Most districts where the minority voting age population is greater than 50% will almost always satisfy the 2-to-1 rule; and most districts where the minority population is below 40% will almost never satisfy the 2-to-1 rule. But in districts with minority voting age populations that range from 40% to 50%, the divergent approaches of the two standards can make a critical difference—as well they should.

In a word, JUSTICE SOUTER well explains why the majority's test is ill suited to the statute's objectives. I add that the test the majority adopts is ill suited to its own administrative ends. Better gateway tests, if needed, can be found.

With respect, I dissent.

Syllabus

VADEN *v.* DISCOVER BANK ET AL.

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

No. 07–773. Argued October 6, 2008—Decided March 9, 2009

Section 4 of the Federal Arbitration Act (FAA or Act), 9 U. S. C. § 4, authorizes a United States district court to entertain a petition to compel arbitration if the court would have jurisdiction, "save for [the arbitration] agreement," over "a suit arising out of the controversy between the parties."

Discover Bank's servicing affiliate filed a complaint in Maryland state court to recover past-due charges from one of its credit cardholders, petitioner Vaden. Discover's pleading presented a claim arising solely under state law. Vaden answered and counterclaimed, alleging that Discover's finance charges, interest, and late fees violated state law. Invoking an arbitration clause in its cardholder agreement with Vaden, Discover then filed a § 4 petition in Federal District Court to compel arbitration of Vaden's counterclaims. The District Court ordered arbitration.

On Vaden's initial appeal, the Fourth Circuit remanded the case for the District Court to determine whether it had subject-matter jurisdiction over Discover's § 4 petition pursuant to 28 U. S. C. § 1331, which gives federal courts jurisdiction over cases "arising under" federal law. The Fourth Circuit instructed the District Court to conduct this inquiry by "looking through" the § 4 petition to the substantive controversy between the parties. With Vaden conceding that her state-law counterclaims were completely preempted by § 27 of the Federal Deposit Insurance Act, the District Court expressly held that it had federal-question jurisdiction and again ordered arbitration. The Fourth Circuit then affirmed. The Court of Appeals recognized that, in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826, this Court held that federal-question jurisdiction depends on the contents of a well-pleaded complaint, and may not be predicated on counterclaims. It concluded, however, that the complete preemption doctrine is paramount and thus overrides the well-pleaded complaint rule.

Held: A federal court may "look through" a § 4 petition to determine whether it is predicated on a controversy that "arises under" federal law; in keeping with the well-pleaded complaint rule as amplified in *Holmes Group*, however, a federal court may not entertain a § 4 petition based on the contents of a counterclaim when the whole controversy

between the parties does not qualify for federal-court adjudication. Pp. 58–72.

(a) Congress enacted the FAA "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443, and to declare " 'a national policy favoring arbitration' of claims that parties contract to settle in that manner," *Preston* v. *Ferrer*, 552 U. S. 346, 353. To that end, § 2 makes arbitration agreements in contracts "involving commerce" "valid, irrevocable, and enforceable," while § 4 provides for federal district court enforcement of those agreements. The "body of federal substantive law" generated by elaboration of § 2 is equally binding on state and federal courts. *Southland Corp.* v. *Keating*, 465 U. S. 1, 12. However, the FAA "requir[es] [for access to a federal forum] an independent jurisdictional basis" over the parties' dispute. *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 582. Under the well-pleaded complaint rule, a suit "arises under" federal law for 28 U. S. C. § 1331 purposes "only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152. Federal jurisdiction cannot be predicated on an actual or anticipated defense, *ibid.*, or rest upon an actual or anticipated counterclaim, *Holmes Group*, 535 U. S. 826. A *complaint* purporting to rest on state law can be recharacterized as one "arising under" federal law if the law governing the complaint is exclusively federal, see *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 8, but a state-law-based *counterclaim*, even if similarly susceptible to recharacterization, remains nonremovable. Pp. 58–62.

(b) FAA § 4's text drives the conclusion that a federal court should determine its jurisdiction by "looking through" a § 4 petition to the parties' underlying substantive controversy. The phrase "save for [the arbitration] agreement" indicates that the district court should assume the absence of the agreement and determine whether it "would have jurisdiction under title 28" over "the controversy between the parties," which is most straightforwardly read to mean the "underlying dispute" between the parties. See *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 25, n. 32. Vaden's argument that the relevant "controversy" is simply and only the parties' discrete dispute over the arbitrability of their claims is difficult to square with § 4's language. If courts are to determine whether they would have jurisdiction "save for [the arbitration] agreement," how can a dispute over an arbitration agreement's existence or applicability be the controversy that counts? The Court is unpersuaded that the "save for" clause means only that the "antiquated and arcane" ouster notion no longer holds sway. To the extent that the ancient "ouster" doctrine continued to impede specific enforcement of arbitration agreements, FAA § 2, the

Act's "centerpiece provision," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 625, directly attended to the problem by commanding that an arbitration agreement is enforceable just as any other contract. Vaden's approach also has curious practical consequences. It would permit a federal court to entertain a § 4 petition only when a federal-question suit is already before the court, when the parties satisfy the requirements for diversity-of-citizenship jurisdiction, or when the dispute over arbitrability involves a maritime contract, yet would not accommodate a § 4 petitioner who *could* file a federal-question suit in, or remove such a suit to, federal court, but has not done so. In contrast, the "look through" approach permits a § 4 petitioner to ask a federal court to compel arbitration without first taking the formal step of initiating or removing a federal-question suit. Pp. 62–65.

(c) Having determined that a district court should look through a § 4 petition, this Court considers whether the court "would have [federal-question] jurisdiction" over "a suit arising out of the controversy" between Discover and Vaden. Because § 4 does not enlarge federal-court jurisdiction, a party seeking to compel arbitration may gain such a court's assistance only if, "save for" the agreement, the entire, actual "controversy between the parties," as they have framed it, could be litigated in federal court. Here, the actual controversy is not amenable to federal-court adjudication. The "controversy between the parties" arose from Vaden's "alleged debt," a claim that plainly did not "arise under" federal law; nor did it qualify under any other head of federal-court jurisdiction. The Fourth Circuit misapprehended *Holmes Group* when it concluded that jurisdiction was proper because Vaden's state-law counterclaims were completely preempted. Under the well-pleaded complaint rule, a completely preempted counterclaim remains a counterclaim, and thus does not provide a key capable of opening a federal court's door. Vaden's responsive counterclaims challenging the legality of Discover's charges are merely an aspect of the whole controversy Discover and Vaden brought to state court. Whether one might hypothesize a federal-question suit involving that subsidiary disagreement is beside the point. The relevant question is whether the whole controversy is one over which the federal courts would have jurisdiction. Section 4 does not give parties license to recharacterize an existing controversy, or manufacture a new controversy, in order to obtain a federal court's aid in compelling arbitration. It is hardly fortuitous that the controversy in this case took the shape it did. Seeking to collect a debt, Discover filed an entirely state-law-grounded complaint in state court, and Vaden chose to file responsive counterclaims. Section 4 does not invite federal courts to dream up counterfactuals when actual litigation has defined the parties' controversy. Allowing parties

to commandeer a federal court to slice off responsive pleadings for discrete arbitration while leaving the remainder of the parties' controversy pending in state court makes scant sense. Furthermore, the presence of a threshold question whether a counterclaim alleged to be based on state law is totally preempted by federal law may complicate the § 4 inquiry. Although FAA § 4 does not empower a federal court to order arbitration here, Discover is not left without recourse. Because the FAA obliges both state and federal courts to honor and enforce arbitration agreements, Discover may petition Maryland's courts for appropriate aid in enforcing the arbitration clause of its contracts with Maryland credit cardholders. Pp. 66–71.

489 F. 3d 594, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which STEVENS, BREYER, and ALITO, JJ., joined, *post,* p. 72.

Daniel R. Ortiz argued the cause for petitioner. With him on the briefs were *John A. Mattingly, Jr.,* and *David T. Goldberg.*

Carter G. Phillips argued the cause for respondents. With him on the brief were *Paul J. Zidlicky, Alan S. Kaplinsky, Joseph W. Hovermill,* and *Matthew T. Wagman.**

JUSTICE GINSBURG delivered the opinion of the Court.

Section 4 of the Federal Arbitration Act, 9 U. S. C. § 4, authorizes a United States district court to entertain a petition to compel arbitration if the court would have jurisdiction, "save for [the arbitration] agreement," over "a suit arising out of the controversy between the parties." We consider in this opinion two questions concerning a district court's

*Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America et al. by *Evan M. Tager, David M. Gossett, Robin S. Conrad, Amar D. Sarwal,* and *Michael F. Altschul;* for Cintas Corp. by *Mark C. Dosker, Joseph A. Meckes,* and *Pierre H. Bergeron;* for the Financial Services Roundtable et al. by *Beth S. Brinkmann, L. Richard Fischer,* and *Seth M. Galanter;* and for Law Professors by *Imre S. Szalai, pro se.*

subject-matter jurisdiction over a § 4 petition: Should a district court, if asked to compel arbitration pursuant to § 4, "look through" the petition and grant the requested relief if the court would have federal-question jurisdiction over the underlying controversy? And if the answer to that question is yes, may a district court exercise jurisdiction over a § 4 petition when the petitioner's complaint rests on state law but an actual or potential counterclaim rests on federal law?

The litigation giving rise to these questions began when Discover Bank's servicing affiliate filed a complaint in Maryland state court. Presenting a claim arising solely under state law, Discover sought to recover past-due charges from one of its credit cardholders, Betty Vaden. Vaden answered and counterclaimed, alleging that Discover's finance charges, interest, and late fees violated state law. Invoking an arbitration clause in its cardholder agreement with Vaden, Discover then filed a § 4 petition in the United States District Court for the District of Maryland to compel arbitration of Vaden's counterclaims. The District Court had subject-matter jurisdiction over its petition, Discover maintained, because Vaden's state-law counterclaims were completely preempted by federal banking law. The District Court agreed and ordered arbitration. Reasoning that a federal court has jurisdiction over a § 4 petition if the parties' underlying dispute presents a federal question, the Fourth Circuit eventually affirmed.

We agree with the Fourth Circuit in part. A federal court may "look through" a § 4 petition and order arbitration if, "save for [the arbitration] agreement," the court would have jurisdiction over "the [substantive] controversy between the parties." We hold, however, that the Court of Appeals misidentified the dimensions of "the controversy between the parties." Focusing on only a slice of the parties' entire controversy, the court seized on Vaden's counterclaims, held them completely preempted, and on that basis affirmed the District Court's order compelling arbitration. Lost from

sight was the triggering plea—Discover's claim for the balance due on Vaden's account. Given that entirely state-based plea and the established rule that federal-court jurisdiction cannot be invoked on the basis of a defense or counterclaim, the whole "controversy between the parties" does not qualify for federal-court adjudication. Accordingly, we reverse the Court of Appeals' judgment.

I

This case originated as a garden-variety, state-law-based contract action: Discover sued its cardholder, Vaden, in a Maryland state court to recover arrearages amounting to $10,610.74, plus interest and counsel fees.[1] Vaden's answer asserted usury as an affirmative defense. Vaden also filed several counterclaims, styled as class actions. Like Discover's complaint, Vaden's pleadings invoked only state law: Vaden asserted that Discover's demands for finance charges, interest, and late fees violated Maryland's credit laws. See Md. Com. Law Code Ann. §§ 12–506, 12–506.2 (Lexis 2005). Neither party invoked—by notice to the other or petition to the state court—the clause in the credit card agreement providing for arbitration of "any claim or dispute between [Discover and Vaden]," App. 44 (capitalization and bold typeface omitted).[2]

Faced with Vaden's counterclaims, Discover sought federal-court aid. It petitioned the United States District Court for the District of Maryland for an order, pursuant to § 4 of the Federal Arbitration Act (FAA or Act), 9 U. S. C. § 4,

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[1] Discover apparently had no access to a federal forum for its suit against Vaden on the basis of diversity-of-citizenship jurisdiction. Under that head of federal-court jurisdiction, the amount in controversy must "exceed[d] . . . $75,000." 28 U. S. C. § 1332(a).

[2] Vaden's preference for court adjudication is unsurprising. The arbitration clause, framed by Discover, prohibited presentation of "any claims as a representative or member of a class." App. 45 (capitalization omitted).

compelling arbitration of Vaden's counterclaims.[3] Although those counterclaims were framed under state law, Discover urged that they were governed entirely by federal law, specifically, § 27(a) of the Federal Deposit Insurance Act (FDIA), 12 U. S. C. § 1831d(a). Section 27(a) prescribes the interest rates state-chartered, federally insured banks like Discover can charge, "notwithstanding any State constitution or statute which is hereby preempted." This provision, Discover maintained, was completely preemptive, *i. e.*, it superseded otherwise applicable Maryland law, and placed Vaden's counterclaims under the exclusive governance of the FDIA. On that basis, Discover asserted, the District Court had authority to entertain the § 4 petition pursuant to 28 U. S. C. § 1331, which gives federal courts jurisdiction over cases "arising under" federal law.

The District Court granted Discover's petition, ordered arbitration, and stayed Vaden's prosecution of her counterclaims in state court pending the outcome of arbitration. App. to Pet. for Cert. 89a–90a. On Vaden's initial appeal, the Fourth Circuit inquired whether the District Court had federal-question jurisdiction over Discover's § 4 petition. To make that determination, the Court of Appeals instructed, the District Court should "look through" the § 4 petition to the substantive controversy between the parties. 396 F. 3d 366, 369, 373 (2005). The appellate court then remanded the case for an express determination whether that controversy presented "a properly invoked federal question." *Id.*, at 373.

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[3] Section 4 reads, in relevant part:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U. S. C. § 4.

On remand, Vaden "concede[d] that the FDIA completely preempts any state claims against a federally insured bank." 409 F. Supp. 2d 632, 636 (Md. 2006). Accepting this concession, the District Court expressly held that it had federal-question jurisdiction over Discover's § 4 petition and again ordered arbitration. *Id.*, at 634–636, 639. In this second round, the Fourth Circuit affirmed, dividing 2 to 1. 489 F. 3d 594 (2007).

Recognizing that "a party may not create jurisdiction by concession," *id.*, at 604, n. 10, the Fourth Circuit majority conducted its own analysis of FDIA § 27(a), ultimately concluding that the provision completely preempted state law and therefore governed Vaden's counterclaims.[4] This Court's decision in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826 (2002), the majority recognized, held that federal-question jurisdiction depends on the contents of a well-pleaded complaint, and may not be predicated on counterclaims. 489 F. 3d, at 600, n. 4. Nevertheless, the majority concluded, the complete preemption doctrine is paramount, "overrid[ing] such fundamental cornerstones of federal subject-matter jurisdiction as the well-pleaded complaint rule." *Ibid.* (quoting 14B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722.1, p. 511 (3d ed. 1998) (hereinafter Wright & Miller)).[5]

The dissenting judge considered *Holmes Group* dispositive. As § 27(a) of the FDIA formed no part of Discover's complaint, but came into the case only as a result of Vaden's

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[4] Our disposition of this case makes it unnecessary to take up the question of § 27(a)'s preemptive force generally or in the particular context of Discover's finance charges. We therefore express no opinion on those issues. Cf. *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 9–10 (2003) (holding that the National Bank Act, 12 U. S. C. §§ 85, 86, completely preempts state-law usury claims against national banks).

[5] But see 489 F. 3d 594, 612 (CA4 2007) (dissenting opinion) (observing that the passage from Wright & Miller referenced by the majority "makes clear that the doctrine of complete preemption is exclusively focused on claims in a *plaintiff's complaint*").

responsive pleadings, the dissent reasoned, "[t]here was no 'properly invoked federal question' in the underlying state case." 489 F. 3d, at 610.

We granted certiorari, 552 U. S. 1256 (2008), in view of the conflict among lower federal courts on whether district courts, petitioned to order arbitration pursuant to § 4 of the FAA, may "look through" the petition and examine the parties' underlying dispute to determine whether federal-question jurisdiction exists over the § 4 petition. Compare *Wisconsin* v. *Ho-Chunk Nation*, 463 F. 3d 655, 659 (CA7 2006) (in determining jurisdiction over a § 4 petition, the court may not "look through" the petition and focus on the underlying dispute); *Smith Barney, Inc.* v. *Sarver*, 108 F. 3d 92, 94 (CA6 1997) (same); *Westmoreland Capital Corp.* v. *Findlay*, 100 F. 3d 263, 267–269 (CA2 1996) (same); and *Prudential-Bache Securities, Inc.* v. *Fitch*, 966 F. 2d 981, 986–989 (CA5 1992) (same), with *Community State Bank* v. *Strong*, 485 F. 3d 597, 605–606 (court may "look through" the petition and train on the underlying dispute), vacated, reh'g en banc granted, 508 F. 3d 576 (CA11 2007);[6] and 396 F. 3d, at 369–370 (case below) (same).

As this case shows, if the underlying dispute is the proper focus of a § 4 petition, a further question may arise. The dispute brought to state court by Discover concerned Vaden's failure to pay over $10,000 in past-due credit card charges. In support of that complaint, Discover invoked no federal law. When Vaden answered and counterclaimed, however, Discover asserted that federal law, specifically § 27(a) of the FDIA, displaced the state laws on which Vaden relied. What counts as the underlying dispute in a case so postured? May Discover invoke § 4, not on the basis of its

[6] In *Community State Bank* v. *Strong*, 485 F. 3d 597, 605–606 (CA11 2007), the Court of Appeals approved the "look through" approach as advanced in Circuit precedent. But Judge Marcus, who authored the court's unanimous opinion, wrote a special concurrence, noting that, were he writing on a clean slate, he would reject the "look through" approach.

own complaint, which had no federal element, but on the basis of counterclaims asserted by Vaden? To answer these questions, we first review relevant provisions of the FAA, 9 U. S. C. §1 *et seq.*, and controlling tenets of federal jurisdiction.

II

In 1925, Congress enacted the FAA "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443 (2006), and to declare "'a national policy favoring arbitration' of claims that parties contract to settle in that manner," *Preston* v. *Ferrer*, 552 U. S. 346, 353 (2008) (quoting *Southland Corp.* v. *Keating*, 465 U. S. 1, 10 (1984)). To that end, §2 provides that arbitration agreements in contracts "involving commerce" are "valid, irrevocable, and enforceable." 9 U. S. C. §2.[7] Section 4—the section at issue here—provides for United States district court enforcement of arbitration agreements. Petitions to compel arbitration, §4 states, may be brought before "any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." See *supra*, at 55, n. 3.[8]

[7] Section 2 reads, in full:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.

[8] A companion provision, §3, provides for stays of litigation pending arbitration. It reads:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the

The "body of federal substantive law" generated by elaboration of FAA § 2 is equally binding on state and federal courts. *Southland*, 465 U. S., at 12 (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 25, n. 32 (1983)); accord *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 271–272 (1995). "As for jurisdiction over controversies touching arbitration," however, the Act is "something of an anomaly" in the realm of federal legislation: It "bestow[s] no federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis" over the parties' dispute. *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 581–582 (2008) (quoting *Moses H. Cone*, 460 U. S., at 25, n. 32).[9] Given the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate. See *Southland*, 465 U. S., at 15; *Moses H. Cone*, 460 U. S., at 25, and n. 32.

The independent jurisdictional basis Discover relies upon in this case is 28 U. S. C. § 1331, which vests in federal dis-

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parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U. S. C. § 3.

[9] Chapter 2 of the FAA, not implicated here, does expressly grant federal courts jurisdiction to hear actions seeking to enforce an agreement or award falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See 9 U. S. C. § 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding . . . ."). FAA § 205 goes further and overrides the well-pleaded complaint rule *pro tanto*. 9 U. S. C. § 205 ("The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal."). As Vaden points out, these sections demonstrate that "when Congress wants to expand [federal-court] jurisdiction, it knows how to do so clearly and unequivocally." Brief for Petitioner 38.

trict courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Under the longstanding well-pleaded complaint rule, however, a suit "arises under" federal law "only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908). Federal jurisdiction cannot be predicated on an actual or anticipated defense: "It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of [federal law]." *Ibid.*

Nor can federal jurisdiction rest upon an actual or anticipated counterclaim. We so ruled, emphatically, in *Holmes Group*, 535 U. S. 826. Without dissent, the Court held in *Holmes Group* that a federal counterclaim, even when compulsory, does not establish "arising under" jurisdiction.[10] Adhering assiduously to the well-pleaded complaint rule, the Court observed, *inter alia*, that it would undermine the clarity and simplicity of that rule if federal courts were obliged to consider the contents not only of the complaint but also of

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[10] *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826 (2002), involved 28 U. S. C. § 1295(a)(1), which vests in the Federal Circuit exclusive jurisdiction over "an appeal from a final decision of a district court . . . if the jurisdiction of that court was based, in whole or in part, on [28 U. S. C. §] 1338." Section 1338(a), in turn, confers on district courts "[exclusive] original jurisdiction of any civil action arising under any Act of Congress relating to patents." The plaintiff's complaint in *Holmes Group* presented a federal claim, but not one relating to patents; the defendant counterclaimed for patent infringement. The Court ruled that the case did not "aris[e] under" the patent laws by virtue of the patent counterclaim, and therefore held that the Federal Circuit lacked appellate jurisdiction under § 1295(a)(1). See 535 U. S., at 830–832.

In reaching its decision in *Holmes Group*, the Court first attributed to the words "arising under" in § 1338(a) the same meaning those words have in § 1331. See *id.*, at 829–830. It then reasoned that a counterclaim asserted in a responsive pleading cannot provide the basis for "arising under" jurisdiction consistently with the well-pleaded complaint rule. See *id.*, at 830–832.

responsive pleadings in determining whether a case "arises under" federal law. *Id.*, at 832. See also *id.*, at 830 ("[T]he well-pleaded complaint rule, properly understood, [does not] allo[w] a counterclaim to serve as the basis for a district court's 'arising under' jurisdiction."); *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 10, n. 9 (1983) ("The well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction.").[11]

A *complaint* purporting to rest on state law, we have recognized, can be recharacterized as one "arising under" federal law if the law governing the complaint is exclusively federal. See *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 8 (2003). Under this so-called "complete-preemption doctrine," a plaintiff's "state cause of action [may be recast] as a federal claim for relief, making [its] removal [by the defendant] proper on the basis of federal question jurisdiction." 14B Wright & Miller § 3722.1, p. 511.[12] A state-law-based *counterclaim*, however, even if similarly susceptible to re-

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[11] The Court noted in *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 10–11, n. 9 (1983), and in *Holmes Group*, 535 U. S., at 831, that commentators have repeatedly suggested Judicial Code revisions under which responsive pleadings that may be dispositive would count in determining whether a case "arises under" federal law. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1312, pp. 188–194 (1969) (discussed in 14B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 505–507 (3d ed. 1998) (hereinafter Wright & Miller)); cf. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 233–234 (1948). Congress, however, has not responded to these suggestions.

[12] Recharacterization of an asserted state-law claim as in fact a claim arising exclusively under federal law, and therefore removable on the defendant's petition, of course does not mean that the claim cannot remain in state court. There is nothing inappropriate or exceptional, Discover acknowledges, about a state court's entertaining, and applying federal law to, completely preempted claims or counterclaims. See Tr. of Oral Arg. 35.

characterization, would remain nonremovable. Under our precedent construing § 1331, as just explained, counterclaims, even if they rely exclusively on federal substantive law, do not qualify a case for federal-court cognizance.

III

Attending to the language of the FAA and the above-described jurisdictional tenets, we approve the "look through" approach to this extent: A federal court may "look through" a § 4 petition to determine whether it is predicated on an action that "arises under" federal law; in keeping with the well-pleaded complaint rule as amplified in *Holmes Group*, however, a federal court may not entertain a § 4 petition based on the contents, actual or hypothetical, of a counterclaim.

A

The text of § 4 drives our conclusion that a federal court should determine its jurisdiction by "looking through" a § 4 petition to the parties' underlying substantive controversy. We reiterate § 4's relevant instruction: When one party seeks arbitration pursuant to a written agreement and the other resists, the proponent of arbitration may petition for an order compelling arbitration in

> "any United States district court which, save for [the arbitration] agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U. S. C. § 4.

The phrase "save for [the arbitration] agreement" indicates that the district court should assume the absence of the arbitration agreement and determine whether it "would have jurisdiction under title 28" without it. See 396 F. 3d, at 369, 372 (case below). Jurisdiction over what? The text of § 4 refers us to "the controversy between the parties." That phrase, the Fourth Circuit said, and we agree, is most

straightforwardly read to mean the "substantive conflict between the parties." *Id.*, at 370. See also *Moses H. Cone*, 460 U. S., at 25, n. 32 (noting in dicta that, to entertain a § 4 petition, a federal court must have jurisdiction over the "underlying dispute").[13]

The majority of Courts of Appeals to address the question, we acknowledge, have rejected the "look through" approach entirely, as Vaden asks us to do here. See *supra*, at 57. The relevant "controversy between the parties," Vaden insists, is simply and only the parties' discrete dispute over the arbitrability of their claims. She relies, quite reasonably, on the fact that a § 4 petition to compel arbitration seeks no adjudication on the merits of the underlying controversy. Indeed, its very purpose is to have an arbitrator, rather than a court, resolve the merits. A § 4 petition, Vaden observes, is essentially a plea for specific performance of an agreement to arbitrate, and it thus presents principally contractual questions: Did the parties validly agree to arbitrate? What issues does their agreement encompass? Has one party dishonored the agreement?

Vaden's argument, though reasonable, is difficult to square with the statutory language. Section 4 directs courts to determine whether they would have jurisdiction "save for [the arbitration] agreement." How, then, can a dispute over the existence or applicability of an arbitration agreement be the controversy that counts?

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[13] The parties' underlying dispute may or may not be the subject of pending litigation. This explains § 4's use of the conditional "would" and the indefinite "*a* suit." A party often files a § 4 petition to compel arbitration precisely because it does not want to bring suit and litigate in court. Sometimes, however, a § 4 petition is filed after litigation has commenced. The party seeking to compel arbitration in such cases is typically the defendant, who claims to be aggrieved by the plaintiff's attempt to litigate rather than arbitrate. This case involves the relatively unusual situation in which the party that initiated litigation of the underlying dispute is also the party seeking to compel arbitration.

The "save for" clause, courts espousing the view embraced by Vaden respond, means only that the "antiquated and arcane" ouster notion no longer holds sway. *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 961 (SDNY 1988). Adherents to this "ouster" explanation of § 4's language recall that courts traditionally viewed arbitration clauses as unworthy attempts to "oust" them of jurisdiction; accordingly, to guard against encroachment on their domain, they refused to order specific enforcement of agreements to arbitrate. See H. R. Rep. No. 96, 68th Cong., 1st Sess., 1–2 (1924) (discussed in *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219–220, and n. 6 (1985)). The "save for" clause, as comprehended by proponents of the "ouster" explanation, was designed to ensure that courts would no longer consider themselves ousted of jurisdiction and would therefore specifically enforce arbitration agreements. See, *e. g.*, *Westmoreland*, 100 F. 3d, at 267–268, and n. 6 (adopting the "ouster" interpretation advanced in *Drexel Burnham Lambert*, 696 F. Supp., at 961–963); *Strong*, 485 F. 3d, at 631 (Marcus, J., specially concurring) (reading § 4's "save for" clause "as instructing the court to 'set aside' not the arbitration agreement . . . , but merely the previous judicial hostility to arbitration agreements").

We are not persuaded that the "ouster" explanation of § 4's "save for" clause carries the day. To the extent that the ancient "ouster" doctrine continued to impede specific enforcement of arbitration agreements, § 2 of the FAA, the Act's "centerpiece provision," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 625 (1985), directly attended to the problem. Covered agreements to arbitrate, § 2 declares, are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Having commanded that an arbitration agreement is enforceable just as any other contract, Congress had no cause to repeat the point. See 1 I. MacNeil, R. Speidel, & T. Stipanowich, Federal Arbitration Law

§ 9.2.3.3, p. 9:18 (1995) (hereinafter MacNeil) ("Th[e] effort to connect the 'save for' language to the ancient problem of 'ouster of jurisdiction' is imaginative, but utterly unfounded and historically inaccurate." (footnote omitted)).[14]

In addition to its textual implausibility, the approach Vaden advocates has curious practical consequences. It would permit a federal court to entertain a § 4 petition only when a federal-question suit is already before the court, when the parties satisfy the requirements for diversity-of-citizenship jurisdiction, or when the dispute over arbitrability involves a maritime contract. See, *e. g.*, *Westmoreland*, 100 F. 3d, at 268–269; 1 MacNeil § 9.2.3.1, pp. 9:12–9:13 (when a federal-question suit has been filed in or removed to federal court, the court "may order arbitration under FAA § 4").[15] Vaden's approach would not accommodate a § 4 petitioner who *could* file a federal-question suit in (or remove such a suit to) federal court, but who has not done so. In contrast, when the parties' underlying dispute arises under federal law, the "look through" approach permits a § 4 petitioner to ask a federal court to compel arbitration without first taking the formal step of initiating or removing a federal-question suit—that is, without seeking federal adjudication of the very questions it wants to arbitrate rather than litigate. See *id.*, § 9.2.3.3, p. 9:21 (explaining that the approach Vaden advocates "creates a totally artificial distinction" based on whether a dispute is subject to pending federal litigation).

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[14] Because "the ouster problem was just as great under state law as it was under federal," the absence of "save for" language in contemporaneous state arbitration acts bolsters our conclusion that § 4 was not devised to dislodge the common-law ouster doctrine. 1 I. MacNeil, R. Speidel, & T. Stipanowich, Federal Arbitration Law § 9.2.3.3, p. 9:18 (1995). See also 396 F. 3d 366, 369–370, n. 2 (CA4 2005) (case below).

[15] Specific jurisdiction-granting provisions may also authorize a federal court to entertain a petition to compel arbitration. See, *e. g.*, 9 U. S. C. §§ 203, 205 (providing for federal-court jurisdiction over arbitration agreements covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

B

Having determined that a district court should "look through" a § 4 petition, we now consider whether the court "would have [federal-question] jurisdiction" over "a suit arising out of the controversy" between Discover and Vaden. 9 U. S. C. § 4. As explained above, § 4 of the FAA does not enlarge federal-court jurisdiction; rather, it confines federal courts to the jurisdiction they would have "save for [the arbitration] agreement." See *supra*, at 59. Mindful of that limitation, we read § 4 to convey that a party seeking to compel arbitration may gain a federal court's assistance only if, "save for" the agreement, the entire, actual "controversy between the parties," as they have framed it, could be litigated in federal court. We conclude that the parties' actual controversy, here precipitated by Discover's state-court suit for the balance due on Vaden's account, is not amenable to federal-court adjudication. Consequently, the § 4 petition Discover filed in the United States District Court for the District of Maryland must be dismissed.

As the Fourth Circuit initially stated, the "controversy between the parties" arose from the "alleged debt" Vaden owed to Discover. 396 F. 3d, at 370. Discover's complaint in Maryland state court plainly did not "arise under" federal law, nor did it qualify under any other head of federal-court jurisdiction. See *supra*, at 54, and n. 1.

In holding that Discover properly invoked federal-court jurisdiction, the Fourth Circuit looked beyond Discover's complaint and homed in on Vaden's state-law-based defense and counterclaims. Those responsive pleadings, Discover alleged, and the Fourth Circuit determined, were completely preempted by the FDIA. See *supra*, at 54–55. The Fourth Circuit, however, misapprehended our decision in *Holmes Group*. Under the well-pleaded complaint rule, a completely preempted counterclaim remains a counterclaim and thus does not provide a key capable of opening a federal court's door. See *supra*, at 59–62. See also *Taylor* v. *An-*

derson, 234 U. S. 74, 75–76 (1914) ("[W]hether a case is one arising under [federal law] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim . . . , unaided by anything alleged in anticipation o[r] avoidance of defenses which it is thought the defendant may interpose.").

Neither Discover nor THE CHIEF JUSTICE, concurring in part and dissenting in part (hereinafter dissent), defends the Fourth Circuit's reasoning. Instead, the dissent insists that a federal court "would have" jurisdiction over "the controversy Discover seeks to arbitrate"—namely, "whether 'Discover Bank charged illegal finance charges, interest and late fees.'" *Post*, at 72 (quoting App. 30). The dissent hypothesizes two federal suits that might arise from this purported controversy: "an action by Vaden asserting that the charges violate the FDIA, or one by Discover seeking a declaratory judgment that they do not." *Post*, at 73.

There is a fundamental flaw in the dissent's analysis: In lieu of focusing on the whole controversy as framed by the parties, the dissent hypothesizes discrete controversies of its own design. As the parties' state-court filings reflect, the originating controversy here concerns Vaden's alleged debt to Discover. Vaden's responsive counterclaims challenging the legality of Discover's charges are a discrete aspect of the whole controversy Discover and Vaden brought to state court. Whether one might imagine a federal-question suit involving the parties' disagreement over Discover's charges is beside the point. The relevant question is whether the whole controversy between the parties—not just a piece broken off from that controversy—is one over which the federal courts would have jurisdiction.

The dissent would have us treat a § 4 petitioner's statement of the issues to be arbitrated as the relevant controversy even when that statement does not convey the full flavor of the parties' entire dispute. Artful dodges by a § 4 petitioner should not divert us from recognizing the actual

dimensions of that controversy. The text of § 4 instructs federal courts to determine whether they would have jurisdiction over "a suit arising out of *the* controversy between the parties"; it does not give § 4 petitioners license to recharacterize an existing controversy, or manufacture a new controversy, in an effort to obtain a federal court's aid in compelling arbitration.[16]

Viewed contextually and straightforwardly, it is hardly "fortuit[ous]" that the controversy in this case took the shape it did. Cf. *post*, at 73. Seeking to collect a debt, Discover filed an entirely state-law-grounded complaint in state court, and Vaden chose to file responsive counterclaims. Perhaps events could have unfolded differently, but § 4 does not invite federal courts to dream up counterfactuals when actual litigation has defined the parties' controversy.[17]

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[16] Noting that the FAA sometimes uses "controversy" to refer to the dispute to be arbitrated, the dissent insists that it must have the same meaning in § 4. Cf. *post*, at 73. But § 4 does not ask a district court to determine whether it would have jurisdiction over "the controversy the § 4 petitioner seeks to arbitrate"; it asks whether the court would have jurisdiction over "the controversy between the parties." Here, the issue Discover seeks to arbitrate is undeniably only a fraction of the controversy between the parties. We decline to rewrite the statute to ignore this reality.

Moreover, our reading of § 4 fully accords with the statute's subjunctive construction ("would have jurisdiction") and its reference to "*a* suit." Cf. *post*, at 75–76. Section 4, we recognize, enables a party to seek an order compelling arbitration even when the parties' controversy is not the subject of pending litigation. See *supra*, at 63, n. 13, 66. Whether or not the controversy between the parties is embodied in an existing suit, the relevant question remains the same: Would a federal court have jurisdiction over an action arising out of that full-bodied controversy?

[17] Our approach, the dissent asserts, would produce "inconsistent results" based "upon the happenstance of how state-court litigation has unfolded." *Post*, at 76. Of course, a party's ability to gain adjudication of a federal question in federal court often depends on how that question happens to have been presented, and the dissent's argument is little more than a veiled criticism of *Holmes Group* and the well-pleaded complaint rule. When a litigant files a state-law claim in state court, and her oppo-

As the dissent would have it, parties could commandeer a federal court to slice off responsive pleadings for arbitration while leaving the remainder of the parties' controversy pending in state court. That seems a bizarre way to proceed. In this case, Vaden's counterclaims would be sent to arbitration while the complaint to which they are addressed—Discover's state-law-grounded debt-collection action—would remain pending in a Maryland court. When the controversy between the parties is not one over which a federal court would have jurisdiction, it makes scant sense to allow one of the parties to enlist a federal court to disturb the state-court proceedings by carving out issues for separate resolution.[18]

Furthermore, the presence of a threshold question whether a counterclaim alleged to be based on state law is totally preempted by federal law may complicate the dissent's § 4 inquiry. This case is illustrative. The dissent relates that Vaden eventually conceded that FDIA § 27(a), not

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nent parries with a federal counterclaim, the action is not removable to federal court, even though it would have been removable had the order of filings been reversed. See *Holmes Group*, 535 U. S., at 831–832.

True, the outcome in this case may well have been different had Vaden initiated an FDIA claim about the legality of Discover's charges. Because that controversy likely would have been amenable to adjudication in a federal forum, Discover could have asked a federal court to send the parties to arbitration. But that is not what occurred here. Vaden did not invoke the FDIA. Indeed, she framed her counterclaims under state law and clearly preferred the Maryland forum. The dissent's hypothesizing about the case that might have been brought does not provide a basis for federal-court jurisdiction.

[18] The dissent observes, *post*, at 75, that our rule might enable a party to request a federal court's aid in compelling arbitration of a state-law counterclaim that might otherwise be adjudicated in state court. But if a federal court would have jurisdiction over the parties' whole controversy, we see nothing anomalous about the court's ordering arbitration of a state-law claim constituting part of that controversy. Federal courts routinely exercise supplemental jurisdiction over state-law claims. See 28 U. S. C. § 1367.

Maryland law, governs the charges and fees Discover may impose. *Post*, at 72. But because the issue is jurisdictional, Vaden's concession is not determinative. See *supra*, at 56, and n. 4. The dissent simply glides by the preemption issue, devoting no attention to it, although this Court has not yet resolved the matter.

In sum, § 4 of the FAA instructs district courts asked to compel arbitration to inquire whether the court would have jurisdiction, "save for [the arbitration] agreement," over "a suit arising out of the controversy between the parties." We read that prescription in light of the well-pleaded complaint rule and the corollary rule that federal jurisdiction cannot be invoked on the basis of a defense or counterclaim. Parties may not circumvent those rules by asking a federal court to order arbitration of the portion of a controversy that implicates federal law when the court would not have federal-question jurisdiction over the controversy as a whole. It does not suffice to show that a federal question lurks somewhere inside the parties' controversy, or that a defense or counterclaim would arise under federal law. Because the controversy between Discover and Vaden, properly perceived, is not one qualifying for federal-court adjudication, § 4 of the FAA does not empower a federal court to order arbitration of that controversy, in whole or in part.[19]

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[19] This Court's declaratory judgment jurisprudence in no way undercuts our analysis. Cf. *post*, at 73, 77–78. Discover, the dissent implies, could have brought suit in federal court seeking a declaration that its charges conform to federal law. Again, the dissent's position rests on its misconception of "the controversy between the parties." Like § 4 itself, the Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts; it is "procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240 (1937). Thus, even in a declaratory judgment action, a federal court could not entertain Discover's state-law debt-collection claim. Cf. 10B Wright & Miller § 2758, pp. 519–521 ("The Declaratory Judgment Act was not intended to enable a party to obtain a change of tribunal from a state to federal court, and it is not the function of the federal declaratory

Discover, we note, is not left without recourse. Under the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate. *Southland*, 465 U. S., at 12; *Moses H. Cone*, 460 U. S., at 25, 26, n. 34. See also *supra*, at 59. Discover may therefore petition a Maryland court for aid in enforcing the arbitration clause of its contracts with Maryland cardholders.

True, Maryland's high court has held that §§ 3 and 4 of the FAA prescribe federal-court procedures and, therefore, do not bind the state courts.[20] But Discover scarcely lacks an available state remedy. Section 2 of the FAA, which does bind the state courts, renders agreements to arbitrate "valid, irrevocable, and *enforceable.*" This provision "carries with it duties [to credit and enforce arbitration agreements] indistinguishable from those imposed on federal courts by FAA §§ 3 and 4." 1 MacNeil § 10.8.1, p. 10:77. Notably, Maryland, like many other States, provides a statutory remedy nearly identical to § 4. See Md. Cts. & Jud. Proc. Code Ann. § 3–207 (Lexis 2006) ("If a party to an arbitration agreement . . . refuses to arbitrate, the other party may file a petition with a court to order arbitration. . . . If the court determines that the agreement exists, it shall order arbitration. Otherwise it shall deny the petition."). See also *Walther* v. *Sovereign Bank*, 386 Md. 412, 424, 872 A. 2d 735, 742 (2005) ("The Maryland Arbitration Act has been called the 'State analogue . . . to the Federal Arbitration Act.' The same policy favoring enforcement of arbitration agreements is present in both our own and the federal acts." (some internal quotation marks and citation omitted)). Even before it filed its debt-recovery action in a Maryland state court, Discover

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action merely to anticipate a defense that otherwise could be presented in a state action." (footnote omitted)).

[20] This Court has not decided whether §§ 3 and 4 apply to proceedings in state courts, see *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 477, n. 6 (1989), and we do not do so here.

could have sought from that court an order compelling arbitration of any agreement-related dispute between itself and cardholder Vaden. At no time was federal-court intervention needed to place the controversy between the parties before an arbitrator.

* * *

For the reasons stated, the District Court lacked jurisdiction to entertain Discover's § 4 petition to compel arbitration. The judgment of the Court of Appeals affirming the District Court's order is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE STEVENS, JUSTICE BREYER, and JUSTICE ALITO join, concurring in part and dissenting in part.

I agree with the Court that a federal court asked to compel arbitration pursuant to § 4 of the Federal Arbitration Act should "look through" the dispute over arbitrability in determining whether it has jurisdiction to grant the requested relief. But look through to what? The statute provides a clear and sensible answer: The court may consider the § 4 petition if the court "would have" jurisdiction over "the subject matter of a suit arising out of the controversy between the parties." 9 U. S. C. § 4.

The § 4 petition in this case explains that the controversy Discover seeks to arbitrate is whether "Discover Bank charged illegal finance charges, interest and late fees." App. 30. Discover contends in its petition that the resolution of this dispute is controlled by federal law—specifically § 27(a) of the Federal Deposit Insurance Act (FDIA), 12 U. S. C. § 1831d(a) (setting forth the interest rates a state-chartered, federally insured bank may charge "notwithstanding any State constitution or statute which is hereby preempted"). Vaden agrees that the legality of Discover's

charges and fees is governed by the FDIA.* A federal court therefore "would have jurisdiction . . . of the subject matter of a suit arising out of the controversy" Discover seeks to arbitrate. That suit could be an action by Vaden asserting that the charges violate the FDIA, or one by Discover seeking a declaratory judgment that they do not.

The majority is diverted off this straightforward path by the fortuity that a complaint happens to have been filed in this case. Instead of looking to the controversy the § 4 petitioner seeks to arbitrate, the majority focuses on the controversy underlying that complaint, and asks whether "the *whole* controversy," as reflected in "the parties' state-court filings," arises under federal law. *Ante*, at 67 (emphasis added). Because that litigation was commenced as a state-law debt-collection claim, the majority concludes there is no § 4 jurisdiction.

This approach is contrary to the language of § 4, and sharply restricts the ability of federal courts to enforce agreements to arbitrate. The "controversy" to which § 4 refers is the dispute alleged to be subject to arbitration. The § 4 petitioner must set forth the nature of that dispute—the one he seeks to arbitrate—in the § 4 petition seeking an order to compel arbitration. Section 4 requires that the petitioner be "aggrieved" by the other party's "failure, neglect, or refusal . . . to arbitrate under a written agreement for arbitration"; that language guides the district court to the specific controversy the other party is unwilling to arbitrate.

That is clear from the FAA's repeated and consistent use of the term "controversy" to mean the specific dispute as-

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*Vaden has conceded that the FDIA completely pre-empts her state-law counterclaims. See 489 F. 3d 594, 604, n. 10 (CA4 2007). What is significant about that concession is not Vaden's agreement on the jurisdictional question of complete pre-emption (which we need not and do not address), cf. *ante*, at 69–70, but rather her agreement that federal law—the FDIA—governs her allegation that Discover's charges and fees are illegal.

serted to be subject to arbitration, not to some broader, "full flavor[ed]" or "full-bodied" notion of the disagreement between the parties. *Ante*, at 67, 68, n. 16. In § 2, for example, the "controversy" is the one "to [be] settle[d] by arbitration" and the one "to [be] submit[ted] to arbitration." 9 U. S. C. § 2. In § 10(a)(3), it is a ground for vacating an arbitration award that the arbitrator refused to hear evidence "pertinent and material to the controversy"—obviously the "controversy" subject to arbitration, or the arbitrator's refusal to consider the evidence would hardly be objectionable. In § 11(c), an award may be modified if "imperfect in matter of form not affecting the merits of the controversy"—again, necessarily the controversy submitted to arbitration, and therefore the subject of the award.

There is no reason to suppose "controversy" meant the controversy subject to arbitration everywhere else in the FAA, but something quite different in § 4. The issue is whether there is jurisdiction to compel arbitration to resolve a controversy; why would the pertinent controversy for assessing jurisdiction be anything other than the same one asserted to be subject to arbitration?

The majority looks instead to the controversy the state-court litigation seeks to resolve. This produces the odd result of defining "controversy" more broadly than the § 4 petition itself. Discover's petition does not seek to arbitrate its state-law debt-collection claims, but rather Vaden's allegation that the fees Discover has been charging her (and other members of her proposed class) violate the FDIA. See App. 30. The majority does not appear to question that there would be federal jurisdiction over a suit arising out of the subject matter of that dispute. The majority finds no jurisdiction here, however, because "a federal court could not entertain Discover's state-law debt-collection claim." *Ante*, at 70, n. 19. There is no jurisdiction to compel arbitration of a plainly federal controversy—the FDIA dispute—because there is no jurisdiction to compel arbitration of the debt-

collection dispute. But why Discover should have to demonstrate federal jurisdiction over a state-court claim it does not seek to arbitrate is a mystery. Cf. *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 19–21 (1983) (affirming federal-court jurisdiction over a § 4 petition seeking to arbitrate only one of two disputes pending in state-court litigation); *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 218–221 (1985) (when litigation involves multiple claims, only some of which are covered by an arbitration agreement, district court must compel arbitration of the covered claims if so requested).

The majority's approach will allow federal jurisdiction to compel arbitration of *entirely* state-law claims. Under that approach the "controversy" is not the one the § 4 petitioner seeks to arbitrate, but a broader one encompassing the "whole controversy" between the parties. *Ante*, at 67. If that broader dispute involves both federal and state-law claims, and the "originating" dispute is federal, *ibid.*, a party could seek arbitration of just the state-law claims. The "controversy" under the majority's view would qualify as federal, giving rise to § 4 jurisdiction to compel arbitration of a purely state-law claim.

Take this case as an example. If Vaden had filed her FDIA claim first, and Discover had responded with a state-law debt-collection counterclaim, that suit is one that "could be litigated in federal court." *Ante*, at 66. As a result, the majority's approach would seem to permit Vaden to file a § 4 petition to compel arbitration of the entirely state-law-based debt-collection dispute, because that dispute would be part and parcel of the "full flavor[ed]," "originating" FDIA controversy. *Ante*, at 67. Defining the controversy as the dispute the § 4 petitioner seeks to arbitrate eliminates this problem by ensuring that the *actual dispute* subject to arbitration is federal.

The majority's conclusion that this controversy "is not one qualifying for federal-court adjudication," *ante*, at 70, stems

from its mistaken focus on the existing litigation. Rather than ask whether a court "would have" jurisdiction over the "subject matter" of "a" suit arising out of the "controversy," the majority asks only whether the court *does* have jurisdiction over the subject matter of a *particular* complaint. But § 4 does not speak of actual jurisdiction over pending suits; it speaks subjunctively of prospective jurisdiction over "the subject matter of a suit arising out of the controversy between the parties." 9 U. S. C. § 4. The fact that Vaden has chosen to package the FDIA controversy in counterclaims in pending state-court litigation in no way means that a district court "would [not] have" jurisdiction over the "subject matter" of "a suit" arising out of the FDIA controversy. A big part of arbitration is avoiding the procedural niceties of formal litigation; it would be odd to have the authority of a court to compel arbitration hinge on just such niceties in a pending case.

By focusing on the sequence in which state-court litigation has unfolded, the majority crafts a rule that produces inconsistent results. Because Discover's debt-collection claim was filed before Vaden's counterclaims, the majority treats the debt-collection dispute as the "originating controversy." *Ante,* at 67. But nothing would have prevented the same disagreements between the parties from producing a different sequence of events. Vaden could have filed a complaint raising her FDIA claims before Discover sought to collect on any amounts Vaden owes. Because the "originating controversy" in that complaint would be whether Discover has charged fees illegal under federal law, in that situation Discover presumably *could* bring a § 4 petition to compel arbitration of the FDIA dispute. The majority's rule thus makes § 4 jurisdiction over the same controversy entirely dependent upon the happenstance of how state-court litigation has unfolded. Nothing in § 4 suggests such a result.

The majority glosses over another problem inherent in its approach: In many if not most cases under § 4, no complaint

will have been filed. See *Hartford Financial Systems, Inc.* v. *Florida Software Servs., Inc.*, 712 F. 2d 724, 728 (CA1 1983) (Breyer, J.) ("Normally, [§ 4] motions are brought in independent proceedings"). What to "look through" to then? The majority instructs courts to look to the "full-bodied controversy." *Ante,* at 68, n. 16. But as this case illustrates, that would lead to a different result had the state-court complaint not been filed. Discover does not seek to arbitrate whether an outstanding debt exists; indeed, Discover's § 4 petition does not even allege any dispute on that point. See App. 28–41. A district court would therefore not understand the § 4 "controversy" to include the debt-collection claim in the absence of the state-court suit. Under the majority's rule, the FDIA dispute would be treated as a "controversy" qualifying under § 4 before the state suit and counterclaims had been filed, but not after.

The far more concrete and administrable approach would be to apply the same rule in all instances: Look to the controversy the § 4 petitioner seeks to arbitrate—as set forth in the § 4 petition—and assess whether a federal court would have jurisdiction over the subject matter of a suit arising out of that controversy. The controversy the moving party seeks to arbitrate and the other party will not would be the same controversy used to assess jurisdiction to compel arbitration.

The majority objects that this would allow a court to "hypothesiz[e] discrete controversies of its own design," *ante,* at 67, in an apparent effort to find federal jurisdiction where there is none. Not so. A district court entertaining a § 4 petition is required to determine what "a suit" arising out of the allegedly arbitrable controversy would look like. There is no helping that, given the statute's subjunctive language. But that does not mean the inquiry is the free-form one the majority posits.

To the contrary, a district court must look to the specific controversy—the concrete dispute that one party has

"fail[ed], neglect[ed], or refus[ed]" to arbitrate—and determine whether *that* controversy would give rise to a suit under federal law. District courts do that sort of thing often enough; the exercise is closely analogous to the jurisdictional analysis in a typical declaratory judgment action. See *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 19 (1983) (jurisdiction over a declaratory judgment action exists when, "*if* the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question" (emphasis added)). Looking to the specific controversy outlined in Discover's § 4 petition (whether its fees violate the FDIA), it hardly requires "dream[ing]" to conceive of a lawsuit in which Vaden would claim the FDIA has been violated and Discover would claim it has not. *Ante*, at 68.

Nor would respondents' approach allow a § 4 petitioner to simply "recharacterize" or "manufacture" a controversy to create federal jurisdiction. *Ibid.* All of the established rules of federal jurisdiction are fully applicable in scrutinizing whether a federal court would have jurisdiction over a suit arising out of the parties' underlying controversy.

For example, a federal question must be presented by the specific controversy the § 4 petitioner seeks to arbitrate, not by some hypothetical federal issue "lurking in the background." *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 117 (1936). A district court could not compel arbitration of a state-law dispute by pointing to a potential federal defense that the § 4 petitioner is not seeking to arbitrate, because the "claim itself must present a federal question" to arise under federal law. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 672 (1950). Nor could a district court compel arbitration of a dispute that, though not federal in character, could lead to the filing of a federal counterclaim, for "a counterclaim . . . cannot serve as the basis for [federal] jurisdiction" of the state-law dispute itself. *Holmes Group*,

Inc. v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826, 831 (2002).

Accordingly, petitioners may no more smuggle state-law claims into federal court through § 4 than they can through declaratory judgment actions, or any other federal cause of action. To the extent § 4 brings some issues into federal court in a particular case that may not be brought in through other procedural mechanisms, it does so by "enlarg[ing] the range of remedies available in the federal courts[,] . . . not extend[ing] their jurisdiction." *Skelly Oil*, *supra*, at 671.

That is why the majority's recital of the basic rules of federal-court jurisdiction in Part II of its opinion is beside the point: No one disputes what those rules are, and no one disputes that they must be followed under § 4 in deciding whether a federal court "would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties." The issue is instead *what* suit should be scrutinized for compliance with those rules. In defining "controversy" by reference to existing litigation, the majority artificially limits the reach of § 4 to the particular suit filed. The correct approach is to accord § 4 the scope mandated by its language and look to "a suit," arising out of the "subject matter" of the "controversy" the § 4 petitioner seeks to arbitrate, and determine whether a federal court would have jurisdiction over such a suit.

The majority concludes by noting that state courts are obliged to honor and enforce agreements to arbitrate. *Ante*, at 71. The question here, however, is one of remedy. It is a common feature of our federal system that States often provide remedies similar to those under federal law for the same wrongs. We do not, however, narrowly construe the federal remedies—say, federal antitrust or civil rights remedies—because state law provides remedies in those areas as well. Cf. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief").

* * *

Discover and Vaden have agreed to arbitrate any dispute arising out of Vaden's account with Discover. Vaden's allegations against Discover have given rise to such a dispute. Discover seeks to arbitrate that controversy, but Vaden refuses to do so. Resolution of the controversy is governed by federal law, specifically the FDIA. There is no dispute about that. In the absence of the arbitration agreement, a federal court "would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties," 9 U. S. C. § 4, whether the suit were brought by Vaden or Discover. The District Court therefore may exercise jurisdiction over this petition under § 4 of the Federal Arbitration Act.

Syllabus

VERMONT *v.* BRILLON

CERTIORARI TO THE SUPREME COURT OF VERMONT

No. 08–88. Argued January 13, 2009—Decided March 9, 2009

In July 2001, respondent Brillon was arrested on felony domestic assault and habitual offender charges. Nearly three years later, in June 2004, he was tried by jury, found guilty as charged, and sentenced to 12 to 20 years in prison. During the time between his arrest and his trial, at least six different attorneys were appointed to represent him. Brillon "fired" his first attorney, who served from July 2001 to February 2002. His third lawyer, who served from March 2002 until June 2002, was allowed to withdraw when he reported that Brillon had threatened his life. His fourth lawyer served from June 2002 until November 2002, when the trial court released him from the case. His fifth lawyer, assigned two months later, withdrew in April 2003. Four months thereafter, his sixth lawyer was assigned, and she took the case to trial in June 2004.

The trial court denied Brillon's motion to dismiss for want of a speedy trial. The Vermont Supreme Court, however, reversed, holding that Brillon's conviction must be vacated, and the charges against him dismissed, because the State did not accord him the speedy trial required by the Sixth Amendment. Citing the balancing test this Court stated in *Barker* v. *Wingo*, 407 U. S. 514, the Vermont Supreme Court concluded that all four factors described in *Barker*—"[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant," *id.*, at 530—weighed against the State. Weighing heavily in Brillon's favor, the Vermont court said, the three-year delay in bringing him to trial was "extreme." In assessing the reasons for that delay, the court separately considered the period of each counsel's representation. It acknowledged that the first year, when Brillon was represented by his first and third lawyers, should not count against the State. But the court counted much of the remaining two years against the State. Delays in that period, the court determined, were caused, for the most part, by the failure or unwillingness of several of the assigned counsel, over an inordinate period of time, to move the case forward. As for the third and fourth *Barker* v. *Wingo* factors, the court found that Brillon repeatedly and adamantly demanded a trial and that his lengthy pretrial incarceration was prejudicial.

Held: The Vermont Supreme Court erred in ranking assigned counsel essentially as state actors in the criminal justice system. Assigned coun-

sel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent. Pp. 89–94.

(a) Primarily at issue here is the reason for the delay in Brillon's trial. In applying *Barker*, the Court has asked "whether the government or the criminal defendant is more to blame for th[e] delay." *Doggett* v. *United States*, 505 U. S. 647, 651. Delay "to hamper the defense" weighs heavily against the prosecution, *Barker*, 407 U. S., at 531, while delay caused by the defense weighs against the defendant, *id.*, at 529. Because "the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation," delay caused by the defendant's counsel is charged against the defendant. *Coleman* v. *Thompson*, 501 U. S. 722, 753. The same principle applies whether counsel is privately retained or publicly assigned, for "'[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" *Polk County* v. *Dodson*, 454 U. S. 312, 318. Unlike a prosecutor or the court, assigned counsel ordinarily is not considered a state actor. Pp. 89–91.

(b) Although the balance arrived at in close cases ordinarily would not prompt this Court's review, the Vermont Supreme Court made a fundamental error in its application of *Barker* that calls for this Court's correction. The court erred in attributing to the State delays caused by the failure of several assigned counsel to move Brillon's case forward and in failing adequately to take into account the role of Brillon's disruptive behavior in the overall balance. Pp. 91–94.

(1) An assigned counsel's failure to move the case forward does not warrant attribution of delay to the State. Most of the delay the Vermont court attributed to the State must therefore be attributed to Brillon as delays caused by his counsel, each of whom requested time extensions. Their inability or unwillingness to move the case forward may not be attributed to the State simply because they are assigned counsel. A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds. Trial courts might well respond by viewing continuance requests made by appointed counsel with skepticism, concerned that even an apparently genuine need for more time is in reality a delay tactic. Yet the same considerations would not attend a privately retained counsel's requests for time extensions. There is no justification for treating defendants' speedy-trial claims differently based on whether their counsel is privately retained or publicly assigned. Pp. 92–93.

Syllabus

(2) The Vermont Supreme Court further erred by treating the period of each counsel's representation discretely. The court failed appropriately to take into account Brillon's role during the first year of delay. Brillon sought to dismiss his first attorney on the eve of trial. His strident, aggressive behavior with regard to his third attorney further impeded prompt trial and likely made it more difficult for the Defender General's office to find replacement counsel. Absent Brillon's efforts to force the withdrawal of his first and third attorneys, no speedy-trial issue would have arisen. Pp. 93–94.

(c) The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic breakdown in the public defender system could be charged to the State. Cf. *Polk County*, 454 U. S., at 324–325. But the Vermont Supreme Court made no determination, and nothing in the record suggests, that institutional problems caused any part of the delay in Brillon's case. P. 94.

183 Vt. 475, 955 A. 2d 1108, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 95.

Christina Rainville argued the cause for petitioner. With her on the briefs was *Erica A. Marthage.*

Leondra R. Kruger argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, then-*Deputy Solicitor General Dreeben*, and *Joseph C. Wyderko.*

William A. Nelson argued the cause for respondent. With him on the brief was *Donald B. Verrilli, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Utah et al. by *Mark L. Shurtleff*, Attorney General of Utah, *J. Frederic Voros, Jr.*, Chief, Criminal Appeals Division, and *Christine F. Soltis* and *Ryan D. Tenney*, Assistant Attorneys General, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Talis J. Colberg* of Alaska, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Mark J. Bennett* of

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the Sixth Amendment guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." Michael Brillon, defendant below, respondent here, was arrested in July 2001 on felony domestic assault and habitual offender charges. Nearly three years later, in June 2004, he was tried by jury, found guilty as charged, and sentenced to 12 to 20 years in prison. The Vermont Supreme Court vacated Brillon's conviction and held that the charges against him must be dismissed because he had been denied his right to a speedy trial.

During the time between Brillon's arrest and his trial, at least six different attorneys were appointed to represent him. Brillon "fired" the first, who served from July 2001 to February 2002. His third lawyer, who served from March 2002 until June 2002, was allowed to withdraw when he reported that Brillon had threatened his life. The Vermont

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Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *G. Steven Rowe* of Maine, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Nancy H. Rogers* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myer*s of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Robert F. McDonnell* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; and for the National Governors Association et al. by *Richard Ruda.*

Anthony J. Franze, *Steven R. Shapiro*, *Robin L. Dahlberg*, and *Maureen Dimino* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for Retired State Court Justices by *Samuel Spital* and *Alan D. Reitzfeld;* and for the Vermont Network Against Domestic and Sexual Violence et al. by *Cheryl Hanna.*

Supreme Court charged against Brillon the delays associated with those periods, but charged against the State periods in which assigned counsel failed "to move his case forward." 183 Vt. 475, 494–495, 955 A. 2d 1108, 1121, 1122 (2008).

We hold that the Vermont Supreme Court erred in ranking assigned counsel essentially as state actors in the criminal justice system. Assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent. For a total of some six months of the time that elapsed between Brillon's arrest and his trial, Brillon lacked an attorney. The State may be charged with those months if the gaps resulted from the trial court's failure to appoint replacement counsel with dispatch. Similarly, the State may bear responsibility if there is "a breakdown in the public defender system." *Id.*, at 479–480, 955 A. 2d, at 1111. But, as the Vermont Supreme Court acknowledged, *id.*, at 500, 955 A. 2d, at 1126, the record does not establish any such institutional breakdown.

I

On July 27, 2001, Michael Brillon was arrested after striking his girlfriend. Three days later he was arraigned in state court in Bennington County, Vermont, and charged with felony domestic assault. His alleged status as a habitual offender exposed him to a potential life sentence. The court ordered him held without bail.

Richard Ammons, from the county public defender's office, was assigned on the day of arraignment as Brillon's first counsel.[1] In October, Ammons filed a motion to recuse the trial judge. It was denied the next month and trial was scheduled for February 2002. In mid-January, Ammons

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[1] Vermont's Defender General has "the primary responsibility for providing needy persons with legal services." Vt. Stat. Ann., Tit. 13, § 5253(a) (1998). These services may be provided "personally, through public defenders," or through contract attorneys. *Ibid.*

moved for a continuance, but the State objected, and the trial court denied the motion.

On February 22, four days before the jury draw, Ammons again moved for a continuance, citing his heavy workload and the need for further investigation. Ammons acknowledged that any delay would not count (presumably against the State) for speedy-trial purposes. The State opposed the motion,[2] and at the conclusion of a hearing, the trial court denied it. Brillon, participating in the proceedings through interactive television, then announced: "You're fired, Rick." App. 187. Three days later, the trial court—over the State's objection—granted Ammons' motion to withdraw as counsel, citing Brillon's termination of Ammons and Ammons' statement that he could no longer zealously represent Brillon.[3] The trial court warned Brillon that further delay would occur while a new attorney became familiar with the case. The same day, the trial court appointed a second attorney, but he immediately withdrew based on a conflict.

On March 1, 2002, Gerard Altieri was assigned as Brillon's third counsel. On May 20, Brillon filed a motion to dismiss Altieri for, among other reasons, failure to file motions, "[v]irtually no communication whatsoever," and his lack of diligence "because of heavy case load." *Id.*, ¶¶ 2, 5, at 113–114. At a June 11 hearing, Altieri denied several of Brillon's allegations, noted his disagreement with Brillon's trial strat-

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[2] The State expressed its concern that the continuance request was "just part and parcel of an effort by the defense to have the Court not hear this matter." App. 180. Under Vermont procedures, the judge presiding over the trial was scheduled to "rotate" out of the county where Brillon's case was pending in March 2002. See *id.*, ¶ 6, at 109. Thus, a continuance past March would have caused a different judge to preside over Brillon's trial, despite the denial of his motion to recuse the initial judge. Ammons requested a continuance until April.

[3] Ammons also cited as cause to withdraw, "certain irreconcilable differences in preferred approach between Mr. Brillon and counsel as to trial strategy, as well as other legitimate legal decisions." *Id.*, ¶ 2, at 104.

egy,[4] and insisted he had plenty of time to prepare. The State opposed Brillon's motion as well. Near the end of the hearing, however, Altieri moved to withdraw on the ground that Brillon had threatened his life during a break in the proceedings. The trial court granted Brillon's motion to dismiss Altieri, but warned Brillon that "this is somewhat of a dubious victory in your case because it simply prolongs the time that you will remain in jail until we can bring this matter to trial." *Id.*, at 226.

That same day, the trial court appointed Paul Donaldson as Brillon's fourth counsel. At an August 5 status conference, Donaldson requested additional time to conduct discovery in light of his caseload. A few weeks later, Brillon sent a letter to the court complaining about Donaldson's unresponsiveness and lack of competence. Two months later, Brillon filed a motion to dismiss Donaldson—similar to his motion to dismiss Altieri—for failure to file motions and "virtually no communication whatsoever." *Id.*, ¶¶ 1, 2, at 115–116. At a November 26 hearing, Donaldson reported that his contract with the Defender General's office had expired in June and that he had been in discussions to have Brillon's case reassigned. The trial court released Donaldson from the case "[w]ithout making any findings regarding the adequacy of [Donaldson]'s representation." 183 Vt., at 490, 955 A. 2d, at 1119. Cf. *post,* at 95–96.

Brillon's fifth counsel, David Sleigh, was not assigned until January 15, 2003; Brillon was without counsel during the intervening two months. On February 25, Sleigh sought extensions of various discovery deadlines, noting that he had been in trial out of town. App. 117. On April 10, however, Sleigh withdrew from the case, based on "modifications to [his] firm's contract with the Defender General." *Id.*, at 158.

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[4] Specifically, Altieri appeared reluctant to follow Brillon's tactic that he "bring in a lot of people" at trial, "some of them young kids and relatives . . . in an attempt by Mr. Brillon—this is his theory—I don't want to use the words trash, [to] impeach [the victim]." *Id.*, at 216–217.

Brillon was then without counsel for the next four months. On June 20, the Defender General's office notified the court that it had received "funding from the legislature" and would hire a new special felony unit defender for Brillon. *Id.*, at 159. On August 1, Kathleen Moore was appointed as Brillon's sixth counsel. The trial court set November 7 as the deadline for motions, but granted several extensions in accord with the parties' stipulation. On February 23, 2004, Moore filed a motion to dismiss for lack of a speedy trial. The trial court denied the motion on April 19.

The case finally went to trial on June 14, 2004. Brillon was found guilty and sentenced to 12 to 20 years in prison. The trial court denied a post-trial motion to dismiss for want of a speedy trial, concluding that the delay in Brillon's trial was "in large part the result of his own actions" and that Brillon had "failed to demonstrate prejudice as a result of [the] pre-trial delay." App. to Pet. for Cert. 72.

On appeal, the Vermont Supreme Court held 3 to 2 that Brillon's conviction must be vacated and the charges dismissed for violation of his Sixth Amendment right to a speedy trial. Citing the balancing test of *Barker* v. *Wingo*, 407 U. S. 514 (1972), the majority concluded that all four of the factors described in *Barker*—"[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"—weighed against the State. *Id.*, at 530.

The court first found that the three-year delay in bringing Brillon to trial was "extreme" and weighed heavily in his favor. See 183 Vt., at 486, 955 A. 2d, at 1116. In assessing the reasons for that delay, the Vermont Supreme Court separately considered the period of each counsel's representation. It acknowledged that the first year, when Brillon was represented by Ammons and Altieri, should not count against the State. *Id.*, at 492, 955 A. 2d, at 1120. But the court counted much of the remaining two years against the State for delays "caused, for the most part, by the failure of several of defend-

ant's assigned counsel, over an inordinate period of time, to move his case forward." *Id.*, at 495, 955 A. 2d, at 1122. As for the third and fourth factors, the court found that Brillon "repeatedly and adamantly demanded to be tried," *ibid.*, and that his "lengthy pretrial incarceration" was prejudicial, despite his insubstantial assertions of evidentiary prejudice, *id.*, at 500, 955 A. 2d, at 1125.

The dissent strongly disputed the majority's characterization of the periods of delay. It concluded that "the lion's share of delay in this case is attributable to defendant, and not to the state." *Id.*, at 502, 955 A. 2d, at 1127. But for Brillon's "repeated maneuvers to dismiss his lawyers and avoid trial through the first eleven months following arraignment," the dissent explained, "the difficulty in finding additional counsel would not have arisen." *Id.*, at 504, 955 A. 2d, at 1128.

We granted certiorari, 554 U. S. 945 (2008),[5] and now reverse the judgment of the Vermont Supreme Court.

II

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." The speedy-trial right is "amorphous," "slippery," and "necessarily relative." *Barker*, 407 U. S., at 522 (quoting *Beavers* v. *Haubert*, 198 U. S. 77, 87 (1905)). It is "consistent with delays and depend[ent] upon circumstances." 407 U. S., at 522 (internal quotation marks omitted). In *Barker*, the Court refused to "quantif[y]" the right

[5] Vermont's Constitution contains a speedy-trial clause which reads: "[I]n all prosecutions for criminal offenses, a person hath a right to . . . a speedy public trial by an impartial jury . . . ." Vt. Const., Ch. I, Art. 10. Notably, the Vermont Supreme Court made no ruling under the State's own prescription, but instead relied solely on the Federal Constitution. Because it did so, our review authority was properly invoked and exercised. See *Oregon* v. *Hass*, 420 U. S. 714, 719–720 (1975); Ginsburg, Book Review, 92 Harv. L. Rev. 340, 343–344 (1978). But see *post*, p. 95.

"into a specified number of days or months" or to hinge the right on a defendant's explicit request for a speedy trial. *Id.*, at 522–525. Rejecting such "inflexible approaches," *Barker* established a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.*, at 529, 530. "[S]ome of the factors" that courts should weigh include "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid.*

Primarily at issue here is the reason for the delay in Brillon's trial. *Barker* instructs that "different weights should be assigned to different reasons," *id.*, at 531, and in applying *Barker*, we have asked "whether the government or the criminal defendant is more to blame for th[e] delay," *Doggett* v. *United States*, 505 U. S. 647, 651 (1992). Deliberate delay "to hamper the defense" weighs heavily against the prosecution. *Barker*, 407 U. S., at 531. "[M]ore neutral reason[s] such as negligence or overcrowded courts" weigh 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.*

In contrast, delay caused by the defense weighs against the defendant: "[I]f delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine." *Id.*, at 529. Cf. *United States* v. *Loud Hawk*, 474 U. S. 302, 316 (1986) (noting that a defendant whose trial was delayed by his interlocutory appeal "normally should not be able . . . to reap the reward of dismissal for failure to receive a speedy trial"). That rule accords with the reality that defendants may have incentives to employ delay as a "defense tactic": delay may "work to the accused's advantage" because "witnesses may become unavailable or their memories may fade" over time. *Barker*, 407 U. S., at 521.

Because "the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation," de-

lay caused by the defendant's counsel is also charged against the defendant. *Coleman* v. *Thompson*, 501 U. S. 722, 753 (1991).[6] The same principle applies whether counsel is privately retained or publicly assigned, for "[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." *Polk County* v. *Dodson*, 454 U. S. 312, 318 (1981) (internal quotation marks omitted). "Except for the source of payment," the relationship between a defendant and the public defender representing him is "identical to that existing between any other lawyer and client." *Ibid.* Unlike a prosecutor or the court, assigned counsel ordinarily is not considered a state actor.[7]

III

Barker's formulation "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," 407 U. S., at 530, and the balance arrived at in close cases ordinarily would not prompt this Court's review. But the Vermont Supreme Court made a fundamental error in its application of *Barker* that calls for this Court's correction. The Vermont Supreme Court erred in attributing to the State delays caused by "the failure of several assigned counsel . . . to move his case forward," 183 Vt., at 494, 955 A. 2d, at 1122,

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[6] Several States' speedy-trial statutes expressly exclude from computation of the time limit continuances and delays caused by the defendant or defense counsel. See, *e. g.*, Cal. Penal Code Ann. § 1381 (West 2000); Ill. Comp. Stat., ch. 725, § 5/103–5(f) (West 2006); N. Y. Crim. Proc. Law Ann. § 30.30(4) (West Supp. 2009); Alaska Rule Crim. Proc. 45(d) (1994); Ark. Rule Crim. Proc. 28.3 (2006); Ind. Rule Crim. Proc. 4(A) (2009). See also Brief for National Governors Association et al. as *Amici Curiae* 17–18, and n. 12.

[7] A public defender may act for the State, however, "when making hiring and firing decisions on behalf of the State," and "while performing certain administrative and possibly investigative functions." *Polk County* v. *Dodson*, 454 U. S. 312, 325 (1981).

and in failing adequately to take into account the role of Brillon's disruptive behavior in the overall balance.

A

The Vermont Supreme Court's opinion is driven by the notion that delay caused by assigned counsel's "inaction" or failure "to move [the] case forward" is chargeable to the State, not the defendant. *Id.*, at 479, 494, 955 A. 2d, at 1111, 1122. In this case, that court concluded, "a significant portion of the delay in bringing defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward." *Id.*, at 494, 955 A. 2d, at 1121.

We disagree. An assigned counsel's failure "to move the case forward" does not warrant attribution of delay to the State. Contrary to the Vermont Supreme Court's analysis, assigned counsel generally are not state actors for purposes of a speedy-trial claim. While the Vermont Defender General's office is indeed "part of the criminal justice system," *ibid.*, the individual counsel here acted only on behalf of Brillon, not the State. See *Polk County*, 454 U. S., at 320–322 (rejecting the view that public defenders act under color of state law because they are paid by the State). See also *supra*, at 90–91.

Most of the delay that the Vermont Supreme Court attributed to the State must therefore be attributed to Brillon as delays caused by his counsel. During those periods, Brillon was represented by Donaldson, Sleigh, and Moore, all of whom requested extensions and continuances.[8] Their "inability or unwillingness . . . to move the case forward," 183

[8] The State conceded before the Vermont Supreme Court that the period of Sleigh's representation—along with a six-month period of no representation—was properly attributed to the State. 183 Vt. 475, 493, 955 A. 2d 1108, 1120–1121 (2008). The State sought to avoid its concession at oral argument before this Court, but in the alternative, noted that the period of Sleigh's representation "is really inconsequential." Tr. of Oral Arg. 5–6. We agree that in light of the three-year delay caused mostly by

Vt., at 494, 955 A. 2d, at 1121, may not be attributed to the State simply because they are assigned counsel.

A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds. Trial courts might well respond by viewing continuance requests made by appointed counsel with skepticism, concerned that even an apparently genuine need for more time is in reality a delay tactic. Yet the same considerations would not attend a privately retained counsel's requests for time extensions. We see no justification for treating defendants' speedy-trial claims differently based on whether their counsel is privately retained or publicly assigned.

B

In addition to making assigned counsel's "failure . . . to move [the] case forward" the touchstone of its speedy-trial inquiry, the Vermont Supreme Court further erred by treating the period of each counsel's representation discretely. The factors identified in *Barker* "have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." 407 U. S., at 533. Yet the Vermont Supreme Court failed appropriately to take into account Brillon's role during the first year of delay in "the chain of events that started all this." Tr. of Oral Arg. 46.

Brillon sought to dismiss Ammons on the eve of trial. His strident, aggressive behavior with regard to Altieri, whom he threatened, further impeded prompt trial and likely made it more difficult for the Defender General's office to find replacement counsel. Even after the trial court's warning regarding delay, Brillon sought dismissal of yet another attorney, Donaldson. Just as a State's "deliberate attempt to delay the trial in order to hamper the defense should be

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Brillon, the attribution of Sleigh's three-month representation does not tip the balance for either side.

weighted heavily against the [State]," *Barker*, 407 U. S., at 531, so too should a defendant's deliberate attempt to disrupt proceedings be weighted heavily against the defendant. Absent Brillon's deliberate efforts to force the withdrawal of Ammons and Altieri, no speedy-trial issue would have arisen. The effect of these earlier events should have been factored into the court's analysis of subsequent delay.[9]

C

The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic "breakdown in the public defender system," 183 Vt., at 479–480, 955 A. 2d, at 1111, could be charged to the State. Cf. *Polk County*, 454 U. S., at 324–325. But the Vermont Supreme Court made no determination, and nothing in the record suggests, that institutional problems caused any part of the delay in Brillon's case.

In sum, delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case," *Barker*, 407 U. S., at 522, and the record in this case does not show that Brillon was denied his constitutional right to a speedy trial.

* * *

For the reasons stated, the judgment of the Vermont Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[9] Brillon lacked counsel for some six months. In light of his own role in the initial periods of delay, however, this six-month period, even if attributed to the State, does not establish a speedy-trial violation.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

We granted certiorari in this case to decide whether delays caused "solely" by a public defender can be "charged against the State pursuant to the test in *Barker* v. *Wingo*, 407 U. S. 514 (1972)." Pet. for Cert. i, ¶ 1. The case, in my view, does not squarely present that question, for the Vermont Supreme Court, when it found Michael Brillon's trial unconstitutionally delayed, did not count such delays against the State. The court's opinion for the most part makes that fact clear; at worst some passages are ambiguous. Given these circumstances, I would dismiss the writ of certiorari as improvidently granted.

I

The relevant time period consists of slightly less than three years, stretching from July 2001, when Brillon was indicted, until mid-June 2004, when he was convicted and sentenced. In light of Brillon's improper behavior, see *ante*, at 85–87, the Vermont Supreme Court did not count months 1 through 12 (mid-July 2001 through mid-June 2002) against the State. Noting the objection that Brillon had sought to "intentionally sabotag[e] the criminal proceedings against him," the Vermont Supreme Court was explicit that this time period "do[es] not count . . . against the [S]tate." 183 Vt. 475, 492, 955 A. 2d 1108, 1120 (2008).

The Vermont Supreme Court did count months 13 through 17 (mid-June 2002 through November 2002) against the State. It did so under circumstances where (1) Brillon's counsel, Paul Donaldson, revealed that his contract with the defender general's office had expired in June 2002—shortly after (perhaps before!) he took over as Brillon's counsel, App. 232–233, (2) he stated that this case was "basically the beginning of [his] departure from the contract," *ibid.*, and (3) he made no filings, missed several deadlines, did "little or nothing" to "move his case forward," and made only one brief appearance at a status conference in mid-August, 183 Vt.,

at 493, 494, 955 A. 2d, at 1121. I believe it fairer to characterize this period, not as a period in which "assigned counsel" failed to move the case forward, *ante*, at 85, but as a period in which Brillon, in practice, *had no assigned counsel*. And, given that the State conceded its responsibility for delays caused by another defender who resigned for "contractual reasons," see *infra* this page, it is hardly unreasonable that the Vermont Supreme Court counted this period of delay against the State.

The Vermont Supreme Court also counted months 18 through 25 (the end of November 2002 through July 2003) against the State. It did so because the State conceded in its brief that this period of delay "*cannot be attributed to the defendant.*" App. 78 (emphasis added). This concession is not surprising in light of the fact that during much of this period, Brillon was represented by David Sleigh, a contract attorney, who during the course of his representation filed nothing on Brillon's behalf except a single motion seeking to extend discovery. The record reflects no other actions by Sleigh other than a letter sent to Brillon informing him that "[a]s a result of modifications to our firm's contract with the Defender General, we will not be representing you in your pending case." *Id.*, at 158. Brillon was left without counsel for a period of nearly six months. The State explained in conceding its responsibility for this delay that Sleigh had been forced to withdraw "for contractual reasons," and that the defender general's office had been unable to replace him "for funding reasons." *Id.*, at 78.

Finally, the Vermont Supreme Court counted against the State the last 11 months—from August 2003 to mid-June 2004. But it is impossible to conclude from the opinion whether it did so because it held the State responsible for the defender's failure to "move the case forward," or for other reasons having nothing to do with counsel, namely, the judge's unavailability, see *id.*, at 138, or the fact that "the [case] files were incomplete" and "additional documents were

needed from the State," 183 Vt., at 491, 955 A. 2d, at 1120–1121. Treating the opinion as charging the State on the basis of the defender's conduct is made more difficult by the fact that Brillon did not argue below that Kathleen Moore, his defender during this period, caused any delays. Appellant's Reply Brief in No. 2005–167 (Vt.), 2007 WL 990004, *7.

II

In sum, I can find no convincing reason to believe the Vermont Supreme Court made the error of constitutional law that the majority attributes to it. Rather than read ambiguities in its opinion against it, thereby assuming the presence of the error the Court finds, I would dismiss the writ as improvidently granted. As a majority nonetheless wishes to decide the case, I would note that the Vermont Supreme Court has considerable authority to supervise the appointment of public defenders. See Vt. Stat. Ann., Tit. 13, §§ 5204, 5272 (1998); see also Vt. Rule Crim. Proc. 44 (2003). It consequently warrants leeway when it decides whether a particular failing is properly attributed to assigned counsel or instead to the failure of the defender general's office properly to assign counsel. *Ante*, at 94. I do not believe the Vermont Supreme Court exceeded that leeway here. And I would affirm its decision.

With respect, I dissent.

Syllabus

KANSAS *v.* COLORADO

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 105, Orig. Argued December 1, 2008—Decided March 9, 2009

Kansas has filed an exception to the Special Master's Fifth and Final Report in this action concerning the Arkansas River, contending that the Special Master erred in concluding that 28 U. S. C. § 1821(b), which sets the witness attendance fee for a proceeding in "any court of the United States" at $40 per day, applies to cases within this Court's original jurisdiction. This determination led to an award considerably lower than the amount that Kansas, as the prevailing party, would have received under its alternative calculation.

Held: Expert witness attendance fees that are available in cases brought under this Court's original jurisdiction shall be the same as the expert witness attendance fees that would be available in a district court under § 1821(b). Kansas contends that Congress has never attempted to regulate a prevailing party's recovery of expert witness fees in a case brought under this Court's original jurisdiction, that Article III of the Constitution would not permit Congress to impose such a restriction, and thus, that the holding in *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 444—that district courts must adhere to § 1821(b)'s witness attendance fee limitations—is not relevant here. Assuming that Kansas' interpretation is correct and that this Court has discretion to determine the fees that are recoverable in original actions, it is nevertheless appropriate to follow § 1821(b). Congress' decision not to permit a prevailing party in the lower courts to recover its actual witness fee expenses departs only slightly from the "American Rule," under which parties generally bear their own expenses. There is no good reason why the rule for recovering expert witness fees should differ markedly depending on whether a case is originally brought in district court or this Court. District-court cases may be no less complex than those brought originally in this Court. And while the parties in original cases may incur substantial expert costs, as happened here, the same is frequently true in lower court litigation. Thus, assuming that the matter is left entirely to this Court's discretion, the best approach is to have a uniform rule that applies in all federal cases. Pp. 101–103.

Exception overruled.

ALITO, J., delivered the opinion for a unanimous Court. ROBERTS, C. J., filed a concurring opinion, in which SOUTER, J., joined, *post*, p. 109.

Stephen N. Six, Attorney General of Kansas, argued the cause for plaintiff. With him on the brief were *Michael C. Leitch*, Deputy Attorney General, *John M. Cassidy*, Assistant Attorney General, and *Leland E. Rolfs* and *John B. Draper*, Special Assistant Attorneys General.

John W. Suthers, Attorney General of Colorado, argued the cause for defendant. With him on the brief were *David W. Robbins* and *Dennis M. Montgomery*, Special Assistant Attorneys General.

JUSTICE ALITO delivered the opinion of the Court.

This is the latest in a line of contested matters that have come before us in this action that was brought in this Court by the State of Kansas against the State of Colorado concerning the Arkansas River. The Special Master has filed a Fifth and Final Report that includes a proposed judgment and decree, and Kansas has filed an exception to the Report, contending that the Special Master erred in concluding that 28 U. S. C. § 1821, which sets the witness attendance fee for a proceeding in "any court of the United States" at $40 per day, applies to cases within this Court's original jurisdiction. Assuming for the sake of argument that Kansas is correct in its interpretation of the statutes at issue in this matter and that this Court has the authority to determine the amount that Kansas should recover in expert witness fees, we hold that the fee set out in § 1821 is nevertheless the appropriate fee. Accordingly, we overrule Kansas' exception and approve the entry of the proposed judgment and decree.

I

Kansas filed this original action in 1985, claiming that Colorado had violated the Arkansas River Compact (Compact),[1]

[1] The Compact, which was approved by negotiators for the States of Kansas and Colorado in 1948, allows post-Compact development in Colorado provided that such development does not cause material depletions of usable stateline flows.

63 Stat. 145, by drilling irrigation wells that depleted water that should have been available for users in Kansas. In 1995, we accepted the recommendation of the Special Master that Colorado's wells had violated the Compact, and we remanded for further proceedings to determine appropriate remedies. See *Kansas* v. *Colorado*, 514 U. S. 673. The Special Master then recommended that monetary damages be awarded as compensation. In 2001, we accepted all but one of the Special Master's recommendations, modifying the remaining recommendation with respect to the starting date for an award of prejudgment interest. See *Kansas* v. *Colorado*, 533 U. S. 1. In 2004, we approved additional recommendations by the Special Master,[2] and the case was again remanded. See *Kansas* v. *Colorado*, 543 U. S. 86.

On remand, the Special Master approved a schedule to resolve remaining disputed issues. Consistent with our guidance, experts for the States were assigned greater responsibility for discussing and resolving issues. Because of the contributions of expert witnesses and the use of the Hydrologic-Institutional Model to determine compliance with the Compact, the parties resolved most of the disputed issues. See *id.*, at 89.

The sole remaining issue concerns Kansas' application for expert witness fees. After the Special Master determined that Kansas was the prevailing party for purposes of awarding "costs," Kansas submitted two alternative proposals for calculating the amount that it was entitled to recover for the costs it had incurred in retaining expert witnesses. The first proposal, which Kansas advocated, was based on the

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[2] The recommendations we approved in 2004 were: (1) that the Court not appoint a River Master; (2) that the amount of prejudgment interest be set; (3) that calculations regarding river depletions be made on a 10-year basis in order to even out possible inaccuracies in computer modeling; and (4) that a Colorado Water Court be given the authority to make certain determinations relevant to continuing implementation of agreements reached through this litigation.

assumption that these fees were not limited by the $40 per day attendance fee set out in § 1821(b) and called for an award of $9,214,727.81 in expert witness fees. The other calculation, which was based on the assumption that § 1821(b) did apply, calculated the amount that Kansas was entitled to recover for expert witness fees at $162,927.94.

After hearing argument, the Special Master held that § 1821 applies in cases within our original jurisdiction. Based on this holding, the two States entered into a cost settlement agreement that provided for total witness costs of $199,577.19 but preserved the right of the States to file exceptions to the Special Master's rulings on legal issues regarding costs.

II

Kansas argues that the Special Master erred in holding that § 1821(b) applies to cases within our original jurisdiction. Kansas contends that early statutes governing the award of costs in cases in the lower courts did not apply to this Court's original cases and that this scheme has been carried forward to the present day. Kansas notes that the statutory provision authorizing the taxation of costs, 28 U. S. C. § 1920, authorizes "[a] judge or clerk of any court of the United States" to tax as costs "[f]ees . . . for . . . witnesses" and that the definition of the term "judge . . . of the United States," as used in Title 28, does not include a Justice of this Court. In Kansas' view, § 1911, which provides that "[t]he Supreme Court may fix the fees to be charged by its clerk," manifests Congress' understanding that we should have the authority to determine the fees that may be recovered by a prevailing party in a case brought under our original jurisdiction. Kansas further maintains that "[e]ven if Congress had intended to regulate taxation of costs in the original jurisdiction of this Court, such an act would be subject to the Court's ultimate authority to regulate procedure within its constitutionally created original jurisdiction." Kansas' Exception and Brief 10. Kansas therefore contends

that our holding in *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 444 (1987), that district courts must adhere to the witness attendance fee limitations set forth in § 1821(b), is not relevant here.

Colorado disagrees. Citing our decision in *Crawford Fitting,* Colorado argues that the $40 per day witness attendance fee limitation of § 1821(b) applies not only to cases in the district courts but also to our original cases. Colorado notes that § 1821(a)(1) prescribes the witness attendance fee for a proceeding in "any court of the United States" and that § 1821(a)(2) defines the term "'court of the United States'" to include this Court. Colorado also contends that there is no precedent to support the argument that the Constitution prohibits Congress from imposing a limit on expert witness fees in cases within our original jurisdiction, and Colorado sees no justification for an award of costs for expert witness fees in excess of the limit in § 1821(b).

III

We find it unnecessary to decide whether Congress has attempted to regulate the recovery of expert witness fees by a prevailing party in a case brought under our original jurisdiction. Nor do we decide whether Kansas is correct in contending that Article III of the Constitution does not permit Congress to impose such a restriction. Assuming for the sake of argument that Kansas is correct in arguing that we have the discretion to determine the fees that are recoverable in original actions, we conclude that it is nevertheless appropriate to follow § 1821(b).

Congress' decision not to permit a prevailing party in the lower courts to recover its actual witness fee expenses may be seen as a decision to depart only slightly from the so-called "American Rule," under which parties generally bear their own expenses. See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240 (1975) (the American Rule applies not only to attorney's fees but also other costs of

litigation, including expert witness fees and miscellaneous costs such as transcripts and duplication). While this policy choice is debatable, we see no good reason why the rule regarding the recovery of expert witness fees should differ markedly depending on whether a case is originally brought in a district court or in this Court. Many cases brought in the district courts are no less complex than those brought originally in this Court. And while the parties in our original cases sometimes are required to incur very substantial expert costs, as happened in the present case, the same is frequently true in lower court litigation. Thus, assuming for the sake of argument that the matter is left entirely to our discretion, we conclude that the best approach is to have a uniform rule that applies in all federal cases.

We therefore hold that the expert witness attendance fees that are available in cases brought under our original jurisdiction shall be the same as the expert witness attendance fees that would be available in a district court under § 1821(b). We thus overrule Kansas' exception to the Report of the Special Master.

It is so ordered.

JUDGMENT

Judgment is awarded against the State of Colorado in favor of the State of Kansas for violations of the Arkansas River Compact resulting from postcompact well pumping in Colorado. Judgment is awarded in the amount of $34,615,146.00 for damages and prejudgment interest, including the required adjustment for inflation, arising from depletions of usable streamflow of the Arkansas River at the Colorado-Kansas Stateline in the amount of 428,005 acre-feet of water during the period 1950–1996. The damages were paid in full on April 29, 2005. Costs through January 31, 2006, including reallocation of Kansas' share of the Special Master's fees and expenses, are awarded to Kansas in the amount of $1,109,946.73. These costs were paid in full on

June 29, 2006. By Stipulation, $100,000.00 of the Special Master's fees and expenses are reallocated from the United States to Kansas.

Kansas' claims regarding the Winter Water Storage Program and the operation of Trinidad Reservoir and all Colorado Counterclaims are hereby dismissed.

DECREE

I. Injunction

A. General Provisions

1. It is Ordered, Adjudged, and Decreed that the State of Colorado, its officers, attorneys, agents, and employees are hereby enjoined to comply with Article IV–D of the Arkansas River Compact by not materially depleting the waters of the Arkansas River, as defined in Article III of the Compact, in usable quantity or availability for use to the water users in Kansas under the Compact by Groundwater Pumping, as prescribed in this Decree, and more particularly:

a. To prevent Groundwater Pumping in excess of the precompact pumping allowance of 15,000 acre-feet per year without Replacement of depletions to Usable Stateline Flow in accordance with this Decree;

b. To enforce the Colorado Use Rules with respect to Groundwater Pumping, unless John Martin Reservoir is spilling and Stateline water is passing Garden City, Kansas; and

c. To enforce the Colorado Measurement Rules with respect to Groundwater Pumping.

2. Compliance with this Decree shall constitute Compact compliance with respect to Groundwater Pumping.

B. Determination of Compact Compliance With Respect to Groundwater Pumping

1. Compact compliance with respect to Groundwater Pumping shall be determined using the results of the H–I Model over a moving ten-year period beginning with 1997,

in accordance with the Compact Compliance Procedures described in Appendix A.* Any Shortfall shall be made up by Colorado as specified in Section I.C of this Decree.

2. Annual Calculations of depletions and accretions to Usable Stateline Flow shall be determined using the H–I Model, in accordance with the procedures described in Appendix B and the Durbin usable flow method with the Larson coefficients, which is documented in Appendix C. Annual Calculations shall be done on a calendar year basis unless the States agree to a different year for the calculations. Accumulation of accretions shall be limited as described in Appendix D. The Annual Calculations for each of the years 1997–2006, found in Appendix E, are final, except as set forth in Section III of this Decree. Similarly, the results of Annual Calculations for years after 2006 shall be final for use in the ten-year Compact compliance accounting, when determined as provided in Appendices A and B, subject to the same provisos applicable to the 1997–2006 Annual Calculations.

3. Colorado shall be entitled to credit for Replacement of depletions to Usable Stateline Flow. The credit for Replacement shall be determined using the H–I Model, except for credit derived from operation of the Offset Account, which shall be determined as set out in Appendix F, and except for credit for direct deliveries of water to the Stateline if the Offset Account does not exist, which shall be determined as set out in Appendix A.

4. The H–I Model may be improved by agreement of the States or pursuant to the Dispute Resolution Procedure contained in Appendix H.

C. Repayment of Shortfalls

1. If there is a Shortfall, Colorado shall make up the Shortfall in accordance with the provisions of Appendix A.

*[Reporter's Note: The appendices will be found in the Final Report of the Special Master, available at http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html and in Clerk of Court's case file.]

2. Colorado shall make up a Shortfall by delivering water to the Offset Account in John Martin Reservoir to the extent that space is available. To the extent that space is not initially available in the Offset Account, Colorado shall make up the rest of such Shortfall by delivering water to the Offset Account as space becomes available. The timing, accounting, crediting, notice, and other matters related to deliveries of water to make up a Shortfall shall be accomplished pursuant to Appendix A.

II. Dispute Resolution

The States shall work together informally to the maximum extent possible to resolve any disagreements regarding implementation of this Decree. Disagreements that cannot be so resolved shall be submitted to the stipulated Dispute Resolution Procedure contained in Appendix H.

III. Modification of Appendices to the Decree

Appendices A–J may be modified only: (a) by agreement of the States or (b) pursuant to the Dispute Resolution Procedure, *provided* that the Colorado Measurement Rules and Colorado Use Rules may be amended by Colorado to the extent that Colorado can demonstrate that any such amendments will adequately protect Kansas' rights under the Compact, and *further provided* that Appendix E shall not be modified except that it shall be subject to later determinations of Replacement credits to be applied toward Colorado's Compact obligations by the Colorado Division 2 Water Court and any appeals therefrom, and further subject to the right of Kansas to seek relief from such Colorado Water Court determinations under the Court's original jurisdiction. Disputes arising under this Section III shall be subject to the Dispute Resolution Procedure.

IV. Retention of Jurisdiction

A. The Court retains jurisdiction for a limited period of time after the end of the initial ten-year startup period (end-

ing in 2006) for the purpose of evaluating the sufficiency of the Colorado Use Rules and their administration and whether changes to this Decree are needed to ensure Compact compliance. The procedures to be followed are set out in Appendix B.1, Part VII.

B. The retained jurisdiction provided in Section IV.A of this Decree shall terminate at the end of 2008, unless, prior to December 31, 2008, either State has notified the Special Master that there is a dispute concerning the sufficiency or administration of the Use Rules that has been submitted to the Dispute Resolution Procedure. If either State notifies the Special Master as provided herein, the retained jurisdiction shall continue, and the States, within 60 days from the conclusion of the Dispute Resolution Procedure, shall request either further proceedings before the Special Master or termination of the retained jurisdiction provided for in Section IV.A of this Decree. The Special Master shall recommend to the Court such action as he deems appropriate. The Special Master shall be discharged upon termination of the retained jurisdiction provided for in Section IV.A of this Decree.

C. Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

D. No application for relief under the retained jurisdiction in this Section IV shall be accepted unless the dispute has first been submitted to the Dispute Resolution Procedure.

V. Definitions

Whenever used in this Judgment and Decree, including Appendices, terms defined in the Compact shall have the meaning ascribed to them in the Compact; in addition, the following terms shall mean:

Acre-foot: The volume of water required to cover one acre of land to a depth of one foot, which is equal to 325,851 gallons;

Annual Calculations: The calculation for each year of depletions and accretions to Usable Stateline Flow using the H–I Model, as described in Appendix B;

Appendix: One of the Appendices listed in Section VI of this Decree and included in Volumes II and III of the Special Master's Fifth and Final Report in this case;

Acceptable Sources of Water: As defined in Appendix G;

ARCA: The Arkansas River Compact Administration created by Article VIII of the Compact;

Colorado Measurement Rules: Amended Rules Governing the Measurement of Tributary Ground Water Diversions Located in the Arkansas River Basin, revised November 30, 2005, contained in Appendix I.1, as they may be amended from time to time in accordance with Article III of this Decree;

Colorado Use Rules: Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin, Colorado, Kan. Exh. 1123, contained in Appendix J.1, as they may be amended from time to time in accordance with Article III of this Decree;

Compact: The Arkansas River Compact, 63 Stat. 145 (1949); Kan. Stat. Ann. § 82a–520; Colo. Rev. Stat. § 37–69–101;

Dispute Resolution Procedure: As set out in Appendix H;

Groundwater Pumping: Pumping of water from wells (other than the Wiley/Sapp Wells) in excess of 50 gallons per minute, from the alluvial and surficial aquifers along the mainstem of the Arkansas River between Pueblo, Colorado, and the Stateline within the domain of the H–I Model described in Appendix C.1;

H–I Model: The Hydrologic-Institutional Model as described and documented in Appendix C.1;

John Martin Reservoir: The reservoir constructed and operated by the United States Army Corps of Engineers on the mainstem of the Arkansas River approximately 58 miles upstream from the Stateline, as referred to in the Compact;

Offset Account: The storage account established in John Martin Reservoir and operated in accordance with the ARCA Resolution Concerning an Offset Account in John Martin Reservoir for Colorado Pumping, dated March 17, 1997, as amended twice on March 30, 1998, and contained in Appendix L, as the same may be further amended by the ARCA;

Replacement: Delivery of water from Acceptable Sources of Water to prevent depletions caused by Groundwater Pumping;

Shortfall: A net depletion to Usable Stateline Flow based on the results of the H–I Model over a ten-year period using the Compact Compliance Accounting Procedures described in Appendix A;

Usable Stateline Flow: Stateline flow as simulated by the H–I Model and determined to be usable pursuant to the Durbin usable flow method with the Larson coefficients, as set out in Appendix C.2; and

Wiley/Sapp Wells: Wells decreed as alternate points of diversion for precompact surface water rights in Colorado by the District Court, Water Div. 2, State of Colorado, Case Nos. 82CW115 (W–4496), 82CW125 (W–4497), and 89CW82; see App. to Third Report of the Special Master 59–61.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SOUTER joins, concurring.

I join the opinion of the Court in full. I do so only, however, because the opinion expressly and carefully makes clear that it in no way infringes this Court's authority to decide on its own, in original cases, whether there should be witness fees and what they should be.

Our appellate jurisdiction is, under the Constitution, subject to "such Exceptions, and . . . such Regulations as the Congress shall make." Art. III, § 2. Our original jurisdiction is not. The Framers presumably "act[ed] intentionally and purposely in the disparate inclusion or exclusion" of these terms. *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432 (1987) (internal quotation marks omitted).

It is accordingly our responsibility to determine matters related to our original jurisdiction, including the availability and amount of witness fees. For the reasons given by the Court, I agree that $40 is a reasonable choice for the fees at issue here. But the choice is ours.

Syllabus

KNOWLES, WARDEN *v.* MIRZAYANCE

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

No. 07–1315. Argued January 13, 2009—Decided March 24, 2009

Respondent Mirzayance entered pleas of not guilty and not guilty by reason of insanity (NGI) at his state-court murder trial. During the guilt phase, he sought to avoid a conviction for first-degree murder and instead obtain a second-degree murder verdict by presenting medical testimony that he was insane at the time of the crime and was, therefore, incapable of the necessary premeditation or deliberation. The jury nevertheless convicted him of first-degree murder. After the trial's NGI phase was scheduled, Mirzayance accepted his counsel's recommendation to abandon the insanity plea. Counsel believed that a defense verdict was unlikely because the jury had just rejected medical testimony similar to that which would be presented to establish the NGI defense. Moreover, although counsel had planned to supplement the medical evidence with testimony by Mirzayance's parents as to their son's mental illness, the parents refused to testify at the last moment. Following his conviction, Mirzayance alleged in state postconviction proceedings that his attorney's recommendation to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U. S. 668. The trial court denied relief, and the California Court of Appeal affirmed.

Mirzayance then applied for federal habeas relief, which the District Court denied. The Ninth Circuit reversed, ordering an evidentiary hearing on counsel's recommendation to withdraw the NGI plea. During the hearing, the Magistrate Judge made extensive factfindings, including, *inter alia*, that the NGI phase medical evidence essentially would have duplicated the evidence the jury rejected in the guilt phase; that counsel doubted the likelihood of prevailing on the NGI claim because the jury's finding of first-degree murder as a practical matter would cripple Mirzayance's chances of convincing the jury that he nevertheless was incapable of understanding the nature and quality of his act and of distinguishing right from wrong; that Mirzayance's parents were not simply reluctant, but had effectively refused, to testify; that counsel had made a carefully reasoned decision not to proceed with the NGI plea after weighing his options and discussing the matter with experienced co-counsel; but that counsel's performance was nevertheless deficient because Mirzayance had "nothing to lose" by going forward with the

NGI phase of the trial. The Magistrate Judge also found prejudice and recommended habeas relief. The District Court accepted the recommendation and granted the writ. The Court of Appeals affirmed, ruling, among other things, that counsel's performance had been deficient because Mirzayance's parents had not refused, but had merely expressed reluctance to testify, and because competent counsel would have attempted to persuade them to testify, which Mirzayance's counsel admittedly did not. The court essentially concluded that competent counsel would have pursued the insanity defense because counsel had nothing to lose by putting on the only defense available. In addition, the court found prejudice because, in the court's view, there was a reasonable probability the jury would have found Mirzayance insane had counsel pursued the NGI phase. The Ninth Circuit concluded that federal habeas relief was authorized under 28 U. S. C. § 2254(d)(1) because the California Court of Appeal had "unreasonabl[y] appli[ed] clearly established Federal law."

Held: Whether the state-court decision is reviewed under § 2254(d)(1)'s standard or *de novo*, Mirzayance has failed to establish that his counsel's performance was ineffective. Pp. 121–128.

(a) The State Court of Appeal's denial of Mirzayance's ineffective-assistance claim did not violate clearly established federal law. The Ninth Circuit reached a contrary result based largely on its application of an improper review standard—it blamed counsel for abandoning the NGI claim because there was "nothing to lose" by pursuing it. But it is not "an unreasonable application of" "clearly established Federal law" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. See, *e. g.*, *Wright* v. *Van Patten*, 552 U. S. 120, 123. Absent anything akin to the "nothing to lose" standard in this Court's precedent, habeas relief could have been granted under § 2254(d)(1) only if the state-court decision in this case had unreasonably applied *Strickland*'s more general standard for ineffective-assistance claims, whereby a defendant must show both deficient performance by counsel and prejudice, 466 U. S., at 687. The question "is not whether a federal court believes the state court's determination" under *Strickland* "was incorrect but whether [it] was unreasonable—a substantially higher threshold." *Schriro* v. *Landrigan*, 550 U. S. 465, 473. And, because *Strickland*'s is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, Mirzayance's ineffective-assistance claim fails. It was not unreasonable for the state court to conclude that counsel's per-

formance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success. Pp. 121–123.

(b) Even if Mirzayance's ineffective-assistance claim were eligible for *de novo* review, it would still fail because he has not shown ineffective assistance at all. Mirzayance can establish neither the deficient performance nor the prejudice required by *Strickland*. As to performance, he has not shown "that counsel's representation fell below an objective standard of reasonableness." 466 U. S., at 687–688. Rather, counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed because similar medical testimony had already been rejected and the parents' testimony, which he believed to be his strongest evidence, would not be available. The Ninth Circuit's position that competent counsel might have persuaded the reluctant parents to testify is in tension with the Magistrate Judge's contrary findings and applies a more demanding standard than *Strickland* prescribes. The failure to show ineffective assistance is also confirmed by the Magistrate Judge's finding that counsel's decision was essentially an informed one "made after thorough investigation of law and facts relevant to plausible options," and was therefore "virtually unchallengeable." *Id.*, at 690. The Ninth Circuit's insistence that counsel was required to assert the only defense available, even one almost certain to lose, is not supported by any "prevailing professional norms" of which the Court is aware. See *id.*, at 688. Nor has Mirzayance demonstrated that he suffered prejudice, which requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id.*, at 694. In fact, it was highly improbable that the jury, having just rejected testimony about Mirzayance's mental condition in the guilt phase, would have reached a different result based on similar evidence at the NGI phase. Pp. 123–128.

Reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, BREYER, and ALITO, JJ., joined, and in which SCALIA, SOUTER, and GINSBURG, JJ., joined all but Part II.

Steven E. Mercer, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Edmund G. Brown, Jr.*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, *Donald E. de Nicola*, Deputy State Solicitor General, and *Kristofer Jorstad*, Deputy Attorney General.

Charles M. Sevilla argued the cause for respondent. With him on the brief was *Eric Multhaup*.*

JUSTICE THOMAS delivered the opinion of the Court.†

A federal court may grant a habeas corpus application arising from a state-court adjudication on the merits if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). In this case, respondent Alexandre Mirzayance claimed ineffective assistance of counsel because his attorney recommended withdrawing his insanity defense. The California courts rejected this claim on state postconviction review. We must decide whether this decision was contrary to or an unreasonable application of clearly established federal law. We hold that it was not. Whether reviewed under the standard of review set forth in § 2254(d)(1) or *de novo*, Mirzayance failed to establish that his counsel's performance was ineffective, see *Strickland* v. *Washington*, 466 U. S. 668 (1984).

I

Mirzayance confessed that he stabbed his 19-year-old cousin nine times with a hunting knife and then shot her four times. At trial, he entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, when both of these pleas are entered, the court must hold a bifurcated trial, with guilt determined during the first phase and the viability of the defendant's NGI plea during the second. Cal. Penal Code Ann. § 1026(a) (West Supp. 2008). During the guilt phase of Mirzayance's trial, he sought to avoid a conviction for first-degree murder by obtaining a verdict on the lesser included offense of second-degree murder. To

Pamela Harris, John H. Blume, and *Keir M. Weyble* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

†JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE GINSBURG join all but Part II of this opinion.

that end, he presented medical testimony that he was insane at the time of the crime and was, therefore, incapable of the premeditation or deliberation necessary for a first-degree murder conviction. The jury nevertheless convicted Mirzayance of first-degree murder.

The trial judge set the NGI phase to begin the day after the conviction was entered but, on the advice of counsel, Mirzayance abandoned his NGI plea before it commenced. He would have borne the burden of proving his insanity during the NGI phase to the same jury that had just convicted him of first-degree murder. Counsel had planned to meet that burden by presenting medical testimony similar to that presented in the guilt phase, including evidence that Mirzayance was insane and incapable of premeditating or deliberating. Because the jury rejected similar evidence at the guilt phase (where the State bore the burden of proof), counsel believed a defense verdict at the NGI phase (where the burden was on the defendant) was unlikely. He planned, though, to have Mirzayance's parents testify and thus provide an emotional account of Mirzayance's struggles with mental illness to supplement the medical evidence of insanity. But on the morning that the NGI phase was set to begin, Mirzayance's parents refused to testify. After consulting with co-counsel, counsel advised Mirzayance that he should withdraw the NGI plea. Mirzayance accepted the advice.

After he was sentenced, Mirzayance challenged his conviction in state postconviction proceedings. Among other allegations, he claimed that counsel's recommendation to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland*. The California trial court denied the petition, and the California Court of Appeal affirmed without offering any reason for its rejection of this particular ineffective-assistance claim. *People* v. *Mirzayance*, Nos. B116856, B124764 (Mar. 31, 1999), App. to Pet. for Cert. 165–167, 200–201 (hereinafter App.). Mirzayance then filed an application for federal habeas relief under 28 U. S. C.

§ 2254, which the District Court denied without an evidentiary hearing. The Court of Appeals reversed the District Court and ordered an evidentiary hearing on counsel's recommendation to withdraw the NGI plea. *Mirzayance* v. *Hickman*, 66 Fed. Appx. 676, 679–681 (CA9 2003). During that evidentiary hearing, a Magistrate Judge made factual findings that the District Court later adopted. Post-Remand Report and Recommendation of United States Magistrate Judge in No. CV 00–01388 DT (RZ) (CD Cal.), App. 38, 68; *Mirzayance* v. *Knowles*, No. CV 00–1388 DT (RZ) (CD Cal., Nov. 15, 2004), *id.*, at 35–36.

According to the Magistrate Judge, counsel's strategy for the two-part trial was to seek a second-degree murder verdict in the first stage and to seek an NGI verdict in the second stage. This strategy faltered when the jury instead convicted Mirzayance of first-degree murder. In the circumstances of this case, the medical evidence that Mirzayance planned to adduce at the NGI phase essentially would have duplicated evidence that the jury had necessarily rejected in the guilt phase. First-degree murder in California includes any killing that is "willful, deliberate, and premeditated." Cal. Penal Code Ann. § 189 (West 1999). To prove NGI, a defendant must show that he was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong at the time of the offense. See *People* v. *Lawley*, 27 Cal. 4th 102, 170, 38 P. 3d 461, 508 (2002). Highlighting this potential contradiction, the trial judge instructed the jury during the guilt phase that "[t]he word 'deliberate,' " as required for a first-degree murder conviction, "means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." App. 48–49 (some internal quotation marks omitted).

When the jury found Mirzayance guilty of first-degree murder, counsel doubted the likelihood of prevailing on the NGI claim. According to the Magistrate Judge:

> "The defense suspected that a jury's finding, beyond a reasonable doubt, that [Mirzayance] had 'deliberated' and 'premeditated' his killing of [the victim] as a practical matter would cripple [Mirzayance's] chances of convincing the jury later, during the sanity phase, that [Mirzayance] nevertheless 'was incapable of knowing or understanding the nature and quality of his . . . act and of distinguishing right from wrong at the time of the commission of the offense,' Cal. Penal Code § 25(b) . . . .
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> . . . . . .
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> "Any remaining chance of securing an NGI verdict . . . now depended (in [counsel's] view) on presenting some 'emotional [im]pact' testimony *by* [Mirzayance's] *parents*, which [counsel] had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." *Id.*, at 50–51 (emphasis in original; capitalization omitted).

But, as the Magistrate Judge found, on the morning that the NGI phase was set to begin, Mirzayance's parents effectively refused to testify:

> "[T]he parents at least expressed clear *reluctance* to testify, which, in context, conveyed the same sense as a refusal." *Id.*, at 72 (emphasis in original).

Although the parties disputed this point, the parents' later actions supported the Magistrate Judge's finding that the parents' reluctance to testify amounted to refusal:

> "Corroborating the Court's finding that [Mirzayance's] parents indicated a strong disinclination to testify at the NGI phase are the facts that (1) they did not testify later at his sentencing hearing, and (2) the reason for their choosing not to do so . . . is that . . . [it] would have been 'too emotional' for them. . . . If weeks after the guilty verdict and the withdrawal of their son's NGI plea, [Mirzayance's] parents' emotions still prevented

> them from testifying at the sentencing hearing, then surely those emotional obstacles to their testifying *in the NGI phase* would have been at least as potent, and probably more so." *Id.*, at 73 (emphasis in original).

The Magistrate Judge found that counsel made a carefully reasoned decision not to go forward with the NGI plea:

> "[Counsel] carefully weighed his options before making his decision final; he did not make it rashly. . . . [Counsel's] strategy at the NGI phase . . . depended entirely on the heartfelt participation of [Mirzayance's] parents as witnesses. . . . Moreover, [counsel] knew that, although he had experts lined up to testify, their testimony had significant weaknesses. . . . [Counsel's] NGI-phase strategy became impossible to attempt once [Mirzayance's] parents . . . expressed . . . their reluctance to [testify] . . . . All [counsel] was left with were four experts, all of whom reached a conclusion—that [Mirzayance] did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well. . . . [Counsel] discussed the situation with his experienced co-counsel . . . who concurred in [counsel's] proposal that he recommend to [Mirzayance] the withdrawal of the NGI plea." *Id.*, at 69–71.

Based on these factual findings, the Magistrate Judge stated that, in his view, counsel's performance was not deficient.

Despite this determination, the Magistrate Judge concluded that the court was bound by the Court of Appeals' remand order to determine only whether " 'there were tactical reasons for abandoning the insanity defense.' " *Id.*, at 98 (quoting *Hickman*, 66 Fed. Appx., at 680). Even though the Magistrate Judge thought that counsel was reasonable in recommending that a very weak claim be dropped, the Mag-

istrate Judge understood the remand order to mean that counsel's performance was deficient if withdrawing the NGI plea would achieve no tactical advantage. The Magistrate Judge found that "[Mirzayance] had nothing to lose" by going forward with the NGI phase of the trial, App. 100, and thus held, under the remand order, that counsel's performance was deficient, *ibid.* As to prejudice, the Magistrate Judge concluded the court was similarly bound by the remand order because the Court of Appeals described the NGI defense as remaining "'viable and strong.'" *Id.*, at 98 (quoting *Hickman*, *supra*, at 681). Accordingly, the Magistrate Judge found prejudice and recommended granting the writ of habeas corpus. The District Court accepted this recommendation and granted the writ.

The Court of Appeals affirmed. *Mirzayance* v. *Knowles*, 175 Fed. Appx. 142, 143 (CA9 2006). It first stated that the lower court had misunderstood its remand order, which it described as requiring an examination of "counsel's reason for abandoning the insanity defense," rather than as mandating that the District Court must find deficient performance if it found counsel had "nothing to lose" by pursuing the insanity defense. *Ibid.;* App. 98–99. Nonetheless, the Court of Appeals affirmed the finding of deficient performance. According to the court, Mirzayance's "parents did not refuse, but merely expressed reluctance to testify." *Knowles*, 175 Fed. Appx., at 144. And because they may have been willing, "[c]ompetent counsel would have attempted to persuade them to testify, which counsel here admits he did not." *Ibid.*[1] The Court of Appeals also "dis-

[1] At best, the Court of Appeals' characterization of counsel's efforts to persuade the parents to testify is misleading. According to the Magistrate Judge, counsel testified that he did attempt to persuade the parents to testify but that their response "'was kind of flat, and I had no influence over them.'" App. 54 (quoting testimony from evidentiary hearing). In his efforts to convince the parents to testify, counsel told them that Mirzayance "had no chance of securing an NGI verdict without the 'emotional quality from nonprofessional witnesses' that Mr. and Mrs. Mirzayance's

agree[d] that counsel's decision was carefully weighed and not made rashly." *Ibid.*

Furthermore, even though it had suggested that the District Court unnecessarily evaluated counsel's strategy under a "nothing to lose" standard, the Court of Appeals affirmed the District Court in large part because Mirzayance's "counsel did not make a true tactical choice" based on its view that counsel had nothing to gain by dropping the NGI defense. *Ibid.* The court held that "[r]easonably effective assistance would put on the only defense available, especially in a case such as this where there was significant potential for success." *Id.*, at 145 (internal quotation marks omitted). The Court of Appeals also found prejudice because, in its view, "[i]f counsel had pursued the insanity phase of the trial, there is a reasonable probability . . . that the jury would have found Mirzayance insane." *Ibid.*

We granted the petition for writ of certiorari, vacated the Court of Appeals' opinion, and remanded for further consideration in light of *Carey* v. *Musladin*, 549 U. S. 70 (2006), which held that a state court had not "'unreasonabl[y] appli[ed] clearly established Federal law'" when it declined to apply our precedent concerning state-sponsored courtroom practices to a case involving spectator conduct at trial, *id.*, at 76–77. *Knowles* v. *Mirzayance*, 549 U. S. 1199 (2007). On remand, the Court of Appeals concluded that its decision was unaffected by *Musladin* and again affirmed the District Court's grant of habeas corpus. App. 4. The Court of Appeals reiterated the same analysis on which it had relied prior to this Court's remand, again finding that the California court had unreasonably applied clearly established federal law because defense counsel's failure to pursue the insanity defense constituted deficient performance as it "secured . . . [n]o actual tactical advantage." *Id.*, at 8. We granted certiorari, 554 U. S. 932 (2008).

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testimony could provide; and 'that they were abandoning their son.'" *Id.*, at 53–54 (same).

II

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d)(1), a federal court may not grant a state prisoner's habeas application unless the relevant state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[2] Here, the relevant state-court decision is the California Court of Appeal's decision denying state habeas relief.

We conclude that the state court's decision to deny Mirzayance's ineffective-assistance-of-counsel claim did not violate clearly established federal law. The Court of Appeals reached a contrary result based, in large measure, on its application of an improper standard of review—it blamed counsel for abandoning the NGI claim because there was nothing

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[2] Before the Court of Appeals, Mirzayance contended that the standard of review set forth in § 2254(d)(1) should not apply to his case. See Brief for Appellee in No. 04–57102 (CA9), pp. 28–29, 33. Before this Court, however, Mirzayance contends that the Court of Appeals correctly applied § 2254(d) to his claim. See Brief for Respondent 27, 32. Mirzayance did question whether the California Court of Appeal's denial of his claim should receive as much deference as the "prototypical" state-court adjudication "involv[ing] both a reasoned, written opinion and an adequate development of the factual record in support of the claims." *Id.*, at 33. Mirzayance thus contends that "the usual § 2254(d) deferential approach must be modified and adapted" in evaluating his claim. *Id.*, at 34. Nonetheless, because Mirzayance has not argued that § 2254(d) is entirely inapplicable to his claim or that the state court failed to reach an adjudication on the merits, we initially evaluate his claim through the deferential lens of § 2254(d). See *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855, n. 3 (1996) (finding that party abandoned issue by failing to address it in the party's brief on the merits); *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513, 527 (1994) (same).

In addition, we do not decide whether the Court of Appeals was correct in finding that an evidentiary hearing on Mirzayance's claim was required. See *Mirzayance* v. *Hickman*, 66 Fed. Appx. 676, 679–681 (CA9 2003). Mirzayance's ineffective-assistance-of-counsel claim fails even under the facts presented at the evidentiary hearing.

to lose by pursuing it.[3] But this Court has held on numerous occasions that it is not "an unreasonable application of" "clearly established Federal law" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. See *Wright* v. *Van Patten*, 552 U. S. 120, 123 (2008) *(per curiam); Schriro* v. *Landrigan*, 550 U. S. 465, 478 (2007); *Musladin*, *supra*, at 76–77. This Court has never established anything akin to the Court of Appeals' "nothing to lose" standard for evaluating *Strickland* claims. Indeed, Mirzayance himself acknowledges that a "nothing to lose" rule is "unrecognized by this Court." Brief for Respondent 28. And the Court of Appeals did not cite any Supreme Court decision establishing a "nothing to lose" standard in any of its three opinions in this case. See App. 3–12; *Knowles*, 175 Fed. Appx. 142; *Hickman*, 66 Fed. Appx. 676.

With no Supreme Court precedent establishing a "nothing to lose" standard for ineffective-assistance-of-counsel claims, habeas relief cannot be granted pursuant to § 2254(d)(1) based on such a standard. Instead, such relief may be granted only if the state-court decision unreasonably applied the more general standard for ineffective-assistance-of-counsel claims established by *Strickland*, in which this Court held that a defendant must show both deficient performance by counsel and prejudice in order to prove that he has received ineffective assistance of counsel, 466 U. S., at 687. Indeed, this Court has repeatedly applied that standard to evaluate ineffective-assistance-of-counsel claims where there

[3] Although the Court of Appeals implicitly disavowed the "nothing to lose" standard applied by the District Court and Magistrate Judge, see App. 5; *Mirzayance* v. *Knowles*, 175 Fed. Appx. 142, 143 (CA9 2006), it nevertheless concluded that "[n]o actual tactical advantage was to be gained" by counsel's withdrawal of the insanity defense, App. 8; *Knowles*, *supra*, at 144. Finding that counsel is deficient by abandoning a defense where there is nothing to gain from that abandonment is equivalent to finding that counsel is deficient by declining to pursue a strategy where there is nothing to lose from pursuit of that strategy.

is no other Supreme Court precedent directly on point. See, *e. g.*, *Van Patten*, *supra*, at 125 (evaluating claim under *Strickland* where no Supreme Court precedent established that any other standard applied to the "novel factual context" before the Court); *Schriro*, *supra*, at 478 (evaluating claim under general *Strickland* standard where no Supreme Court precedent addressed the particular "situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court").

The question "is not whether a federal court believes the state court's determination" under the *Strickland* standard "was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro*, *supra*, at 473. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. See *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, see *Yarborough* v. *Gentry*, 540 U. S. 1, 5–6 (2003) *(per curiam)*, Mirzayance's ineffective-assistance claim fails. It was not unreasonable for the state court to conclude that his defense counsel's performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success. As explained more fully below, this Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success. See also *infra*, at 127.

III

Even if Mirzayance's ineffective-assistance-of-counsel claim were eligible for *de novo* review, it would still fail.

Strickland requires a defendant to establish deficient performance and prejudice. 466 U. S., at 687. Mirzayance can establish neither.

Mirzayance has not shown "that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 687–688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*, at 690.

Here, Mirzayance has not shown that his counsel violated these standards. Rather, his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail. The jury had already rejected medical testimony about Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt. The Magistrate Judge explained this point:

> "All [counsel] was left with were four experts, all of whom reached a conclusion—that [Mirzayance] did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well." App. 71.

In fact, the Magistrate Judge found that counsel "convincingly detailed ways in which [the experts] could have been impeached, for overlooking or minimizing facts which showcased [Mirzayance's] clearly goal-directed behavior." *Id.*, at 70.

In the NGI phase, the burden would have switched to Mirzayance to prove insanity by a preponderance of the evidence. Mirzayance's counsel reasonably believed that there was almost no chance that the same jury would have reached a different result when considering similar evidence, especially with Mirzayance bearing the burden of proof. Furthermore, counsel knew he would have had to present this defense without the benefit of the parents' testimony, which he believed to be his strongest evidence. See *ibid.* ("[Counsel's] strategy at the NGI phase had been to appeal to the jury in one or both of two ways that depended entirely on the heartfelt participation of [Mirzayance's] parents as witnesses"). Counsel reasonably concluded that this defense was almost certain to lose.

The Court of Appeals took the position that the situation was not quite so dire because the parents "merely expressed reluctance to testify." *Id.*, at 7; *Knowles*, 175 Fed. Appx., at 144. It explained that "[c]ompetent counsel would have attempted to persuade them to testify." App. 7; *Knowles*, *supra*, at 144. But that holding is in tension with the Magistrate Judge's findings and applies a more demanding standard than *Strickland* prescribes. The Magistrate Judge noted that the parents "conveyed the same sense as a refusal." App. 72. Indeed, the Magistrate Judge found that the parents "did not testify later at [Mirzayance's] sentencing hearing" because it "would have been 'too emotional' for them." *Id.*, at 73 (quoting testimony from evidentiary hearing). Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded. Counsel's acceptance of the parents' "convey[ance] [of] . . . a refusal," *id.*, at 72, does not rise to the high bar for deficient performance set by *Strickland*.

Mirzayance's failure to show ineffective assistance of counsel is confirmed by the Magistrate Judge's finding that

"[counsel] carefully weighed his options before making his decision final; he did not make it rashly." App. 69. The Magistrate Judge explained all of the factors that counsel considered—many of which are discussed above—and noted that counsel "discussed the situation with his experienced co-counsel" before making it. *Id.*, at 71. In making this finding, the Magistrate Judge identified counsel's decision as essentially an informed decision "made after thorough investigation of law and facts relevant to plausible options." *Strickland*, 466 U. S., at 690. As we stated in *Strickland*, such a decision is "virtually unchallengeable." *Ibid.*

Without even referring to the Magistrate Judge's finding, the Court of Appeals "disagree[d] that counsel's decision was carefully weighed and not made rashly." App. 7; *Knowles*, s*upra*, at 144. In its view, "counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea." App. 8; *Knowles*, *supra*, at 144–145. But courts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous. Fed. Rule Civ. Proc. 52(a); *Anderson* v. *Bessemer City*, 470 U. S. 564, 573–574 (1985). Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior.

In light of the Magistrate Judge's factual findings, the state court's rejection of Mirzayance's ineffective-assistance-of-counsel claim was consistent with *Strickland*. The Court of Appeals insisted, however, that "'[r]easonably effective assistance' required here that counsel assert the only defense available . . . ." App. 8; see also *Knowles*, *supra*, at 145. But we are aware of no "prevailing professional norms" that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. See *Strickland*, *supra*, at 688. And in this case, counsel did not give up "the only defense available." Counsel put on a de-

fense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase.[4] The law does not require counsel to raise every available nonfrivolous defense. See *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983); cf. *Wiggins* v. *Smith*, 539 U. S. 510, 533 (2003) (explaining, in case involving similar issue of counsel's responsibility to present mitigating evidence at sentencing, that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant . . . [or even] to present mitigating evidence at sentencing in every case"). Counsel also is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether. Mirzayance has thus failed to demonstrate that his counsel's performance was deficient.

In addition, Mirzayance has not demonstrated that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U. S., at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a "reasonable probability" that he would have prevailed on his insanity defense had he pursued it. This Mirzayance cannot

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[4] Mirzayance has no complaints about the sentencing phase since he received the lowest possible sentence for his first-degree murder conviction. California authorizes three possible sentences for murder: death, life imprisonment without parole, and imprisonment for 25 years to life. Cal. Penal Code Ann. §190(a) (West 1999). Mirzayance was sentenced to 25 years to life plus 4 years for a weapons enhancement.

do. It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase. See *supra*, at 125.

IV

Mirzayance has not shown that the state court's conclusion that there was no ineffective assistance of counsel "was contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254. In fact, he has not shown ineffective assistance at all. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

It is so ordered.

Syllabus

PUCKETT *v.* UNITED STATES

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

No. 07–9712. Argued January 14, 2009—Decided March 25, 2009

In exchange for petitioner Puckett's guilty plea, the Government agreed to request (1) a three-level reduction in his offense level under the Federal Sentencing Guidelines on the ground that he had accepted responsibility for his crimes; and (2) a sentence at the low end of the applicable Guidelines range. The District Court accepted the plea, but before Puckett was sentenced he assisted in another crime. As a result, the Government opposed any reduction in Puckett's offense level, and the District Court denied the three-level reduction. On appeal, Puckett raised for the first time the argument that by backing away from its reduction request, the Government had broken the plea agreement. The Fifth Circuit found that Puckett had forfeited that claim by failing to raise it below; applied Federal Rule of Criminal Procedure 52(b)'s plain-error standard for unpreserved claims of error; and held that, although the error had occurred and was obvious, Puckett had not satisfied the third prong of plain-error analysis in that he failed to demonstrate that his ultimate sentence was affected, especially since the District Judge had found that acceptance-of-responsibility reductions for defendants who continued to engage in criminal activity were so rare as "to be unknown."

Held: Rule 52(b)'s plain-error test applies to a forfeited claim, like Puckett's, that the Government failed to meet its obligations under a plea agreement, and applies in the usual fashion. Pp. 134–143.

(a) In federal criminal cases, Rule 51(b) instructs parties how to preserve claims of error: "by informing the court—when [a] ruling . . . is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." A party's failure to preserve a claim ordinarily prevents him from raising it on appeal, but Rule 52(b) recognizes a limited exception for plain errors. "Plain-error review" involves four prongs: (1) There must be an error or defect that the appellant has not affirmatively waived, *United States* v. *Olano*, 507 U. S. 725, 732–733; (2) it must be clear or obvious, see *id.*, at 734; (3) it must have affected the appellant's substantial rights, *i. e.*, "affected the outcome of the district court proceedings," *ibid.;* and (4) if the three other prongs are satisfied, the court

Syllabus

of appeals has the *discretion* to remedy the error if it "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *id.*, at 736. The question here is not *whether* plain-error review applies when a defendant fails to preserve a claim that the Government defaulted on its plea-agreement obligations, but what conceivable reason exists for disregarding its evident application. The breach undoubtedly violates the defendant's rights, but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others. Pp. 134–136.

(b) Neither Puckett's doctrinal arguments nor the practical considerations that he raises counsel against applying plain-error review in the present context. The Government's breach of the plea agreement does not retroactively cause the defendant's guilty plea to have been unknowing or involuntary. This Court's decision in *Santobello* v. *New York*, 404 U. S. 257, does not govern, since the question whether an error can be found harmless is different from the question whether it can be subjected to plain-error review. Puckett is wrong in contending that no purpose is served by applying plain-error review: There is much to be gained by inducing the objection to be made at the trial court level, where (among other things) the error can often be remedied. And not all plea breaches will satisfy the doctrine's four prongs. Pp. 136–143.

505 F. 3d 377, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 143.

Lars Robert Isaacson argued the cause for petitioner. With him on the briefs were *Jonathan D. Hacker* and *Geoffrey M. Wyatt.*

Lisa H. Schertler argued the cause for the United States. With her on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, *Deputy Solicitor General Dreeben*, and *Kathleen A. Felton.**

**Kevin P. Martin*, *Dahlia S. Fetouh*, *Jodi B. Kalagher*, and *Barbara Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

JUSTICE SCALIA delivered the opinion of the Court.

The question presented by this case is whether a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review set forth in Rule 52(b) of the Federal Rules of Criminal Procedure.

I

In July 2002, James Puckett was indicted by a grand jury in the Northern District of Texas on one count of armed bank robbery, 18 U. S. C. §2113(a), (d), and one count of using a firearm during and in relation to a crime of violence, §924(c)(1). He negotiated a plea agreement with the Government, which was filed with the District Court on September 3, 2003. As part of that deal, Puckett agreed to plead guilty to both counts, waive his trial rights, and cooperate with the Government by being truthful regarding his participation in criminal activities. App. 51a–53a. In exchange, the Government agreed to the following two terms:

> "8. The government agrees that Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level.
>
> "9. The government also agrees to request that Puckett's sentence be placed at the lowest end of the guideline level deemed applicable by the Court." *Id.*, at 54a.

To satisfy the first of these obligations, the Government filed a motion in the District Court pursuant to §3E1.1 of the United States Sentencing Commission's Guidelines Manual (Nov. 2003) (USSG). That provision directs sentencing courts to decrease a defendant's offense level under the Guidelines by two levels if he "clearly demonstrates acceptance of responsibility for his offense," and by a third level "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty." Two weeks later, the

District Court held a plea colloquy, see Fed. Rule Crim. Proc. 11(b), and accepted Puckett's plea.

Because of delays due to health problems experienced by Puckett, sentencing did not take place for almost three years. In the interim, Puckett assisted another man in a scheme to defraud the Postal Service, and confessed that assistance (under questioning) to a probation officer. The officer prepared an addendum to Puckett's presentence report recommending that he receive *no* § 3E1.1 reduction for acceptance of responsibility, on the theory that true acceptance of responsibility requires termination of criminal conduct. See USSG § 3E1.1, comment., n. 1(b).

When sentencing finally did take place on May 4, 2006, Puckett's counsel objected to the addendum, pointing out that the Government had filed a motion requesting that the full three-level reduction in offense level be granted. The District Judge turned to the prosecutor, who responded that the motion was filed "a long time ago," App. 79a, before Puckett had engaged in the additional criminal behavior. She made clear that the Government opposed any reduction in Puckett's offense level for acceptance of responsibility. The probation officer then added his view that under the Guidelines, a reduction would be improper.

After hearing these submissions, the District Judge concluded that even assuming he had the discretion to grant the reduction, he would not do so. "[I]t's so rare [as] to be unknown around here where one has committed a crime subsequent to the crime for which they appear before the court and for them even then to get the three points." *Id.*, at 80a–81a. He agreed, however, to follow the recommendation that the Government made, pursuant to its commitment in the plea agreement, that Puckett be sentenced at the low end of the applicable Guidelines range, which turned out to be 262 months in prison for the armed bank robbery and a mandatory minimum consecutive term of 84 months for the firearm crime. Had the District Court granted the three-

level reduction for acceptance of responsibility, the bottom of the Guidelines range would have been 188 months for the robbery; the firearm sentence would not have been affected.

Importantly, at no time during the exchange did Puckett's counsel object that the Government was violating its obligations under the plea agreement by backing away from its request for the reduction. He never cited the relevant provision of the plea agreement. And he did not move to withdraw Puckett's plea on grounds that the Government had broken its sentencing promises.

On appeal to the United States Court of Appeals for the Fifth Circuit, Puckett did argue, *inter alia*, that the Government violated the plea agreement at sentencing. The Government conceded that by objecting to the reduction for acceptance of responsibility, it had violated the obligation set forth in paragraph 8 of the agreement, but maintained that Puckett had forfeited this claim by failing to raise it in the District Court. The Court of Appeals agreed, and applied the plain-error standard that Rule 52(b) makes applicable to unpreserved claims of error. 505 F. 3d 377, 384 (2007). It held that although error had occurred and was obvious, Puckett had not satisfied the third prong of the plain-error analysis by demonstrating that the error affected his substantial rights, *i. e.*, caused him prejudice. *Id.*, at 386. Especially in light of the District Judge's statement that granting a reduction when the defendant had continued to engage in criminal conduct was "so rare [as] to be unknown," Puckett could not show that the Government's breach had affected his ultimate sentence. The Court of Appeals accordingly affirmed the conviction and sentence. *Id.*, at 388.

We granted certiorari, 554 U. S. 945 (2008), to consider a question that has divided the Federal Courts of Appeals: whether Rule 52(b)'s plain-error test applies to a forfeited claim, like Puckett's, that the Government failed to meet its obligations under a plea agreement. See *In re Sealed Case*, 356 F. 3d 313, 315–318 (CADC 2004) (discussing conflict

among the Circuits). Concluding that Rule 52(b) does apply and in the usual fashion, we now affirm.

II

If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited. "No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U. S. 414, 444 (1944).

If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *United States* v. *Padilla*, 415 F. 3d 211, 224 (CA1 2005) (Boudin, C. J., concurring).

This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 89 (1977); see also *United States* v. *Vonn*, 535 U. S. 55, 72 (2002).

In federal criminal cases, Rule 51(b) tells parties how to preserve claims of error: "by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Failure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error. See *United States* v. *Young*, 470 U. S. 1, 15, and n. 12 (1985). Rule 52(b), however, recognizes a limited exception to that preclusion. The Rule provides, in full: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

We explained in *United States* v. *Olano*, 507 U. S. 725 (1993), that Rule 52(b) review—so-called "plain-error review"—involves four steps, or prongs. First, there must be an error or defect—some sort of "[d]eviation from a legal rule"—that has not been intentionally relinquished or abandoned, *i. e.*, affirmatively waived, by the appellant. *Id.*, at 732–733. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. See *id.*, at 734. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." *Ibid.* Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.*, at 736 (quoting *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936)). Meeting all four prongs is difficult, "as it should be." *United States* v. *Dominguez Benitez*, 542 U. S. 74, 83, n. 9 (2004).

We have repeatedly cautioned that "[a]ny unwarranted extension" of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice, see *Young*, *supra*, at 15; and that

the creation of an unjustified exception to the Rule would be "[e]ven less appropriate," *Johnson* v. *United States*, 520 U. S. 461, 466 (1997). The real question in this case is not *whether* plain-error review applies when a defendant fails to preserve a claim that the Government defaulted on its plea-agreement obligations, but rather what conceivable reason exists for disregarding its evident application. Such a breach is undoubtedly a violation of the defendant's rights, see *Santobello* v. *New York*, 404 U. S. 257, 262 (1971), but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others.

III

Puckett puts forward several possible reasons why plain-error review should not apply in the present context. We understand him to be making effectively four distinct arguments: two doctrinal, two practical. We consider each set in turn.

A

Puckett's primary precedent-based argument proceeds as follows: When the Government breaks a promise that was made to a defendant in the course of securing a guilty plea, the knowing and voluntary character of that plea retroactively vanishes, because (as it turns out) the defendant was not aware of its true consequences. Since guilty pleas must be knowing and voluntary to be valid, *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969), the guilty plea is thus void, along with the defendant's corresponding waiver of his right to trial. And because, under this Court's precedents, a waiver of the right to trial must be made by the defendant personally, see *Taylor* v. *Illinois*, 484 U. S. 400, 417–418, and n. 24 (1988), no action by counsel alone could resurrect the voided waiver. Therefore, Puckett concludes, *counsel's* failure timely to object to a Government breach can have no

effect on the analysis, and the court of appeals must always correct the error.

This elaborate analysis suffers from at least two defects. First, there is nothing to support the proposition that the Government's breach of a plea agreement retroactively causes the defendant's agreement to have been unknowing or involuntary. Any more than there is anything to support the proposition that a mere breach of contract retroactively causes the other party's promise to have been coerced or induced by fraud. Although the analogy may not hold in all respects, plea bargains are essentially contracts. See *Mabry* v. *Johnson*, 467 U. S. 504, 508 (1984). When the consideration for a contract fails—that is, when one of the exchanged promises is not kept—we do not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; we say that the contract was broken. See 23 R. Lord, Williston on Contracts § 63.1 (4th ed. 2002) (hereinafter Williston). The party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely, see 26 *id.*, § 68.1 (4th ed. 2003); but that is not the same thing as saying the contract was never validly concluded.

So too here. When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, *i. e.*, to withdraw his plea. But rescission is not the only possible remedy; in *Santobello* we allowed for a resentencing at which the Government would fully comply with the agreement—in effect, specific performance of the contract. 404 U. S., at 263. In any case, it is entirely clear that a breach does not cause the guilty plea, when entered, to have been unknowing or involuntary. It is precisely *because* the plea was knowing and voluntary (and hence valid)

that the Government is obligated to uphold its side of the bargain.[1]

Moreover, and perhaps more fundamentally, Puckett's argument confuses the concepts of waiver and forfeiture. Nobody contends that Puckett's counsel has *waived*—that is, intentionally relinquished or abandoned, *Olano*, 507 U. S., at 733—Puckett's right to seek relief from the Government's breach. (If he had, there would be no error at all and plain-error analysis would add nothing.) The objection is rather that Puckett *forfeited* the claim of error through his counsel's failure to raise the argument in the District Court. This Court's precedents requiring that certain waivers be personal, knowing, and voluntary are thus simply irrelevant. Those holdings determine *whether error occurred*, but say nothing about the proper standard of review when the claim of error is not preserved. The question presented by this case *assumes* error; only the standard of review is in dispute.

Puckett's second doctrinal attack rests on our decision in *Santobello*. In that case, the State had promised in a plea

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[1] Puckett points out that in *Brady* v. *United States*, 397 U. S. 742 (1970), we quoted approvingly the Fifth Circuit's statement that guilty pleas must stand unless induced by "misrepresentation (including unfulfilled or unfulfillable promises)," *id.*, at 755 (quoting *Shelton* v. *United States*, 246 F. 2d 571, 572, n. 2 (CA5 1957) (en banc); internal quotation marks omitted). But it is hornbook law that misrepresentation requires an intent *at the time of contracting* not to perform. 26 Williston § 69.11. It is more difficult to explain the other precedent relied upon by Puckett—our suggestion in *Mabry* v. *Johnson*, 467 U. S. 504, 509 (1984), that "when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." That statement, like the one in *Brady*, was dictum. Its conclusion that the conviction cannot stand is only sometimes true (if that is the remedy the court prescribes for the breach). And even when the conviction is overturned, the reason is not that the guilty plea was unknowing or involuntary. We disavow any aspect of the *Mabry* dictum that contradicts our holding today.

deal that it would make no sentencing recommendation, but the prosecutor (apparently unaware of that commitment) asked the state trial court to impose the maximum penalty of one year. Defense counsel immediately objected. 404 U. S., at 259. The trial judge proceeded anyway to impose the 1-year sentence, reassuring Santobello that the prosecutor's recommendation did not affect his decision. *Id.*, at 259–260. This Court vacated the conviction and remanded the case because "the interests of justice" would thus be best served. *Id.*, at 262.

Puckett maintains that if the "interests of justice" required a remand in *Santobello* even though the breach there was likely harmless, those same interests call for a remand *whenever* the Government reneges on a plea bargain, forfeiture or not. We do not agree. Whether an error can be found harmless is simply a different question from whether it can be subjected to plain-error review. *Santobello* (given that the error in that case *was* preserved) necessarily addressed only the former.

B

Doctrine and precedent aside, Puckett argues that practical considerations counsel against subjecting plea-breach claims to the rule of plain-error review. Specifically, he contends that no purpose would be served by applying the rule; and that plea breaches will *always* satisfy its four prongs, making its application superfluous. Accepting, *arguendo* (and *dubitante*), that policy concerns can ever authorize a departure from the Federal Rules, both arguments are wrong.

Puckett suggests that once the prosecution has broken its agreement, *e. g.*, by requesting a higher sentence than agreed upon, it is too late to "unring" the bell even if an objection is made: The district judge has already heard the request, and under *Santobello* it does not matter if he was influenced by it. So why demand the futile objection?

For one thing, requiring the objection means the defendant cannot "game" the system, "wait[ing] to see if the sentence later str[ikes] him as satisfactory," *Vonn*, 535 U. S., at 73, and then seeking a second bite at the apple by raising the claim. For another, the breach itself will not always be conceded.[2] In such a case, the district court if apprised of the claim will be in a position to adjudicate the matter in the first instance, creating a factual record and facilitating appellate review. Thirdly, *some* breaches may be curable upon timely objection—for example, where the prosecution simply forgot its commitment and is willing to adhere to the agreement. And finally, if the breach is established but cannot be cured, the district court can grant an immediate remedy (*e. g.*, withdrawal of the plea or resentencing before a different judge) and thus avoid the delay and expense of a full appeal.

Puckett also contends that plain-error review "does no substantive work" in the context of the Government's breach of a plea agreement. Brief for Petitioner 22. He claims that the third prong, the prejudice prong, has no application, since plea-breach claims fall within "a special category of forfeited errors that can be corrected regardless of their effect on the outcome." *Olano*, 507 U. S., at 735.

This Court has several times declined to resolve whether "structural" errors—those that affect "the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991)—automatically satisfy the third prong of the plain-error test. *Olano*, *supra*, at 735; *Johnson*, 520 U. S., at 469; *United States* v. *Cotton*, 535 U. S. 625, 632 (2002). Once again we need not answer that question, because

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[2] Indeed, in this case the Government might well have argued that it was excused from its obligation to assert "demonstrated acceptance of responsibility" because Puckett's ongoing criminal conduct hindered performance. See 13 Williston § 39.3 (4th ed. 2000). That argument might have convinced us had it been pressed, but the Government conceded the breach, and we analyze the case as it comes to us.

breach of a plea deal is not a "structural" error as we have used that term. We have never described it as such, see *Johnson*, *supra*, at 468–469, and it shares no common features with errors we *have* held structural. A plea breach does not "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Neder* v. *United States*, 527 U. S. 1, 9 (1999) (emphasis deleted); it does not "defy analysis by 'harmless-error' standards" by affecting the entire adjudicatory framework, *Fulminante*, *supra*, at 309; and the "difficulty of assessing the effect of the error," *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4 (2006), is no greater with respect to plea breaches at sentencing than with respect to other procedural errors at sentencing, which are routinely subject to harmlessness review, see, *e. g.*, *United States* v. *Teague*, 469 F. 3d 205, 209–210 (CA1 2006).

Santobello did hold that automatic reversal is warranted when objection to the Government's breach of a plea agreement has been preserved,[3] but that holding rested not upon the premise that plea-breach errors are (like "structural" errors) somehow not *susceptible*, or not *amenable*, to review for harmlessness, but rather upon a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining—an "essential" and "highly desirable" part of the criminal process, 404 U. S., at 261–262. But the rule of contemporaneous objection is equally essential and desirable, and when the two collide we see no need to relieve the defendant of his usual burden of showing prejudice. See *Olano*, *supra*, at 734.

The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (*e. g.*, the sentence that the prosecutor promised

[3] We need not confront today the question whether *Santobello*'s automatic-reversal rule has survived our recent elaboration of harmless-error principles in such cases as *Fulminante* and *Neder*.

to request) or because he likely would not have obtained those benefits in any event (as is seemingly the case here).[4]

On the dissent's view, a defendant in Puckett's position has always suffered an impairment of his "substantial rights" under *Olano*'s third prong, because he has been convicted "in the absence of trial or compliance with the terms of the plea agreement dispensing with the Government's obligation to prove its case." *Post*, at 143–144 (opinion of SOUTER, J.). But that is simply an *ipse dixit* recasting the conceded error—breach of the plea agreement—as the effect on substantial rights. Any trial error can be said to impair substantial rights if the harm is defined as "being convicted at a trial tainted with [fill-in-the-blank] error." Nor does the fact that there is a "protected liberty interest" at stake render this case different, see *post*, at 145. That interest is always at stake in criminal cases. Eliminating the third plain-error prong through semantics makes a nullity of *Olano*'s instruction that a defendant normally "must make a specific showing of prejudice" in order to obtain relief, 507 U. S., at 735.

Puckett contends that the fourth prong of plain-error review likewise has no application because every breach of a plea agreement will constitute a miscarriage of justice. That is not so. The fourth prong is meant to be applied on a case-specific and fact-intensive basis. We have emphasized that a "*per se* approach to plain-error review is flawed." *Young*, 470 U. S., at 17, n. 14. It is true enough that when the Government reneges on a plea deal, the integrity of the

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[4] Because, as we have explained, the breach consists of a wrongful denial of the rights obtained by the defendant through the plea agreement and does not automatically invalidate the plea, we agree with the Government that the question with regard to prejudice is not whether Puckett would have entered the plea had he known about the future violation. Cf. *United States* v. *Dominguez Benitez*, 542 U. S. 74, 83 (2004). When the rights acquired by the defendant relate to sentencing, the "'outcome'" he must show to have been affected is his sentence.

system may be called into question, but there may well be countervailing factors in particular cases. Puckett is again a good example: Given that he obviously did not cease his life of crime, receipt of a sentencing reduction for *acceptance of responsibility* would have been so ludicrous as itself to compromise the public reputation of judicial proceedings.

Of course the second prong of plain-error review also will often have some "bite" in plea-agreement cases. Not all breaches will be clear or obvious. Plea agreements are not always models of draftsmanship, so the scope of the Government's commitments will on occasion be open to doubt. Moreover, the Government will often have a colorable (albeit ultimately inadequate) excuse for its nonperformance. See n. 2, *supra*.

* * *

Application of plain-error review in the present context is consistent with our cases, serves worthy purposes, has meaningful effects, and is in any event compelled by the Federal Rules. While we recognize that the Government's breach of a plea agreement is a serious matter, "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, 520 U. S., at 466.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, dissenting.

Petitioner's situation does not excite sympathy, but the Court's holding will stand for a rule in circumstances less peculiar than those here. I disagree with my colleagues with respect to the interest at stake for a criminal defendant in a case like this, and I respectfully dissent.

This case turns on whether plain-error review applies to an unpreserved claim that the Government breached its plea agreement and on identifying the relevant effect, or substan-

tial rights implicated, under the third prong of *United States* v. *Olano*, 507 U. S. 725, 734 (1993). I agree with the majority that plain error is the proper test, but depart from the Court's holding that the effect in question is length of incarceration for the offense charged (as to which the error here probably made no ultimate difference). I would hold that the relevant effect is conviction in the absence of trial or compliance with the terms of the plea agreement dispensing with the Government's obligation to prove its case.

The first two conditions for recognizing plain error, that there be error and that it be clear, see *id.*, at 732–734, are without doubt satisfied here. Before sentencing, a colloquy in accordance with Federal Rule of Criminal Procedure 11 laid the ground for satisfying the requirement that the error be obvious, by making a public record of the terms of the plea agreement between Puckett and the Government. Both the written agreement and the Government's representation to the District Court included the Government's statement that Puckett qualified for a three-level reduction in his offense level under the Sentencing Guidelines, because of his acceptance of responsibility for his offense. See App. 54a ("The government agrees that Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level"); *id.*, at 68a ("The government agrees that Mr. Puckett has demonstrated acceptance of responsibility and thereby would qualify for a three level reduction in his offense level").

Puckett does indeed appear to have satisfied the conditions on which the Government's commitment was premised: he accepted responsibility for committing "his offense[s]" and "assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty." United States Sentencing Commission, Guidelines Manual §3E1.1 (Nov. 2003). His subsequent criminality (during the unusual 3-year break between his guilty plea and sentencing) was not a failure on

his part to accept responsibility for his prior crimes (the benefit of which the Government had already received by the time Puckett pleaded guilty). In any case, the Government could have insisted on a provision in the plea agreement allowing it to back out of its commitment if Puckett engaged in additional criminal conduct prior to sentencing, and did not do so. It should therefore be bound by the terms of the agreement it made, whether or not Puckett was in fact entitled to the reduction. In administering the criminal law no less than the civil, parties are routinely bound by agreements they wish they had not made. This is why the Government has no choice but to admit that it breached the plea agreement when, at sentencing, it objected to the three-level reduction. Despite its contention that the plain-error doctrine does not save Puckett from his failure to object at the sentencing hearing, the Government does not deny that a deal is a deal and it does not deny that it broke its word.

The plain-error doctrine will not, however, avail Puckett anything unless the remaining conditions set out in *Olano* are satisfied, the third requiring a showing that sentencing Puckett on a plea given in return for an unfulfilled promise by the Government violated his substantial rights. See 507 U. S., at 734. The majority understands the effect in question to be length of incarceration. See *ante*, at 142, n. 4 ("When the rights acquired by the defendant relate to sentencing, the '"outcome"' he must show to have been affected is his sentence"). Since Puckett can hardly show that a court apprised of his subsequent criminality would have given him the three-level reduction even in the absence of the Government's breach, in the majority's view he cannot satisfy the "substantial rights" criterion and so fails to qualify for correction of the admitted clear error.

I, on the contrary, would identify the effect on substantial rights as the criminal conviction itself, regardless of length of incarceration. My reason is simply that under the Constitution the protected liberty interest in freedom from crimi-

nal taint, subject to the Fifth Amendment's due process guarantee of fundamental fairness, is properly understood to require a trial or plea agreement honored by the Government before the stigma of a conviction can be imposed. That protection does not vanish if a convicted defendant turns out to get a light sentence. It is the trial leading to possible conviction, not the sentencing hearing alone, that is the focus of this guarantee, and it is the possibility of criminal conviction itself, without more, that calls for due process protection. In a legal system constituted this way, it is hard to imagine anything less fair than branding someone a criminal not because he was tried and convicted, but because he entered a plea of guilty induced by an agreement the Government refuses to honor.

Agreements must therefore be kept by the Government as well as by the individual, and if the plain-error doctrine can ever rescue a defendant from the consequence of forfeiting rights by inattention, it should be used when the Government has induced an admission of criminality by making an agreement that it deliberately breaks after the defendant has satisfied his end of the bargain. Redressing such fundamentally unfair behavior by the Government, whether by vacating the plea or enforcing the plea agreement, see *Santobello* v. *New York*, 404 U. S. 257, 263 (1971), is worth the undoubted risk of allowing a defendant to game the system and the additional administrative burdens, see *ante*, at 134, 140. If the Judiciary is worried about gamesmanship and extra proceedings, all it needs to do is to minimize their likelihood by making it plain that it will require the Government to keep its word or seek rescission of the plea agreement if it has cause to do so. Thus, I would find that a defendant's substantial rights have been violated whenever the Government breaches a plea agreement, unless the defendant got just what he bargained for anyway from the sentencing court.

What I have said about the third *Olano* criterion determines my treatment of the fourth, addressing whether leav-

ing the error uncorrected "may be said . . . 'seriously [to] affect the fairness, integrity or public reputation of judicial proceedings.'" 507 U. S., at 744 (STEVENS, J., dissenting) (quoting *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936)). If I am right that in this case the protected interest is in the guarantee that no one is liable to spend a day behind bars as a convict without a trial or his own agreement, then the fairness and integrity of the Judicial Branch suffer when a court imprisons a defendant after he pleaded guilty in reliance on a plea agreement, only to have the Government repudiate the obligation it agreed upon. That is precisely what happened here, yet the Judiciary denies relief under an appellate procedure for correcting patent error. Judicial repute does not escape without damage in the eyes of anyone who sees beyond the oddity of this case.

Puckett is entitled to relief because he and every other defendant who may make an agreement with the Government are entitled to take the Government at its word. Puckett insists that the Government keep its word, and if we are going to have a plain-error doctrine at all, the Judiciary has no excuse for closing this generally available avenue of redress to Puckett or to any other criminal defendant standing in his shoes.

Syllabus

RIVERA *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 07–9995. Argued February 23, 2009—Decided March 31, 2009

During jury selection in petitioner Rivera's state-court first-degree murder trial, his counsel sought to use a peremptory challenge to excuse venire member Deloris Gomez. Rivera had already exercised two peremptory challenges against women, one of whom was African-American. It is conceded that there was no basis to challenge Gomez for cause. She met the requirements for jury service, and Rivera does not contend that she was biased against him. The trial court rejected the peremptory challenge out of concern that it was discriminatory. Under *Batson* v. *Kentucky*, 476 U. S. 79, and later decisions applying *Batson*, parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors based on race, ethnicity, or sex. At trial, the jury, with Gomez as its foreperson, found Rivera guilty of first-degree murder. The Illinois Supreme Court subsequently affirmed the conviction, holding that the peremptory challenge should have been allowed, but rejecting Rivera's argument that the improper seating of Gomez was a reversible error. Observing that the Constitution does not mandate peremptory challenges and that they are not necessary for a fair trial, the court held that the denial of Rivera's peremptory challenge was not a structural error requiring automatic reversal. Nor, the court found, was the error harmless beyond a reasonable doubt. The court added that it did not need to decide whether the trial court's denial was "an error of constitutional dimension" in the circumstances of Rivera's case, a comment that appears to be related to Rivera's arguments that, even absent a freestanding constitutional entitlement to peremptory challenges, the inclusion of Gomez on his jury violated the Fourteenth Amendment's Due Process Clause.

Held: Provided that all jurors seated in a criminal case are qualified and unbiased, the Due Process Clause does not require automatic reversal of a conviction because of the trial court's good-faith error in denying the defendant's peremptory challenge to a juror. Pp. 156–162.

(a) Rivera maintains that due process requires reversal whenever a criminal defendant's peremptory challenge is erroneously denied. He asserts that a trial court that fails to dismiss a lawfully challenged juror commits structural error because the jury becomes an illegally constituted tribunal, whose verdict is *per se* invalid; that this is true even if the Constitution does not mandate peremptory challenges, since crimi-

nal defendants have a constitutionally protected liberty interest in their state-provided peremptory challenge rights; that the issue is not amenable to harmless-error analysis, as it is impossible to ascertain how a properly constituted jury would have decided his case; and that automatic reversal therefore must be the rule as a matter of federal law. Rivera's arguments do not withstand scrutiny. If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws. There is no freestanding constitutional right to peremptory challenges. See, *e. g.*, *United States* v. *Martinez-Salazar*, 528 U. S. 304, 311. They are "a creature of statute," *Ross* v. *Oklahoma*, 487 U. S. 81, 89, which a State may decline to offer at all, *Georgia* v. *McCollum*, 505 U. S. 42, 57. Thus, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. See, *e. g.*, *Engle* v. *Isaac*, 456 U. S. 107, 121, n. 21. The Due Process Clause safeguards not the meticulous observance of state procedural prescriptions, but "the fundamental elements of fairness in a criminal trial." *Spencer* v. *Texas*, 385 U. S. 554, 563–564. Pp. 156–158.

(b) The trial judge's refusal to excuse Gomez did not deprive Rivera of his constitutional right to a fair trial before an impartial jury. *Ross* is instructive. There, a criminal defendant used a peremptory challenge to rectify an Oklahoma trial court's erroneous denial of a for-cause challenge, leaving him with one fewer peremptory challenge to use at his discretion. Even though the trial court's error might "have resulted in a jury panel different from that which would otherwise have decided [Ross's] case," 487 U. S., at 87, because no member of the jury as finally composed was removable for cause, there was no violation of his Sixth Amendment right to an impartial jury or his Fourteenth Amendment right to due process, *id.*, at 86–91. This Court reached the same conclusion with regard to a federal-court trial in *Martinez-Salazar*, 528 U. S., at 316. Rivera's efforts to distinguish *Ross* and *Martinez-Salazar* are unavailing. First, although in contrast to Rivera, the *Ross* and *Martinez-Salazar* defendants did not challenge any of the jurors who were in fact seated, neither Gomez nor any other member of Rivera's jury was removable for cause. Thus, like the *Ross* and *Martinez-Salazar* juries, Rivera's jury was impartial for Sixth Amendment purposes. Rivera suggests that due process concerns persist because Gomez knew he did not want her on the panel, but this Court rejects the notion that a juror is constitutionally disqualified whenever she is aware of a challenge. Second, it is not constitutionally significant that, in contrast to *Ross* and *Martinez-Salazar*, the seating of Gomez over

Syllabus

Rivera's peremptory challenge was at odds with state law. Errors of state law do not automatically become violations of due process. As in *Ross* and *Martinez-Salazar*, there is no suggestion here that the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner. Rather, his conduct reflected a good-faith effort to enforce *Batson*'s antidiscrimination requirements. To hold that a one-time, good-faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a tradeoff. Pp. 158–160.

(c) Rivera errs in insisting that, even without a constitutional violation, the deprivation of a state-provided peremptory challenge requires reversal as a matter of federal law. He relies on a suggestion in *Swain* v. *Alabama*, 380 U. S. 202, 219, that "[t]he denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." This statement was disavowed in *Martinez-Salazar*, see 528 U. S., at 317, n. 4. Typically, an error is designated as "structural," therefore "requir[ing] automatic reversal," only when "the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " *Washington* v. *Recuenco*, 548 U. S. 212, 218–219. The mistaken denial of a state-provided peremptory challenge does not, in the circumstances here, constitute such an error. The automatic reversal precedents Rivera cites are inapposite. One set of cases involves *constitutional* errors concerning the qualification of the jury or judge. See, *e. g.*, *Batson*, 476 U. S., at 86, 87. A second set of cases involves circumstances in which federal judges or tribunals lacked statutory authority to adjudicate the controversy, resulting in a judgment invalid as a matter of federal law. See, *e. g.*, *Nguyen* v. *United States*, 539 U. S. 69. Nothing in those decisions suggests that federal law renders state-court judgments void whenever there is a state-law defect in a tribunal's composition. Absent a federal constitutional violation, States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se* or, as the Illinois Supreme Court implicitly held here, that the improper seating of a competent and unbiased juror could rank as a harmless error under state law. Pp. 160–162.

227 Ill. 2d 1, 879 N. E. 2d 876, affirmed.

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

James K. Leven argued the cause for petitioner. With him on the briefs were *Sarah O'Rourke Schrup*, *Robert N. Hochman*, and *Jeffrey T. Green*.

Michael A. Scodro, Solicitor General of Illinois, argued the cause for respondent. With him on the brief were *Lisa Madigan*, Attorney General, *Jane Elinor Notz*, Deputy Solicitor General, *Michael M. Glick* and *Karl R. Triebel*, Assistant Attorneys General, *Alan J. Spellberg*, and *Judy L. DeAngelis*.

Matthew D. Roberts argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Glavin*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the consequences of a state trial court's erroneous denial of a defendant's peremptory challenge to the seating of a juror in a criminal case. If all seated jurors

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*Briefs of *amici curiae* urging affirmance were filed for the State of Florida et al. by *Bill McCollum*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Courtney Brewer* and *Craig D. Feiser*, Deputy Solicitors General, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Steve Six* of Kansas, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Kelly A. Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *John R. Kroger* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William Sorrell* of Vermont, *Robert M. McKenna* of Washington, and *J. B. Van Hollen* of Wisconsin; for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for the National District Attorneys Association by *Linda T. Coberly* and *Gene C. Schaerr*.

Abigail K. Hemani, *Kevin P. Martin*, and *Barbara Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

are qualified and unbiased, does the Due Process Clause of the Fourteenth Amendment nonetheless require automatic reversal of the defendant's conviction?

Following a jury trial in an Illinois state court, defendant-petitioner Michael Rivera was convicted of first-degree murder and sentenced to a prison term of 85 years. On appeal, Rivera challenged the trial court's rejection of his peremptory challenge to venire member Deloris Gomez. Gomez sat on Rivera's jury and indeed served as the jury's foreperson. It is conceded that there was no basis to challenge Gomez for cause. She met the requirements for jury service, and Rivera does not contend that she was in fact biased against him. The Supreme Court of Illinois held that the peremptory challenge should have been allowed, but further held that the error was harmless and therefore did not warrant reversal of Rivera's conviction. We affirm the judgment of the Illinois Supreme Court.

The right to exercise peremptory challenges in state court is determined by state law. This Court has "long recognized" that "peremptory challenges are not of federal constitutional dimension." *United States* v. *Martinez-Salazar*, 528 U. S. 304, 311 (2000). States may withhold peremptory challenges "altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U. S. 42, 57 (1992). Just as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge. Accordingly, we have no cause to disturb the Illinois Supreme Court's determination that, in the circumstances Rivera's case presents, the trial court's error did not warrant reversal of his conviction.

I

Rivera was charged with first-degree murder in the Circuit Court of Cook County, Illinois. The State alleged that Rivera, who is Hispanic, shot and killed Marcus Lee, a 16-

year-old African-American, after mistaking Lee for a member of a rival gang.

During jury selection, Rivera's counsel questioned prospective juror Deloris Gomez, a business office supervisor at Cook County Hospital's outpatient orthopedic clinic. App. 32–33. Gomez stated that she sometimes interacted with patients during the check-in process and acknowledged that Cook County Hospital treats many gunshot victims. She maintained, however, that her work experience would not affect her ability to be impartial. After questioning Gomez, Rivera's counsel sought to use a peremptory challenge to excuse her. *Id.*, at 33. At that point in the jury's selection, Rivera had already used three peremptory challenges. Two of the three were exercised against women; one of the two women thus eliminated was African-American. Illinois law affords each side seven peremptory challenges. See Ill. Sup. Ct. Rule 434(d) (West 2006).

Rather than dismissing Gomez, the trial judge called counsel to chambers, where he expressed concern that the defense was discriminating against Gomez. App. 34–36. Under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), and later decisions building upon *Batson*, parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex. Without specifying the type of discrimination he suspected or the reasons for his concern, the judge directed Rivera's counsel to state his reasons for excusing Gomez. Counsel responded, first, that Gomez saw victims of violent crime on a daily basis. Counsel next added that he was "pulled in two different ways" because Gomez had "some kind of Hispanic connection given her name." App. 34. At that point, the judge interjected that Gomez "appears to be an African American"—the second "African American female" the defense had struck. *Id.*, at 34–35. Dissatisfied with counsel's proffered reasons, the judge denied the challenge to Gomez, but agreed to allow counsel to question Gomez further.

After asking Gomez additional questions about her work at the hospital, Rivera's counsel renewed his challenge. Counsel observed, outside the jury's presence, that most of the jurors already seated were women. Counsel said he hoped to "get some impact from possibly other men in the case." *Id.*, at 39. The court reaffirmed its earlier ruling, and Gomez was seated on the jury.

Rivera's case proceeded to trial. The jury, with Gomez as its foreperson, found Rivera guilty of first-degree murder. A divided panel of the Appellate Court of Illinois rejected Rivera's challenge to the trial judge's *Batson* ruling and affirmed his conviction. 348 Ill. App. 3d 168, 810 N. E. 2d 129 (2004).

The Supreme Court of Illinois accepted Rivera's petition for leave to appeal and remanded for further proceedings. 221 Ill. 2d 481, 852 N. E. 2d 771 (2006). A trial judge, the court held, may raise a *Batson* issue *sua sponte* only when there is a prima facie case of discrimination. Concluding that the record was insufficient to evaluate the existence of a prima facie case, the court instructed the trial judge to articulate the bases for his *Batson* ruling and, in particular, to clarify whether the alleged discrimination was on the basis of race, sex, or both. 221 Ill. 2d, at 515–516, 852 N. E. 2d, at 791.

On remand, the trial judge stated that prima facie evidence of sex discrimination—namely, counsel's two prior challenges to women and "the nature of [counsel's] questions"—had prompted him to raise the *Batson* issue. App. 136. Counsel's stated reasons for challenging Gomez, the judge reported, convinced him that "there had been a purposeful discrimination against Mrs. Gomez because of her gender." *Id.*, at 137.

The case then returned to the Illinois Supreme Court. Although that court disagreed with the trial judge's assessment, it affirmed Rivera's conviction. 227 Ill. 2d 1, 879 N. E.

2d 876 (2007). The Illinois High Court concluded "that the record fails to support a *prima facie* case of discrimination *of any kind.*" *Id.*, at 15, 879 N. E. 2d, at 884. Accordingly, the court determined, the trial judge erred, first in demanding an explanation from Rivera's counsel, and next, in denying Rivera's peremptory challenge of Gomez. *Ibid.*

Even so, the Illinois Supreme Court rejected Rivera's ultimate argument that the improper seating of Gomez ranked as "reversible error without a showing of prejudice." *Id.*, at 16, 879 N. E. 2d, at 885 (quoting *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965)). Citing this Court's guiding decisions, the Illinois court observed that "the Constitution does not confer a right to peremptory challenges." 227 Ill. 2d, at 17, 879 N. E. 2d, at 885 (quoting *Batson*, 476 U. S., at 91). Although "peremptory challenges are '*one* means of assuring the selection of a qualified and unbiased jury,'" the court explained, they are not "indispensable to a fair trial." 227 Ill. 2d, at 16, 879 N. E. 2d, at 885 (quoting *Batson*, 476 U. S., at 91).

Accordingly, the court held, the denial of Rivera's peremptory challenge did not qualify as a structural error requiring automatic reversal. See 227 Ill. 2d, at 19–20, 879 N. E. 2d, at 887 (citing *Washington* v. *Recuenco*, 548 U. S. 212, 218–219 (2006)). The court saw no indication that Rivera had been "tried before a biased jury, or even *one* biased juror." 227 Ill. 2d, at 20, 879 N. E. 2d, at 887. In that regard, the court stressed, Rivera did "not suggest that Gomez was subject to excusal for cause." *Ibid.*

Relying on both federal and state precedents, the court proceeded to consider whether it was "clear beyond a reasonable doubt that a rational jury would have found [Rivera] guilty absent the error." *Id.*, at 21, 879 N. E. 2d, at 887 (quoting *Neder* v. *United States*, 527 U. S. 1, 18 (1999)). After reviewing the trial record, the court concluded that Gomez's presence on the jury did not prejudice Rivera be-

cause "any rational trier of fact would have found [Rivera] guilty of murder on the evidence adduced at trial." 227 Ill. 2d, at 26, 879 N. E. 2d, at 890.

Having held the error harmless beyond a reasonable doubt, the court added that it "need not decide whether the erroneous denial of a peremptory challenge is an error of constitutional dimension in these circumstances." *Id.*, at 27, 879 N. E. 2d, at 891. This comment, it appears, related to Rivera's arguments that, even absent a freestanding constitutional entitlement to peremptory challenges, the inclusion of Gomez on his jury violated his Fourteenth Amendment right to due process of law.

We granted certiorari, 554 U. S. 945 (2008), to resolve an apparent conflict among state high courts over whether the erroneous denial of a peremptory challenge requires automatic reversal of a defendant's conviction as a matter of federal law. Compare *Angus* v. *State*, 695 N. W. 2d 109, 118 (Minn. 2005) (applying automatic reversal rule); *State* v. *Vreen*, 143 Wash. 2d 923, 927–932, 26 P. 3d 236, 238–240 (2001) (same), with *People* v. *Bell*, 473 Mich. 275, 292–299, 702 N. W. 2d 128, 138–141 (2005) (rejecting automatic reversal rule and looking to state law to determine the consequences of an erroneous denial of a peremptory challenge); 227 Ill. 2d, at 15–27, 879 N. E. 2d, at 884–891 (case below). We now affirm the judgment of the Supreme Court of Illinois.

II

The Due Process Clause of the Fourteenth Amendment, Rivera maintains, requires reversal whenever a criminal defendant's peremptory challenge is erroneously denied. Rivera recalls the ancient lineage of the peremptory challenge and observes that the challenge has long been lauded as a means to guard against latent bias and to secure "the constitutional end of an impartial jury and a fair trial." *McCollum*, 505 U. S., at 57. When a trial court fails to dismiss a lawfully challenged juror, Rivera asserts, it commits struc-

tural error: The jury becomes an illegally constituted tribunal, and any verdict it renders is *per se* invalid. According to Rivera, this holds true even if the Constitution does not itself mandate peremptory challenges, because criminal defendants have a constitutionally protected liberty interest in their state-provided peremptory challenge rights. Cf. *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985) (although "the Constitution does not require States to grant appeals as of right to criminal defendants," States that provide such appeals "must comport with the demands of the Due Process and Equal Protection Clauses").

The improper seating of a juror, Rivera insists, is not amenable to harmless-error analysis because it is impossible to ascertain how a properly constituted jury—here, one without juror Gomez—would have decided his case. Thus, he urges, whatever the constitutional status of peremptory challenges, automatic reversal must be the rule as a matter of federal law.

Rivera's arguments do not withstand scrutiny. If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.

As Rivera acknowledges, Brief for Petitioner 38, this Court has consistently held that there is no freestanding constitutional right to peremptory challenges. See, *e. g.*, *Martinez-Salazar*, 528 U. S., at 311. We have characterized peremptory challenges as "a creature of statute," *Ross* v. *Oklahoma*, 487 U. S. 81, 89 (1988), and have made clear that a State may decline to offer them at all, *McCollum*, 505 U. S., at 57. See also *Holland* v. *Illinois*, 493 U. S. 474, 482 (1990) (dismissing the notion "that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges"). When States provide peremptory challenges (as all do in some form), they confer a benefit "beyond the minimum require-

ments of fair [jury] selection," *Frazier* v. *United States*, 335 U. S. 497, 506 (1948), and thus retain discretion to design and implement their own systems, *Ross*, 487 U. S., at 89.[1]

Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. "[A] mere error of state law," we have noted, "is not a denial of due process." *Engle* v. *Isaac*, 456 U. S. 107, 121, n. 21 (1982) (internal quotation marks omitted). See also *Estelle* v. *McGuire*, 502 U. S. 62, 67, 72–73 (1991). The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but "the fundamental elements of fairness in a criminal trial." *Spencer* v. *Texas*, 385 U. S. 554, 563–564 (1967).

The trial judge's refusal to excuse juror Gomez did not deprive Rivera of his constitutional right to a fair trial before an impartial jury. Our decision in *Ross* is instructive. Ross, a criminal defendant in Oklahoma, used a peremptory challenge to rectify the trial court's erroneous denial of a for-cause challenge, leaving him with one fewer peremptory challenge to use at his discretion. The trial court's error, we acknowledged, "may have resulted in a jury panel different from that which would otherwise have decided [Ross's] case." 487 U. S., at 87. But because no member of the jury as finally composed was removable for cause, we found no violation of Ross's Sixth Amendment right to an impartial jury or his Fourteenth Amendment right to due process. *Id.*, at 86–91.

We encountered a similar situation in *Martinez-Salazar* and reached the same conclusion. Martinez-Salazar, who was tried in federal court, was entitled to exercise peremp-

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[1] See Dept. of Justice, Bureau of Justice Statistics, State Court Organization 2004, pp. 228–232 (2006) (Table 41), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf (as visited Mar. 27, 2009, and in Clerk of Court's case file) (detailing peremptory challenge rules by State).

tory challenges pursuant to Federal Rule of Criminal Procedure 24(b). His decision to use one of his peremptory challenges to cure the trial court's erroneous denial of a for-cause challenge, we held, did not impair his rights under that Rule. "[A] principal reason for peremptories," we explained, is "to help secure the constitutional guarantee of trial by an impartial jury." 528 U. S., at 316. Having "received precisely what federal law provided," and having been tried "by a jury on which no biased juror sat," Martinez-Salazar could not "tenably assert any violation of his . . . right to due process." *Id.*, at 307, 317.

Rivera's efforts to distinguish *Ross* and *Martinez-Salazar* are unavailing. First, Rivera observes, the defendants in *Ross* and *Martinez-Salazar* did not challenge any of the jurors who were in fact seated. In contrast, Rivera attempted to exercise a peremptory challenge against a specific person—Gomez—whom he perceived to be unfavorable to his cause. But, as Rivera recognizes, neither Gomez nor any other member of his jury was removable for cause. See Tr. of Oral Arg. 9. Thus, like the juries in *Ross* and *Martinez-Salazar*, Rivera's jury was impartial for Sixth Amendment purposes. Rivera suggests that due process concerns persist because Gomez knew he did not want her on the panel. Gomez, however, was not privy to the *in camera* discussions concerning Rivera's attempt to exercise a peremptory strike against her. See *supra*, at 153. We reject the notion that a juror is constitutionally disqualified whenever she is aware that a party has challenged her. Were the rule otherwise, a party could circumvent *Batson* by insisting in open court that a trial court dismiss a juror even though the party's peremptory challenge was discriminatory. Or a party could obtain a juror's dismissal simply by making in her presence a baseless for-cause challenge. Due process does not require such counterintuitive results.

Second, it is not constitutionally significant that the seating of Gomez over Rivera's peremptory challenge was at

odds with state law. The defendants in *Ross* and *Martinez-Salazar*, Rivera emphasizes, were not denied their peremptory challenge rights under applicable law—state law in *Ross* and the Federal Rules of Criminal Procedure in *Martinez-Salazar*. But as we have already explained, *supra*, at 157–159, errors of state law do not automatically become violations of due process. As in *Ross* and *Martinez-Salazar*, there is no suggestion here that the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner. *Martinez-Salazar*, 528 U. S., at 316; *Ross*, 487 U. S., at 91, n. 5. Rather, the trial judge's conduct reflected a good-faith, if arguably overzealous, effort to enforce the antidiscrimination requirements of our *Batson*-related precedents. To hold that a one-time, good-faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a tradeoff.

Rivera insists that, even without a constitutional violation, the deprivation of a state-provided peremptory challenge requires reversal as a matter of federal law. We disagree. Rivera relies in part on *Swain*, 380 U. S. 202, which suggested that "[t]he denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." *Id.*, at 219. We disavowed this statement in *Martinez-Salazar*, observing, albeit in dicta, "that the oft-quoted language in *Swain* was not only unnecessary to the decision in that case . . . but was founded on a series of our early cases decided long before the adoption of harmless-error review." 528 U. S., at 317, n. 4. As our recent decisions make clear, we typically designate an error as "structural," therefore "requir[ing] automatic reversal," only when "the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " *Recuenco*, 548 U. S., at 218–219 (quoting

Neder, 527 U. S., at 9). The mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character.

The automatic reversal precedents Rivera cites are inapposite. One set of cases involves *constitutional* errors concerning the qualification of the jury or judge. In *Batson*, for example, we held that the unlawful exclusion of jurors based on race requires reversal because it "violates a defendant's right to equal protection," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice." 476 U. S., at 86, 87. Similarly, dismissal of a juror in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968),[2] we have held, is constitutional error that requires vacation of a death sentence. See *Gray* v. *Mississippi*, 481 U. S. 648 (1987). See also *Gomez* v. *United States*, 490 U. S. 858, 876 (1989) ("Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." (internal quotation marks omitted)).

A second set of cases involves circumstances in which federal judges or tribunals lacked statutory authority to adjudicate the controversy. We have held the resulting judgment in such cases invalid as a matter of federal law. See, *e. g.*, *Nguyen* v. *United States*, 539 U. S. 69 (2003); *Wingo* v. *Wedding*, 418 U. S. 461 (1974). Nothing in these decisions suggests that federal law renders state-court judgments void whenever there is a state-law defect in a tribunal's composition. Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tri-

[2] Under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, at 522.

bunal of its lawful authority and thus require automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*. Or they may conclude, as the Supreme Court of Illinois implicitly did here, that the improper seating of a competent and unbiased juror does not convert the jury into an ultra vires tribunal; therefore the error could rank as harmless under state law.

In sum, Rivera received precisely what due process required: a fair trial before an impartial and properly instructed jury, which found him guilty of every element of the charged offense.

* * *

For the reasons stated, the judgment of the Supreme Court of Illinois is

Affirmed.

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HAWAII ET AL. *v.* OFFICE OF HAWAIIAN AFFAIRS ET AL.

CERTIORARI TO THE SUPREME COURT OF HAWAII

No. 07–1372. Argued February 25, 2009—Decided March 31, 2009

After the overthrow of the Hawaiian monarchy in 1893, Congress annexed the Territory of Hawaii pursuant to the Newlands Resolution, under which Hawaii ceded to the United States the "absolute fee" and ownership of all public, government, and crown lands. In 1959, the Admission Act made Hawaii a State, granting it "all the public lands . . . held by the United States," § 5(b), and requiring these lands, "together with the proceeds from [their] sale . . . , [to] be held by [the] State as a public trust," § 5(f). Hawaii state law also authorizes the State to use or sell the ceded lands, provided the proceeds are held in trust for Hawaiian citizens. In 1993, Congress' joint Apology Resolution "apologize[d]" for this country's role in overthrowing the Hawaiian monarchy, § 1, and declared that nothing in the resolution was "intended to serve as a settlement of any claims against the United States," § 3.

The "Leiali'i parcel," a Maui tract of former crown land, was ceded to the United States at annexation and has been held by the State since 1959 as part of the Admission Act § 5(f) trust. Hawaii's affordable housing agency (HFDC) received approval to remove the parcel from the trust and redevelop it upon compensating respondent Office of Hawaiian Affairs (OHA), which manages funds from the use or sale of ceded lands for the benefit of native Hawaiians. After HFDC refused OHA's demand that the payment include a disclaimer preserving any native Hawaiian claims to lands transferred from the trust for redevelopment, respondents sued to enjoin the sale or transfer of the Leiali'i parcel and any other of the ceded lands until final determination of native Hawaiians' claims. The state trial court entered judgment against respondents, but the Hawaiian Supreme Court vacated that ruling. Relying on the Apology Resolution, the court granted the injunction that respondents requested, rejecting petitioners' argument that the Admission Act and state law give the State explicit power to sell ceded lands.

Held:

1. This Court has jurisdiction. Respondents argue to no avail that the case does not raise a federal question because the State Supreme Court merely held that the sale of ceded lands would constitute a breach of the State's fiduciary duty to native Hawaiians under state law. The

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Court has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Michigan* v. *Long*, 463 U. S. 1032, 1040. Far from providing a plain statement that its decision rested on state law, the state court plainly held that the decision was dictated by federal law, particularly the Apology Resolution. Pp. 171–172.

2. The Apology Resolution did not strip Hawaii of its sovereign authority to alienate the lands the United States held in absolute fee and granted to the State upon its admission to the Union. Pp. 172–177.

(a) Neither of the resolution's substantive provisions justifies the judgment below. The first such provision's six verbs—*i. e.*, Congress "acknowledge[d] the historical significance" of the monarchy's overthrow, "recognize[d] and commend[ed] efforts of reconciliation" with native Hawaiians, "apologize[d] to [them]" for the overthrow, "expresse[d] [the] commitment to acknowledge [the overthrow's] ramifications," and "urge[d] the President . . . to also acknowledge [those] ramifications," § 1—are all conciliatory or precatory. This is not the kind of language Congress uses to create substantive rights, especially rights enforceable against the cosovereign States. See, *e. g.*, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17–18. The resolution's second substantive provision, the § 3 disclaimer, by its terms speaks only to those who may or may not have "claims against the United States." The State Supreme Court, however, read § 3 as a congressional recognition—and preservation—of claims *against Hawaii*. There is no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another. Pp. 173–174.

(b) The State Supreme Court's conclusion that the 37 "whereas" clauses prefacing the Apology Resolution clearly recognize native Hawaiians' "unrelinquished" claims over the ceded lands is wrong for at least three reasons. First, such "whereas" clauses cannot bear the weight that the lower court placed on them. See, *e. g.*, *District of Columbia* v. *Heller*, 554 U. S. 570, 578, n. 3. Second, even if the clauses had some legal effect, they did not restructure Hawaii's rights and obligations, as the lower court found. "[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 662. The Apology Resolution reveals no such intention, much less a clear and manifest one. Third, because the resolution would raise grave constitutional concerns if it purported to "cloud" Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union, see, *e. g.*, *Idaho* v. *United States*, 533 U. S. 262, 280, n. 9, the Court refuses to read the

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nonsubstantive "whereas" clauses to create such a "cloud" retroactively, see, *e. g., Clark* v. *Martinez*, 543 U. S. 371, 381–382. Pp. 175–177.

117 Haw. 174, 177 P. 3d 884, reversed and remanded.

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

Mark J. Bennett, Attorney General of Hawaii, argued the cause for petitioners. With him on the briefs were *Lisa M. Ginoza*, First Deputy Attorney General, *Dorothy Sellers*, Solicitor General, *William J. Wynhoff*, Deputy Attorney General, *Seth P. Waxman*, *Jonathan E. Nuechterlein*, and *Jonathan G. Cedarbaum*.

William M. Jay argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were former *Solicitor General Garre*, *Assistant Attorney General Tenpas*, then-*Deputy Solicitor General Joseffer*, *Deputy Solicitor General Kneedler*, *David C. Shilton*, and *John Emad Arbab*.

Kannon K. Shanmugam argued the cause for respondents. With him on the brief were *Anna-Rose Mathieson*, *Kimberly D. Perrotta*, *Sherry P. Broder*, *Jon M. Van Dyke*, *Melody K. MacKenzie*, *William Meheula*, and *Hayden Aluli*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Robert M. McKenna*, Attorney General of Washington, *Maureen A. Hart*, Solicitor General, and *Jay D. Geck*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Talis J. Coldberg* of Alaska, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Kelly A. Ayotte* of New Hampshire, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Nancy H. Rogers* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff*

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether Congress stripped the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution to apologize for the role that the United States played in overthrowing the Hawaiian monarchy in the late 19th century. Relying on Congress' joint resolution, the Supreme Court of Hawaii permanently enjoined the State from alienating certain of its lands, pending resolution of native Hawaiians' land claims that the court described as "unrelinquished." We reverse.

I

A

In 1893, "[a] so-called Committee of Safety, a group of professionals and businessmen, with the active assistance of

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of Utah, *William H. Sorrell* of Vermont, and *Bruce A. Salzburg* of Wyoming; for the Commissioner of Public Lands for the State of New Mexico by *Turner W. Branch;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso*, *John C. Eastman*, and *Edwin Meese III;* for the Grassroot Institute of Hawaii et al. by *H. William Burgess* and *Shannon Lee Goessling;* for the Mountain States Legal Foundation by *J. Scott Detamore* and *William Perry Pendley;* and for the Pacific Legal Foundation et al. by *John H. Findley*, *Robert H. Thomas*, and *Ilya Shapiro*.

Briefs of *amici curiae* urging affirmance were filed for the Equal Justice Society et al. by *Eric K. Yamamoto;* for the National Congress of American Indians by *Beth S. Brinkmann*, *Brian R. Matsui*, *John E. Echohawk*, and *Kim Jerome Gottschalk;* for the Native Hawaiian Legal Corp. et al. by *Catherine E. Stetson* and *Jessica L. Ellsworth;* for Abigail Kinoiki Kekaulike Kawananakoa by *George W. Van Buren;* and for Samuel L. Kealoha, Jr., et al. by *Walter R. Schoettle* and *Emmett E. Lee Loy*.

Briefs of *amici curiae* were filed for the Alaska Federation of Natives, Inc., by *David S. Case*, *Carol H. Daniel*, and *Riyaz Kanji;* for the Asian American Justice Center et al. by *Jonathan M. Cohen*, *Mark A. Packman*, *Karen Narasaki*, and *Vincent Eng;* for Current and Former Hawaii State Officials by *Virginia A. Seitz* and *Sarah O'Rouke Schrup;* for the Hawai'i Congressional Delegation by *Sri Srinivasan;* and for the Sovereign Councils of the Hawaiian Homelands Assembly et al. by *Charles Rothfeld*, *Andrew J. Pincus*, and *Thomas W. Merrill*.

John Stevens, the United States Minister to Hawaii, acting with the United States Armed Forces, replaced the [Hawaiian] monarchy with a provisional government." *Rice* v. *Cayetano*, 528 U. S. 495, 504–505 (2000). "That government sought annexation by the United States," *id.*, at 505, which the United States granted, see Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, No. 55, 30 Stat. 750 (hereinafter Newlands Resolution). Pursuant to the Newlands Resolution, the Republic of Hawaii "cede[d] absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind" and further "cede[d] and transfer[red] to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining" (hereinafter ceded lands).[1] *Ibid.* The Newlands Resolution further provided that all "property and rights" in the ceded lands "are vested in the United States of America." *Ibid.*

Two years later, Congress established a government for the Territory of Hawaii. See Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 (hereinafter Organic Act). The Organic Act reiterated the Newlands Resolution and made clear that the new Territory consisted of the land that the United States acquired in "absolute fee" under that resolution. See § 2, *ibid.* The Organic Act further provided:

> "[T]he portion of the public domain heretofore known as Crown land is hereby declared to have been, on [the effective date of the Newlands Resolution], and prior thereto, the property of the Hawaiian government, and

[1] "Crown lands" were lands formerly held by the Hawaiian monarchy. "Public" and "Government" lands were other lands held by the Hawaiian government.

> to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law." § 99, *id.*, at 161; see also § 91, *id.*, at 159.

In 1959, Congress admitted Hawaii to the Union. See Pub. L. 86–3, 73 Stat. 4 (hereinafter Admission Act). Under the Admission Act, with exceptions not relevant here, "the United States grant[ed] to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union." § 5(b), *id.*, at 5. These lands, "together with the proceeds from the sale or other disposition of [these] lands and the income therefrom, shall be held by [the] State as a public trust" to promote various public purposes, including supporting public education, bettering conditions of native Hawaiians, developing home ownership, making public improvements, and providing lands for public use. § 5(f), *id.*, at 6. Hawaii state law also authorizes the State to use or sell the ceded lands, provided that the proceeds are held in trust for the benefit of the citizens of Hawaii. See, *e. g.*, Haw. Rev. Stat. §§ 171–45, 171–18 (1993).

In 1993, Congress enacted a joint resolution "to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103–150, 107 Stat. 1513 (hereinafter Apology Resolution). In a series of the preambular "whereas" clauses, Congress made various observations about Hawaii's history. For example, the Apology Resolution states that "the indigenous Hawaiian people never di-

rectly relinquished their claims . . . over their national lands to the United States" and that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land." *Id.*, at 1512. In the same vein, the Apology Resolution's only substantive section—entitled "Acknowledgement and Apology"—states that Congress:

> "(1) . . . acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;
>
> "(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;
>
> "(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;
>
> "(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and
>
> "(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people." *Id.*, at 1513.

Finally, § 3 of the Apology Resolution states that "[n]othing in this Joint Resolution is intended to serve as a settlement of any claims against the United States." *Id.*, at 1514.

B

This suit involves a tract of former crown land on Maui, now known as the "Leiali'i parcel," that was ceded in "abso-

lute fee" to the United States at annexation and has been held by the State since 1959 as part of the trust established by § 5(f) of the Admission Act. The Housing Finance and Development Corporation (HFDC)—Hawaii's affordable housing agency—received approval to remove the Leiali'i parcel from the § 5(f) trust and redevelop it. In order to transfer the Leiali'i parcel out of the public trust, HFDC was required to compensate respondent Office of Hawaiian Affairs (OHA), which was established to receive and manage funds from the use or sale of the ceded lands for the benefit of native Hawaiians. Haw. Const., Art. XII, §§ 4–6.

In this case, however, OHA demanded more than monetary compensation. Relying on the Apology Resolution, respondent OHA demanded that HFDC include a disclaimer preserving any native Hawaiian claims to ownership of lands transferred from the public trust for redevelopment. HFDC declined to include the requested disclaimer because "to do so would place a cloud on title, rendering title insurance unavailable." App. to Pet. for Cert. 207a.

Again relying on the Apology Resolution, respondents then sued the State, its Governor, HFDC (since renamed), and its officials. Respondents sought "to enjoin the defendants from selling or otherwise transferring the Leiali'i parcel to third parties and selling or otherwise transferring to third parties any of the ceded lands in general until a determination of the native Hawaiians' claims to the ceded lands is made." *Office of Hawaiian Affairs* v. *Housing and Community Development Corporation of Hawaii*, 117 Haw. 174, 189, 177 P. 3d 884, 899 (2008). Respondents "alleged that an injunction was proper because, in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust . . . ." *Id.*, at 188, 177 P. 3d, at 898.

The state trial court entered judgment against respondents, but the Supreme Court of Hawaii vacated the lower court's ruling. Relying on a "plain reading of the Apology

Resolution," which "dictate[d]" its conclusion, *id.*, at 212, 177 P. 3d, at 922, the State Supreme Court ordered "an injunction against the defendants from selling or otherwise transferring to third parties (1) the Leiali'i parcel and (2) any other ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved," *id.*, at 218, 177 P. 3d, at 928. In doing so, the court rejected petitioners' argument that "the State has the undoubted and explicit power to sell ceded lands pursuant to the terms of the Admission Act and pursuant to state law." *Id.*, at 211, 177 P. 3d, at 921 (internal quotation marks and alterations omitted). We granted certiorari. 554 U. S. 944 (2008).

II

Before turning to the merits, we first must address our jurisdiction. According to respondents, the Supreme Court of Hawaii "merely held that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians *under state law.*" Brief for Respondents 17. Because respondents believe that this case does not raise a federal question, they urge us to dismiss for lack of jurisdiction.

Although respondents dwell at length on that argument, see *id.*, at 19–34, we need not tarry long to reject it. This Court has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983). Far from providing a "plain statement" that its decision rested on state law, *id.*, at 1041, the State Supreme Court plainly held that its decision was "dictate[d]" by federal law—in particular, the Apology Resolution, see 117 Haw., at 212, 177 P. 3d, at 922. Indeed, the court explained that the Apology Resolution lies "[a]t the heart of [respondents'] claims," that respondents' "current claim for

injunctive relief is . . . based largely upon the Apology Resolution," and that respondents' arguments presuppose that the Apology Resolution "changed the legal landscape and restructured the rights and obligations of the State." *Id.*, at 189–190, 177 P. 3d, at 899–900 (internal quotation marks omitted). The court noted that "[t]he primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction*" against sale of the trust lands, *id.*, at 210, 177 P. 3d, at 920, and it concluded, "[b]ased on a plain reading" of the Apology Resolution, that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands," *id.*, at 191, 177 P. 3d, at 901.

Based on these and the remainder of the State Supreme Court's 77 references to the Apology Resolution, we have no doubt that the decision below rested on federal law.[2] We are therefore satisfied that this Court has jurisdiction. See 28 U. S. C. § 1257.

III

Turning to the merits, we must decide whether the Apology Resolution "strips Hawaii of its sovereign authority to sell, exchange, or transfer," Pet. for Cert. i, the lands that the United States held in "absolute fee," 30 Stat. 750, and "grant[ed] to the State of Hawaii, effective upon its admission into the Union," 73 Stat. 5. We conclude that the Apology Resolution has no such effect.

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[2] Respondents argue that the Supreme Court of Hawaii relied on the Apology Resolution "simply to support its factual determination that Native Hawaiians have unresolved claims to the ceded lands." Brief for Respondents 21. Regardless of its factual determinations, however, the lower court's *legal* conclusions were, at the very least, "interwoven with the federal law." *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983). See 117 Haw. 174, 217, 218, 177 P. 3d 884, 927, 928 (2008) ("hold[ing]" that respondents' legal claim "arose" only when "the Apology Resolution was signed into law on November 23, 1993"); *id.*, at 211, n. 25, 177 P. 3d, at 921, n. 25 (emphasizing that "our holding is grounded in Hawai'i and federal law"). See also n. 4, *infra*.

A

"We begin, as always, with the text of the statute." *Permanent Mission of India to United Nations* v. *City of New York*, 551 U. S. 193, 197 (2007). The Apology Resolution contains two substantive provisions. See 107 Stat. 1513–1514. Neither justifies the judgment below.

The Apology Resolution's first substantive provision uses six verbs, all of which are conciliatory or precatory. Specifically, Congress "acknowledge[d] the historical significance" of the Hawaiian monarchy's overthrow, "recognize[d] and commend[ed] efforts of reconciliation" with native Hawaiians, "apologize[d] to [n]ative Hawaiians" for the monarchy's overthrow, "expresse[d] [Congress'] commitment to acknowledge the ramifications of the overthrow," and "urge[d] the President of the United States to also acknowledge the ramifications of the overthrow . . . ." § 1. Such terms are not the kind that Congress uses to create substantive rights—especially those that are enforceable against the cosovereign States. See, *e. g.*, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17–18 (1981).[3]

The Apology Resolution's second and final substantive provision is a disclaimer, which provides: "Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States." § 3. By its terms, § 3 speaks only to those who may or may not have "claims *against the United States*." The court below, however, held that the

[3] The Apology Resolution's operative provisions thus stand in sharp contrast with those of other "apologies," which Congress intended to have substantive effect. See, *e. g.*, Civil Liberties Act of 1988, 102 Stat. 903, 50 U. S. C. App. § 1989 (2000 ed.) (acknowledging and apologizing "for the evacuation, relocation and internment" of Japanese citizens during World War II and providing $20,000 in restitution to each eligible individual); Radiation Exposure Compensation Act, 104 Stat. 920, notes following 42 U. S. C. § 2210 (2000 ed. and Supp. V) ("apologiz[ing] on behalf of the Nation . . . for the hardships" endured by those exposed to radiation from above-ground nuclear testing facilities and providing $100,000 in compensation to each eligible individual).

only way to save § 3 from superfluity is to construe it as a congressional recognition—and preservation—of claims *against Hawaii* and as "the *foundation* (or starting point) for reconciliation" between the State and native Hawaiians. 117 Haw., at 192, 177 P. 3d, at 902.

"We must have regard to all the words used by Congress, and as far as possible give effect to them," *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 475 (1911), but that maxim is not a judicial license to turn an irrelevant statutory provision into a relevant one. And we know of no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another.[4] Cf. *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U. S. 438, 457 (2009) ("Two wrong claims do not make one that is right"). The Supreme Court of Hawaii erred in reading § 3 as recognizing claims inconsistent with the title held in "absolute fee" by the United States, 30 Stat. 750, and conveyed to the State of Hawaii at statehood. See *supra*, at 167–168.

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[4] The court below held that respondents "prevailed on the merits" by showing that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations." 117 Haw., at 212, 177 P. 3d, at 922. And it further held that petitioners failed to show that the State has the "power to sell ceded lands pursuant to the terms of the Admission Act." *Id.*, at 211, 177 P. 3d, at 921 (internal quotation marks and alterations omitted). Respondents now insist, however, that their claims are "nonjusticiable" to the extent that they are grounded on "broader moral and political" bases. Brief for Respondents 18. No matter how respondents characterize their claims, it is undeniable that they have asserted title to the ceded lands throughout this litigation, see *id.*, at 40, n. 15 (conceding the point), and it is undeniable that the Supreme Court of Hawaii relied on those claims in issuing an injunction, which is a legal (and hence justiciable) remedy—not a moral, political, or nonjusticiable one.

B

Rather than focusing on the operative words of the law, the court below directed its attention to the 37 "whereas" clauses that preface the Apology Resolution. See 107 Stat. 1510–1513. "Based on a plain reading of" the "whereas" clauses, the Supreme Court of Hawaii held that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands." 117 Haw., at 191, 177 P. 3d, at 901. That conclusion is wrong for at least three reasons.

First, "whereas" clauses like those in the Apology Resolution cannot bear the weight that the lower court placed on them. As we recently explained in a different context, "where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation . . . , a court has no license to make it do what it was not designed to do." *District of Columbia* v. *Heller*, 554 U. S. 570, 578, n. 3 (2008). See also *Yazoo & Mississippi Valley R. Co.* v. *Thomas*, 132 U. S. 174, 188 (1889) ("[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up").

Second, even if the "whereas" clauses had some legal effect, they did not "chang[e] the legal landscape and restructur[e] the rights and obligations of the State." 117 Haw., at 190, 177 P. 3d, at 900. As we have emphasized, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 662 (2007) (internal quotation marks omitted). The Apology Resolution reveals no indication—much less a "clear and manifest" one—that Congress intended to amend or repeal the State's rights and obligations

under the Admission Act (or any other federal law); nor does the Apology Resolution reveal any evidence that Congress intended *sub silentio* to "cloud" the title that the United States held in "absolute fee" and transferred to the State in 1959. On that score, we find it telling that even respondent OHA has now abandoned its argument, made below, that "Congress . . . enacted the Apology Resolution and thus . . . change[d]" the Admission Act. App. 114a; see also Tr. of Oral Arg. 31, 37–38.

Third, the Apology Resolution would raise grave constitutional concerns if it purported to "cloud" Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union. We have emphasized that "Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State." *Idaho* v. *United States,* 533 U. S. 262, 280, n. 9 (2001) (internal quotation marks and alteration omitted); see also *id.*, at 284 (Rehnquist, C. J., dissenting) ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed"). And that proposition applies *a fortiori* where virtually all of the State's public lands—not just its submerged ones—are at stake. In light of those concerns, we must not read the Apology Resolution's nonsubstantive "whereas" clauses to create a retroactive "cloud" on the title that Congress granted to the State of Hawaii in 1959. See, *e. g.*, *Clark* v. *Martinez,* 543 U. S. 371, 381–382 (2005) (the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

* * *

When a state supreme court incorrectly bases a decision on federal law, the court's decision improperly prevents the

citizens of the State from addressing the issue in question through the processes provided by the State's constitution. Here, the State Supreme Court incorrectly held that Congress, by adopting the Apology Resolution, took away from the citizens of Hawaii the authority to resolve an issue that is of great importance to the people of the State. Respondents defend that decision by arguing that they have both state-law property rights in the land in question and "broader moral and political claims for compensation for the wrongs of the past." Brief for Respondents 18. But we have no authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law. The judgment of the Supreme Court of Hawaii is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

PHILIP MORRIS USA INC. *v.* WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAMS, DECEASED

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 07–1216. Argued December 3, 2008—Decided March 31, 2009
Certiorari dismissed. Reported below: 344 Ore. 45, 176 P. 3d 1255.

Stephen M. Shapiro argued the cause for petitioner. With him on the briefs were *Andrew L. Frey*, *Andrew H. Schapiro*, *Lauren R. Goldman*, *Kenneth S. Geller*, *Miguel A. Estrada*, *Theodore J. Boutrous, Jr.*, *David J. Debold*, *Kenneth S. Geller*, *William F. Gary*, and *Sharon A. Rudnick*.

Robert S. Peck argued the cause for respondent. With him on the brief were *James S. Coon*, *Raymond F. Thomas*, *William A. Gaylord*, *Charles S. Tauman*, *Maureen Leonard*, and *Kathryn H. Clarke*.*

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*Briefs of *amici curiae* urging reversal were filed for Associated Oregon Industries et al. by *Thomas W. Brown* and *Joel S. DeVore;* for the Chamber of Commerce of the United States of America by *Jonathan D. Hacker*, *Irving L. Gornstein*, *Robin S. Conrad*, and *Amar D. Sarwal;* for the National Association of Manufacturers by *Francis R. Ortiz*, *Jan S. Amundson*, and *Quentin Riegel;* for the National Association of Mutual Insurance Companies by *Sheila L. Birnbaum*, *Douglas W. Dunham*, and *Ellen P. Quackenbos;* for the Pacific Legal Foundation by *Timothy Sandefur* and *Deborah J. La Fetra;* and for the Washington Legal Foundation et al. by *Arvin Maskin*, *Konrad Cailteux*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for Federal Procedure Scholars by *Erwin Chemerinsky;* for Public Justice, P. C., et al. by *Elizabeth J. Cabraser* and *Steven E. Fineman;* and for the Oregon Trial Lawyers Association by *Meagan A. Flynn*.

Briefs of *amici curiae* were filed for the State of Oregon et al. by *Hardy Myers*, Attorney General of Oregon, *Peter Shepherd*, Deputy Attorney General, *Mary H. Williams*, Solicitor General, and *Janet A. Metcalf*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Joseph R. Biden III* of Delaware, *Douglas F. Gansler* of Maryland, *Jim Hood* of Mississippi, *Gary King* of New Mexico,

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

Henry D. McMaster of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, and *Bruce A. Salzburg* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for Retired Oregon Supreme Court Justice Susan M. Leeson et al. by *Scott A. Shorr* and *Robert K. Udziela.*

Syllabus

HARBISON *v.* BELL, WARDEN

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

No. 07–8521. Argued January 12, 2009—Decided April 1, 2009

After the Tennessee state courts rejected petitioner Harbison's conviction and death sentence challenges, the Federal District Court appointed a federal public defender to represent him in filing a habeas petition under 28 U. S. C. § 2254. That petition was denied. Harbison then sought appointment of counsel for state clemency proceedings. Because Tennessee law no longer authorizes the appointment of state public defenders as clemency counsel, his federal counsel moved to expand the scope of her representation to include the state proceedings. In denying the motion, the District Court relied on Circuit precedent construing 18 U. S. C. § 3599, which provides for the appointment of federal counsel. The Sixth Circuit affirmed.

Held:

1. A certificate of appealability pursuant to 28 U. S. C. § 2253(c)(1)(A) is not required to appeal an order denying a request for federally appointed counsel under § 3599 because § 2253(c)(1)(A) governs only final orders that dispose of a habeas corpus proceeding's merits. P. 183.

2. Section 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation. Pp. 183–194.

(a) Section 3599(a)(2), which refers to both § 2254 and § 2255 proceedings, triggers the appointment of counsel for both state and federal postconviction litigants, and § 3599(e) governs the scope of appointed counsel's duties. Thus, federally funded counsel appointed to represent a state prisoner in § 2254 proceedings "shall also represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant." § 3599(e). Because state clemency proceedings are "available" to state petitioners who obtain subsection (a)(2) representation, the statute's plain language indicates that appointed counsel's authorized representation includes such proceedings. Moreover, subsection (e)'s reference to "proceedings for . . . other clemency" refers to state proceedings, as federal clemency is exclusively executive, while States administer clemency in various ways. The Government is correct that appointed counsel is not expected to provide each service enumerated in subsection (e) for every client. Rather, counsel's representation includes only those judicial proceedings transpiring "subse-

quent" to her appointment, which under subsection (a)(2) begins with the § 2254 or § 2255 "post-conviction process." Pp. 183–188.

(b) The Government's attempts to overcome § 3599's plain language are not persuasive. First, this Court's reading of the statute does not produce absurd results. Contrary to the Government's contention, a lawyer is not required to represent her client during a state retrial following postconviction relief because the retrial marks the commencement of new judicial proceedings, not a subsequent stage of existing proceedings; state postconviction proceedings are also not "subsequent" to federal habeas proceedings. Second, the legislative history does not support the Government's argument that Congress intended § 3599 to apply only to federal defendants. Congress' decision to furnish counsel for state clemency proceedings reflects both clemency's role as the " 'fail safe' of our criminal justice system," *Herrera* v. *Collins*, 506 U. S. 390, 415, and the fact that federal habeas counsel are well positioned to represent their clients in clemency proceedings. Pp. 188–194.

503 F. 3d 566, reversed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., *post*, p. 194, and THOMAS, J., *post*, p. 196, filed opinions concurring in the judgment. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which ALITO, J., joined, *post*, p. 200.

Dana C. Hansen Chavis argued the cause for petitioner. With her on the briefs were *Stephen M. Kissinger*, *Andrew J. Pincus*, *Charles A. Rothfeld*, and *Dan M. Kahan*.

William M. Jay argued the cause for the United States as *amicus curiae* in support of the judgment below. With him on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, *Deputy Solicitor General Dreeben*, and *Robert J. Erickson*. *Robert E. Cooper, Jr.*, Attorney General of Tennessee, *Michael E. Moore*, Solicitor General, and *Gordon W. Smith*, Associate Solicitor General, filed a brief for respondent.*

**Donald B. Verrilli, Jr.*, and *Virginia E. Sloan* filed a brief for the Constitution Project as *amicus curiae* urging reversal.

Daniel T. Kobil and *Irving L. Gornstein* filed a brief for Current and Former Governors as *amici curiae*.

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Edward Jerome Harbison was sentenced to death by a Tennessee court in 1983. In 1997, after the state courts rejected challenges to his conviction and sentence, the Federal District Court appointed the Federal Defender Services of Eastern Tennessee to represent him in filing a petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254.[1] During the course of that representation, counsel developed substantial evidence relating both to Harbison's culpability and to the appropriateness of his sentence. Although the courts did not order relief, the evidence proved persuasive to one Circuit Judge. See 408 F. 3d 823, 837–846 (CA6 2005) (Clay, J., dissenting).

Shortly after his habeas corpus petition was denied, Harbison requested counsel for state clemency proceedings. In 2006, the Tennessee Supreme Court held that state law does not authorize the appointment of state public defenders as clemency counsel. *State* v. *Johnson*, No. M1987–00072–SC–DPE–DD *(per curiam)*, 2006 Tenn. Lexis 1236, *3 (Oct. 6, 2006). Thereafter, Harbison's federally appointed counsel moved to expand the authorized scope of her representation to include state clemency proceedings. Relying on Circuit precedent construing 18 U. S. C. § 3599, which provides for the appointment of federal counsel, the District Court denied the motion, and the Court of Appeals affirmed. 503 F. 3d 566 (CA6 2007).

We granted certiorari, 554 U. S. 917 (2008), to decide two questions: (1) whether a certificate of appealability (COA) is required to appeal an order denying a request for federally appointed counsel pursuant to § 3599, and (2) whether § 3599(e)'s reference to "proceedings for executive or other clemency as may be available to the defendant" encompasses

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[1] Federal Defender Services of Eastern Tennessee is a nonprofit organization established pursuant to the Criminal Justice Act of 1964, 18 U. S. C. § 3006A(g)(2)(B).

state clemency proceedings. We conclude that a COA is not necessary and that § 3599 authorizes federally appointed counsel to represent clients in state clemency proceedings.

I

We first consider whether Harbison was required to obtain a COA to appeal the District Court's order. The State of Tennessee and the United States as *amicus curiae* agree with Harbison that he was not.

The District Court's denial of Harbison's motion to authorize his federal counsel to represent him in state clemency proceedings was clearly an appealable order under 28 U. S. C. § 1291. See, *e. g.*, *McFarland* v. *Scott*, 512 U. S. 849 (1994) (reviewing the Court of Appeals' judgment denying a petition for the appointment of counsel pursuant to the statute now codified at 18 U. S. C. § 3599). The question is whether Harbison's failure to obtain a COA pursuant to 28 U. S. C. § 2253(c)(1)(A) deprived the Court of Appeals of jurisdiction over the appeal.

Section 2253(c)(1)(A) provides that unless a circuit justice or judge issues a COA, an appeal may not be taken from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." This provision governs final orders that dispose of the merits of a habeas corpus proceeding—a proceeding challenging the lawfulness of the petitioner's detention. See generally *Slack* v. *McDaniel*, 529 U. S. 473, 484–485 (2000); *Wilkinson* v. *Dotson*, 544 U. S. 74, 78–83 (2005). An order that merely denies a motion to enlarge the authority of appointed counsel (or that denies a motion for appointment of counsel) is not such an order and is therefore not subject to the COA requirement.

II

The central question presented by this case is whether 18 U. S. C. § 3599 authorizes counsel appointed to represent a state petitioner in 28 U. S. C. § 2254 proceedings to represent

him in subsequent state clemency proceedings. Although Tennessee takes no position on this question, the Government defends the judgment of the Court of Appeals that the statute does not authorize such representation.

We begin with the language of the statute. Section 3599, titled "Counsel for financially unable defendants," provides for the appointment of counsel for two classes of indigents, described, respectively, in subsections (a)(1) and (a)(2). The former states:

> "[I]n every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—
>
> "(A) before judgment; or
>
> "(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
>
> "shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)."

Subsection (a)(2) states:

> "In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)."

The parties agree that subsections (a)(1) and (a)(2) make two different groups eligible for federally appointed counsel: Subsection (a)(1) describes federal capital defendants, while subsection (a)(2) describes state and federal postconviction

litigants, as indicated by its reference to both § 2254 and § 2255 proceedings.[2]

After subsections (b) through (d) discuss counsel's necessary qualifications, subsection (e) sets forth counsel's responsibilities. It provides:

> "Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and *shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.*" (Emphasis added.)

Focusing on the italicized clause of subsection (e), Harbison contends that the plain language of the statute dictates the outcome of this case. We are persuaded by his argument.

Under a straightforward reading of the statute, subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel's duties. See § 3599(a)(2) (stating that habeas petitioners challenging a death sentence shall be entitled to "the furnishing of . . . services in accordance with subsections (b) through (f)"). Thus, once federally funded counsel is appointed to represent a state prisoner in § 2254 proceedings, she "shall also represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant." § 3599(e). Because state clemency proceedings are "available" to state petitioners who obtain

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[2] We note that § 3599 uses the term "defendant" to describe postconviction litigants.

representation pursuant to subsection (a)(2), the statutory language indicates that appointed counsel's authorized representation includes such proceedings.

The Government contends that, fairly read, the statute as a whole is intended to furnish representation only in federal proceedings and that all proceedings listed in subsection (e), including clemency proceedings, should be understood to be federal. The absence of the word "federal" in this subsection is not dispositive, it maintains, because subsection (a)(1) likewise does not use the word "federal" yet the parties agree that provision concerns only federal defendants. Just as "federal" is implied by context in subsection (a)(1), so too, the Government says, is it implied in subsection (e). According to the Government, the repeated use of the word "available" supports this reading: Congress contemplated that not all catalogued proceedings would be available to any given client, and clemency proceedings are simply not available to state petitioners because they are ineligible for federal clemency.

The Government's argument is not convincing. Subsection (a)(1) is properly understood as describing federal defendants because the statute is primarily concerned with federal criminal actions[3] and (a)(1) includes no language suggesting that it applies more broadly. By contrast, subsection (a)(2) refers to state litigants, and it in turn provides that subsection (e) applies to such litigants. There is therefore no basis for assuming that Congress intended "proceedings for executive or other clemency as may be available to the defendant" in subsection (e) to indicate only federal clemency.

To the contrary, the reference to "proceedings for executive *or other* clemency," § 3599(e) (emphasis added), reveals

[3] As we discuss below, § 3599 was originally enacted as part of a statute creating a new federal capital offense, Anti-Drug Abuse Act of 1988, § 7001(b), 102 Stat. 4388, and it is now codified in Title 18, which principally addresses federal criminal proceedings.

that Congress intended to include state clemency proceedings within the statute's reach.[4] Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law. U. S. Const., Art. II, § 2, cl. 1.[5] By contrast, the States administer clemency in a variety of ways. See, *e. g.*, Ga. Const., Art. IV, § 2 (independent board has clemency authority); Nev. Const., Art. 5, § 14 (governor, supreme court justices, and attorney general share clemency power); Fla. Const., Art. IV, § 8 (legislature has clemency authority for treasonous offenses); *McLaughlin* v. *Bronson*, 206 Conn. 267, 271, 537 A. 2d 1004, 1006–1007 (1988) ("In Connecticut, the pardoning power is vested in the legislature, which has delegated its exercise to the board of pardons" (citation omitted)). Congress' reference to "other clemency" thus does not refer to federal clemency but instead encompasses the various forms of state clemency.[6]

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[4] JUSTICE SCALIA argues that subsection (e), including the reference to "other clemency," was drafted to apply only to federal defendants, but this is not correct, as we discuss *infra*, at 190–193.

[5] The Government suggests that Congress might have referred to "other clemency" to encompass the Executive's use of other persons to assist him in reviewing clemency applications. But as the Government concedes, see Tr. of Oral Arg. 43—and as Members of Congress would have known—regardless of what assistance the President seeks, the federal proceeding is one for executive clemency under the Constitution.

[6] We also note that the Government's proposal to read the word "federal" into § 3599(e) would lead to absurd results. It is clear, for example, that a state inmate faced with an imminent execution might be required to apply for a stay from a state court before seeking such relief in a federal court. On our reading of the statute, federally appointed counsel would be permitted to represent her client pursuant to subsection (e)'s reference to "applications for stays of execution and other appropriate motions and procedures." But on the Government's reading, the inmate would have to secure new counsel to file the stay request because his federal counsel would not be authorized to represent him. Such a rigid limit on the authority of appointed federal counsel would be inconsistent with the basic purpose of the statute. Cf. *McFarland* v. *Scott*, 512 U. S. 849, 854–857 (1994).

The Government's reliance on the word "available" is also misplaced. While it maintains that Congress' repeated use of the word shows that various § 3599(e) procedures do not apply to particular indigents, the term instead indicates the breadth of the representation contemplated. The directive that counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . all available post-conviction process," for example, hardly suggests a limitation on the scope of representation.

The Government is correct that appointed counsel is not expected to provide each service enumerated in subsection (e) for every client. But that limitation does not follow from the word "available"; it follows from the word "subsequent" and the organization of subsection (e) to mirror the ordinary course of proceedings for capital defendants. Counsel's responsibilities commence at a different part of subsection (e) depending on whether she is appointed pursuant to subsection (a)(1)(A), (a)(1)(B), or (a)(2). When she is appointed pursuant to (a)(1)(A), she is charged with representing her client in all listed proceedings. When she is appointed pursuant to (a)(1)(B) (*i. e.*, after the entry of a federal death sentence), her representation begins with "appeals." And when she is appointed pursuant to (a)(2), her representation begins with the § 2254 or § 2255 "post-conviction process." Thus, counsel's representation includes only those judicial proceedings transpiring "subsequent" to her appointment. It is the sequential organization of the statute and the term "subsequent" that circumscribe counsel's representation, not a strict division between federal and state proceedings.

III

In an attempt to overcome the plain language of § 3599, the Government advances two additional arguments that merit discussion. First, it contends that a literal reading of subsection (e) would lead to unacceptable results: It would re-

quire a federal lawyer who obtained relief for her client in § 2254 proceedings to continue to represent him during his state retrial; similarly, it would require federal counsel to represent her client in any state habeas proceeding following her appointment. Second, the Government claims that the statute's legislative history shows that Congress did not intend to include state clemency proceedings within § 3599(e)'s coverage. Neither argument is persuasive.

The Government suggests that reading § 3599(e) to authorize federally funded counsel for state clemency proceedings would require a lawyer who succeeded in setting aside a state death sentence during postconviction proceedings to represent her client during an ensuing state retrial. We do not read subsection (e) to apply to state-court proceedings that follow the issuance of a federal writ of habeas corpus. When a retrial occurs after postconviction relief, it is not properly understood as a "subsequent stage" of judicial proceedings but rather as the commencement of new judicial proceedings. Moreover, subsection (a)(2) provides for counsel only when a state petitioner is unable to obtain adequate representation. States are constitutionally required to provide trial counsel for indigent defendants. Thus, when a state prisoner is granted a new trial following § 2254 proceedings, his state-furnished representation renders him ineligible for § 3599 counsel until the commencement of new § 2254 proceedings.

The Government likewise argues that our reading of § 3599(e) would require federally funded counsel to represent her client in any state habeas proceeding occurring after her appointment because such proceedings are also "available post-conviction process." But as we have previously noted, subsection (e) authorizes counsel to represent her client in "subsequent" stages of available judicial proceedings. State habeas is not a stage "subsequent" to federal habeas. Just the opposite: Petitioners must exhaust their claims in state court before seeking federal habeas relief. See § 2254(b)(1).

That state postconviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute.[7]

The Government also argues that § 3599(e) should not be interpreted as including state clemency proceedings because it was drafted to apply only to federal defendants. Section 3599 was originally enacted as part of the Anti-Drug Abuse Act of 1988, § 7001(b), 102 Stat. 4388 (codified at 21 U. S. C. §§ 848(q)(4)–(10)), which created a federal capital offense of drug-related homicide. In 2006, the death penalty procedures specified in that Act were repealed and recodified without change at 18 U. S. C. § 3599. Based on the 1988 legislative history, the Government argues that subsection (e) was not written to apply to state petitioners at all. In its telling, the subsection was drafted when the bill covered only federal defendants; state litigants were added, by means of what is now subsection (a)(2), just a few hours before the bill passed in rushed end-of-session proceedings; and Congress simply did not attend to the fact that this amendment applied what is now subsection (e) to state litigants.

While the legislative history is regrettably thin, the evidence that is available does not support the Government's argument. State petitioners were a part of the Anti-Drug Abuse Act from the first day the House of Representatives took up the bill. In the amendment authorizing the death penalty for drug-related homicides, Representative George Gekas included a provision that closely resembles the current § 3599(a)(2): "In any post-conviction proceeding under *section 2254* or 2255 of title 28, United States Code, seeking to va-

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[7] Pursuant to § 3599(e)'s provision that counsel may represent her client in "other appropriate motions and procedures," a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation. This is not the same as classifying state habeas proceedings as "available post-conviction process" within the meaning of the statute.

cate or set aside a death sentence, the court shall appoint counsel to represent any defendant who is or becomes financially unable to obtain adequate representation." 134 Cong. Rec. 22984 (1988) (emphasis added).

Following passage of the Gekas amendment, Representative John Conyers proposed replacing its provisions on appellate and collateral process (including the above-quoted provision) with language comprising the provisions now codified at §§ 3599(a)(1), (b), (c), and (e). Because his amendment introduced the § 3599(e) language and did not refer specifically to § 2254 proceedings, the Government and JUSTICE SCALIA argue that Representative Conyers drafted subsection (e) to apply only to federal defendants. But his floor statements evince his particular concern for state prisoners. He explained that his amendment filled a gap because "[w]hile State courts appoint lawyers for indigent defendants, there is no legal representation automatically provided once the case i[s] appealed to the Federal level." *Id.*, at 22996.[8] He then cited discussions by the Chief Judge of the Eleventh Circuit and the NAACP devoted exclusively to errors found by federal courts during habeas corpus review of state capital cases. *Ibid.*

In the Senate, Representative Conyers' language was first replaced with Representative Gekas' provision for counsel for § 2254 and § 2255 petitioners, and then a subsequent amendment substituted the text of the Conyers amendment. See *id.*, at 30401, 30746. Thereafter, the House amended the bill a final time to insert the language now codified at

[8] Despite his reference to "defendants" and "appealed," Representative Conyers was clearly discussing state prisoners seeking federal habeas relief. Representative Gekas' amendment similarly referred to postconviction litigants as "defendants," and the relevant portion of his amendment was titled "Appeal in Capital Cases" even though it incorporated § 2254 and § 2255 proceedings. 134 Cong. Rec. 22984. As codified, § 3599(a)(2) likewise uses the term "defendant" to refer to habeas petitioners. The Government is incorrect to suggest that the statute's use of this term illustrates that it was not written to apply to postconviction litigants.

§ 3599(a)(2) while leaving the Conyers language in place. See *id.*, at 33215. The Government argues that this late amendment marked the first occasion on which state prisoners were brought within the bill's compass. But Representative Gekas' initial amendment explicitly referenced § 2254 petitioners, and Representative Conyers' proposal sought to provide additional protections for all capital defendants. The House's final amendment is therefore best understood not as altering the bill's scope, but as clarifying it.

The Government's arguments about § 3599's history and purposes are laced with the suggestion that Congress simply would not have intended to fund clemency counsel for indigent state prisoners because clemency proceedings are a matter of grace entirely distinct from judicial proceedings.[9] As this Court has recognized, however, "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera* v. *Collins*, 506 U. S. 390, 411–412 (1993) (footnote omitted). Far from regarding clemency as a matter of mercy alone, we have called it "the 'fail safe' in our criminal justice system." *Id.*, at 415.[10]

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[9] The Government also submits that providing federally funded counsel for state clemency proceedings would raise "unique federalism concerns." Brief for United States as *Amicus Curiae* 31. But Tennessee's position belies that claim. Following other States that have litigated the question, Tennessee has expressed "no view" on the statute's scope because it "has no real stake in whether an inmate receives federal funding for clemency counsel." Brief for Respondent 7; see also Brief for Current and Former Governors as *Amici Curiae* 18 ("Contrary to the view of the Solicitor General . . . , the fact that counsel is appointed by a federal court does not reflect an intrusion on state sovereignty").

[10] See also *Kansas* v. *Marsh*, 548 U. S. 163, 193 (2006) (SCALIA, J., concurring) ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death

Congress' decision to furnish counsel for clemency proceedings demonstrates that it, too, recognized the importance of such process to death-sentenced prisoners, and its reference to "other clemency," § 3599(e), shows that it was familiar with the availability of state as well as federal clemency proceedings. Moreover, Congress' sequential enumeration suggests an awareness that clemency proceedings are not as divorced from judicial proceedings as the Government submits. Subsection (e) emphasizes continuity of counsel, and Congress likely appreciated that federal habeas counsel are well positioned to represent their clients in the state clemency proceedings that typically follow the conclusion of § 2254 litigation.

Indeed, as the history of this case demonstrates, the work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application. Harbison's federally appointed counsel developed extensive information about his life history and cognitive impairments that was not presented during his trial or appeals. She also litigated a claim under *Brady* v. *Maryland*, 373 U. S. 83 (1963), based on police records that had been suppressed for 14 years. One Court of Appeals judge concluded that the nondisclosure of these records "undermine[d] confidence in Harbison's guilty verdict" because the evidence contained therein could have supported a colorable defense that a third party murdered the victim and that Harbison's codefendant falsely implicated him. 408 F. 3d, at 840 (Clay, J., dissenting). Although the Court of Appeals concluded that Harbison's *Brady* claim was procedurally defaulted, the information contained in the police records could be marshaled together with information about Harbison's background in a

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sentence is carried out"); *Dretke* v. *Haley*, 541 U. S. 386, 399 (2004) (KENNEDY, J., dissenting) ("Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider").

clemency application to the Tennessee Board of Probation and Parole and the Governor.

Harbison's case underscores why it is "entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells." *Hain* v. *Mullin*, 436 F. 3d 1168, 1175 (CA10 2006) (en banc). In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the "'fail-safe'" of our justice system. *Herrera*, 506 U. S., at 415.

IV

We conclude that a COA is not required to appeal an order denying a motion for federally appointed counsel. We further hold that § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

I agree with much of the Court's opinion. Title 18 U. S. C. § 3599(a)(2) entitles indigent federal habeas petitioners to appointed counsel "in accordance with" subsection (e). Subsection (e) specifies that the appointed counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and shall also represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant." Nothing in the text of § 3599(e) excludes proceedings for available *state* clemency, and, as the Court points out, there are good reasons to expect federal habeas counsel to carry on through state clemency proceedings. See *ante*, at 192–193 and this page.

At the same time, the "plain language of § 3599," *ante*, at 188, does not fully resolve this case. The obligation in subsection (e) that the appointed counsel represent the defendant in "every subsequent stage of available judicial proceedings" is not on its face limited to "federal" proceedings, just as there is no such limitation with respect to clemency. Yet it is highly unlikely that Congress intended federal habeas petitioners to keep their federal counsel during subsequent state judicial proceedings. See *Hain* v. *Mullin*, 436 F. 3d 1168, 1178 (CA10 2006) (Briscoe, J., dissenting) ("[I]t cannot seriously be suggested that Congress intended, in the event a state capital prisoner obtains federal habeas relief and is granted a new trial, to provide federally-funded counsel to represent that prisoner in the ensuing state trial, appellate, and post-conviction proceedings . . . "). Harbison concedes as much. Reply Brief for Petitioner 11–12; Tr. of Oral Arg. 5–6, 15.

If there were no way to read the words of the statute to avoid this problematic result, I might be forced to accept the Government's invitation to insert the word "federal" into § 3599(e)—a limitation that would have to apply to clemency as well. But fortunately the best reading of the statute avoids the problem: Section 3599(e)'s reference to "subsequent stage[s] of available judicial proceedings" does not include state judicial proceedings after federal habeas, because those are more properly regarded as new judicial proceedings.

The meaning of that phrase is not entirely plain, but it is plain that not every lawsuit involving an inmate that arises after the federal habeas proceeding is included. Surely "subsequent stage[s]" do not include, for example, a challenge to prison conditions or a suit for divorce in state court, even if these available judicial proceedings occur subsequent to federal habeas. That must be because these are new proceedings rather than "subsequent stage[s]" of the proceed-

ings for which federal counsel is available. Once it is acknowledged that Congress has drawn a line at some point, this is the "best reading" of the statutory language. *Post*, at 198 (THOMAS, J., concurring in judgment).

JUSTICE THOMAS does not disagree. Instead, he contends that it is not necessary to decide what the first part of the sentence means in deciding what the second part means. *Post*, at 199. We have said that "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole." *United States* v. *Morton*, 467 U. S. 822, 828 (1984). This certainly applies to reading sentences as a whole.

I entirely agree with JUSTICE THOMAS that "Congress' intent is found in the words it has chosen to use," and that "[o]ur task is to apply the text, not to improve upon it," even if that produces "very bad policy." *Post*, at 198–199 (internal quotation marks omitted). Here, we need only apply the text of § 3599 to conclude that federal counsel is available for state clemency, but not for subsequent state-court litigation. I therefore concur in the result.

JUSTICE THOMAS, concurring in the judgment.

I agree that under 28 U. S. C. § 2253(c)(1)(A), a certificate of appealability was not required to seek appellate review of the issue in this case. See *ante*, at 183; see also *post*, at 200 (SCALIA, J., concurring in part and dissenting in part). I further agree with the Court that 18 U. S. C. §§ 3599(a)(2) and (e) entitle eligible state postconviction litigants to federally funded counsel in available state clemency proceedings. See *ante*, at 183, 185–186. As even JUSTICE SCALIA acknowledges in his dissenting opinion, the statute "contains no express language limiting its application to proceedings in a federal forum." *Post*, at 207; see also *ante*, at 194 (ROBERTS, C. J., concurring in judgment) ("Nothing in the text of § 3599(e) excludes proceedings for available *state* clemency . . . "). By its express terms, the statute "entitle[s]" eligible litigants to appointed counsel who "shall rep-

resent the defendant . . . in such . . . proceedings for executive or other clemency as may be available to the defendant." §§ 3599(a)(2), (e). Because the statute applies to individuals challenging either state or federal convictions, see § 3599(a)(2), and because state clemency is the only clemency available to those challenging state convictions, §§ 3599(a)(2) and (e) necessarily entitle eligible state postconviction litigants to federally funded counsel in state clemency proceedings.

I disagree, however, with the assumption that § 3599 must be limited to "federal" proceedings in at least some respects. *Ante*, at 186; *ante*, at 195 (ROBERTS, C. J., concurring in judgment); *post*, at 202–203. The majority and dissent read such a limitation into subsection (a)(1) of the statute. But that subsection, like subsection (a)(2), "contains no language limiting its application to *federal* capital defendants. It provides counsel to indigent defendants in '*every* criminal action in which a defendant is charged with a crime which may be punishable by death.'" *Post*, at 202 (quoting § 3599(a)(1)). The majority, then, compounds its error by attempting to discern some distinction between subsections (a)(1) and (a)(2), to which it properly declines to add an extratextual "federal" limitation, see *ante*, at 185–186. The dissent seizes on this inconsistency between the majority's interpretation of subsections (a)(1) and (a)(2), but responds by incorrectly reading a parallel "federal" limitation into subsection (a)(2), see *post*, at 202–203. In the dissent's view, "it is perfectly reasonable to assume" that subsection (a)(2) is limited to federal postconviction proceedings—including clemency proceedings—"even where the statute contains no such express limitation." *Post*, at 202.

THE CHIEF JUSTICE, in contrast, finds a "federal" limitation in a clause of subsection (e) that is not before this Court in order to cabin the reach of today's decision. He observes that the text of subsection (e) includes no "federal" limitation with respect to any of the proceedings listed in that subsec-

tion. But THE CHIEF JUSTICE finds a way to avoid this "problematic result" by adding a different limitation to § 3599. In his view, the "best" reading of the phrase "subsequent stage[s] of available judicial proceedings" is one that excludes "state judicial proceedings after federal habeas" proceedings because they are "new"—not "subsequent"—judicial proceedings. *Ante*, at 195. Without this limitation, THE CHIEF JUSTICE explains, "[he] might be forced to accept the Government's invitation to insert the word 'federal' into § 3599(e)—a limitation that would have to apply to clemency as well"—because he finds it "highly unlikely that Congress intended" for there to be no federal limitation at all in subsection (e). *Ante*, at 195.

This Court is not tasked with interpreting § 3599 in a way that it believes is consistent with the policy outcome intended by Congress. Nor should this Court's approach to statutory construction be influenced by the supposition that "it is highly unlikely that Congress intended" a given result. See *ante*, at 195 (ROBERTS, C. J., concurring in judgment). Congress' intent is found in the words it has chosen to use. See *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 98 (1991) ("The best evidence of [Congress'] purpose is the statutory text adopted by both Houses of Congress and submitted to the President"). This Court's interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue. Even if the proper interpretation of a statute upholds a "very bad policy," it "is not within our province to second-guess" the "wisdom of Congress' action" by picking and choosing our preferred interpretation from among a range of potentially plausible, but likely inaccurate, interpretations of a statute. *Eldred* v. *Ashcroft*, 537 U. S. 186, 222 (2003); see also *TVA* v. *Hill*, 437 U. S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute"). "Our task is to apply the text, not

to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989).

This statute's silence with respect to a "federal" limitation in no way authorizes us to assume that such a limitation must be read into subsections (a) and (e) in order to blunt the slippery-slope policy arguments of those opposed to a plain-meaning construction of the provisions under review, see *ante*, at 188–190. And Congress' silence certainly does not empower us to go even further and incorporate such an assumption into the text of these provisions. *Post*, at 205–207. Moreover, the Court should not decide a question irrelevant to this case in order to pre-empt the "problematic" results that might arise from a plain-text reading of the statutory provision under review. See *ante*, at 195 (ROBERTS, C. J., concurring in judgment). Whether or not THE CHIEF JUSTICE's construction of the "subsequent stage of available judicial proceedings" clause of subsection (e) is correct, it is irrelevant to the proper interpretation of the clemency clause of subsection (e). Even if the statute were to authorize federal postconviction counsel to appear in state proceedings other than state clemency proceedings, a question not resolved by today's decision, that conclusion would not provide a legitimate basis for adopting the dissent's atextual interpretation of the clemency clause of subsection (e). The "best" interpretation of the clemency clause does not turn on the unresolved breadth of the "subsequent stage of available judicial proceedings" clause.

Rather, the Court must adopt the interpretation of the statute that is most faithful to its text. Here, the absence of a "federal" limitation in the text of subsections (a) and (e) of § 3599 most logically suggests that these provisions are not limited to federal clemency proceedings. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its draft-

ing errors, and to provide for what we might think is the preferred result." *Lamie* v. *United States Trustee*, 540 U. S. 526, 542 (2004) (internal quotation marks and ellipsis omitted). Accordingly, I concur in the judgment.

JUSTICE SCALIA, with whom JUSTICE ALITO joins, concurring in part and dissenting in part.

I agree with the Court that Harbison was not required to obtain a certificate of appealability under 28 U. S. C. § 2253(c)(1)(A) before appealing the District Court's denial of his motion to expand counsel's appointment. See *ante*, at 183. I do not agree, however, that 18 U. S. C. § 3599 gives state prisoners federally funded counsel to pursue state clemency. While purporting to adopt a "straightforward reading of the statute," *ante*, at 185, the Court in fact selectively amends the statute—inserting words in some places, twisting their meaning elsewhere. Because the statute is most naturally and coherently read to provide federally funded counsel to capital defendants appearing in a federal forum, I would affirm the decision of the Sixth Circuit and hold that Harbison was not entitled to federally funded counsel to pursue state clemency.

I

Title 18 U. S. C. § 3599(a)(2) provides for the appointment of counsel as follows:

> "In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)."

Section 3599(e) defines the scope of appointed counsel's representation:

> "Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

As the Court notes, the first of these provisions entitled Harbison to counsel for § 2254 proceedings. And the second of them, without any express qualification, provides for counsel's continued representation through "such . . . proceedings for executive or other clemency as may be available to the defendant," which in petitioner's case would include state clemency proceedings. The Court thus concludes that the statute's "plain language" provides Harbison federally funded counsel to represent him in state clemency proceedings. *Ante,* at 185.

But the Court quickly abandons its allegedly "plain" reading of the statute when it confronts the subsection that precedes these two, which provides:

> "Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

> "(A) before judgment; or
>
> "(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
>
> "shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)." § 3599(a)(1).

The Court states that "(a)(1) describes federal capital defendants." *Ante*, at 184. But according to the Court's mode of analysis, that is not so. Subsection (a)(1), like subsection (e), contains no language limiting its application to *federal* capital defendants. It provides counsel to indigent defendants in "*every* criminal action in which a defendant is charged with a crime which may be punishable by death." § 3599(a)(1) (emphasis added). Why, then, is subsection (a)(1) limited to *federal* capital defendants? Because, as the Court notes, "the statute is primarily concerned with federal criminal actions and (a)(1) includes no language suggesting that it applies more broadly." *Ante*, at 186 (footnote omitted).

Quite right. Section 3599 was enacted as part of a bill that created a new federal capital offense, see *ibid.*, n. 3, and it is perfectly reasonable to assume that a *federal* statute, providing *federally* funded counsel, applies in *federal* proceedings only, even where the statute contains no such express limitation. Cf. *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 247–248 (1833). But there is no basis for adopting that reading with respect to only *half* the statute. If subsection (a)(1) is limited to federal proceedings, then subsection (e), which likewise contains no express federal limitation, is similarly limited. We cannot give the same silence (omission of the limiting word "federal") in adjacent and simultaneously enacted subsections of the same law (§ 3599) divergent meanings.

The Court advances two arguments for reading subsection (e) more broadly. First, it claims that unlike subsection

(a)(1), "subsection (a)(2) refers to state litigants." *Ante*, at 186. It most certainly does not. It refers to *proceedings* under §§ 2254 and 2255—proceedings under *federal* statutes providing *federal* causes of action in *federal* court. Read together, subsections (a)(1) and (a)(2) provide federally funded counsel for persons convicted of capital crimes who are appearing in federal court. Subsection (a)(2) neither undermines the Court's earlier statement that "the statute's primary focus is federal" proceedings, nor gives the Court license to insert words selectively into the statutory text.

The Court next reasons that the phrase "executive or *other* clemency" suggests that subsection (e) includes state clemency proceedings. Since (the argument goes) federal clemency is exclusively executive, the word "other" must refer to state clemency, or else it would be superfluous. But the drafting history, which the Court thinks relevant, *ante*, at 190–192, defeats the inference the Court wishes to draw. The current text of subsection (e) first appeared in a version of the bill that included what is now subsection (a)(1) (which the Court concedes deals only with federal proceedings), but *not* subsection (a)(2) (which the Court would deem applicable to state proceedings). 134 Cong. Rec. 22995 (1988). In other words, at the time of its introduction, subsection (e) applied only to federal defendants, and the phrase "or other clemency" was unquestionably superfluous.

In any event, the Court's reading places a great deal of weight on avoiding superfluity in a statute that is already teeming with superfluity. Item: Subsection (a)(2) needlessly refers to § 2255 proceedings even though subsections (a)(1) and (e) taken together would provide federal capital defendants with counsel in § 2255 proceedings. Item: Subsection (a)(2) provides counsel "in accordance with subsections (b) through (f)" even though subsections (b) and (c) have no conceivable relevance to subsection (a)(2).* Item: Subsec-

*Subsection (b) details the requisite qualifications for a lawyer appointed "before judgment"; but appointments under subsection (a)(2) are made only after judgment. Subsection (c) requires that a lawyer ap-

tion (e) provides counsel "throughout every subsequent stage of *available* judicial proceedings," including "all *available* post-conviction process." (Emphasis added.) The first use of the term "available" is already of dubious value (is counsel expected to represent a defendant in *unavailable* proceedings?), but its needless repetition is inexplicable. In a statute that is such a paragon of shoddy draftsmanship, relying upon the superfluity of "or other" to extend the statute's application from federal to state proceedings is quite absurd—and doubly absurd when that extension is illogically limited to the subsection in which "or other" appears.

II

The Court's reading of subsection (e) faces a second substantial difficulty. Subsection (e) provides that counsel, once appointed,

> "shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." § 3599(e).

In other words, once counsel is appointed under (a)(2), petitioner is entitled to federal counsel "throughout every subsequent stage of available judicial proceedings." The Government argues that, if subsection (e) is not limited to federal proceedings, then a § 2254 petitioner who obtains federally funded counsel will retain that counsel, at federal expense, in all "subsequent" state-court proceedings, including the retrial that follows the grant of federal habeas relief. The

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pointed after judgment have been "admitted to practice *in the court of appeals* for not less than five years" (emphasis added); but the postconviction proceedings dealt with by subsection (a)(2) take place in federal *district court.*

Court disagrees, on the ground that a new trial represents the "commencement of new judicial proceedings." *Ante*, at 189.

I need not enter that controversy. What is clear, at least, is that (if subsection (e) includes state proceedings) federally funded counsel would have to represent petitioners in subsequent state habeas proceedings. The Court tries to split the baby here, conceding that "a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust [in state court] a claim in the course of her federal habeas representation." *Ante*, at 190, n. 7. The Court tries to derive this discretionary authority from subsection (e)'s provision for representation by federal counsel in "other *appropriate* motions and procedures." §3599(e) (emphasis added). But that provision is *in addition to*, rather than *in limitation of*, subsection (e)'s unqualified statement that counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . all available post-conviction process." The provision then continues: "*together with* applications for stays of execution and other appropriate motions and procedures." (Emphasis added.) There is no way in which this can be read to limit the requirement that counsel represent the defendant in "every subsequent stage of available judicial proceedings," which would include habeas proceedings in state court.

The Court seeks to avoid this conclusion by saying that "[s]tate habeas is not a stage 'subsequent' to federal habeas," because "[p]etitioners must exhaust their claims in state court before seeking federal habeas relief." *Ante*, at 189. This is a breathtaking denial of reality, confusing what *should be* with what *is*. It is rather like saying that murder does not exist because the law forbids it. To be sure, petitioners are *supposed to* complete state postconviction proceedings before pursuing relief in federal court. But they often do not do so, and when they do not our opinions permit them to seek stays or dismissals of their §2254 petitions in

order that they may thereafter *(subsequently)* return to state court to exhaust their claims. See *Rhines* v. *Weber*, 544 U. S. 269, 277–278 (2005); *Pliler* v. *Ford*, 542 U. S. 225, 228 (2004). Additionally, inmates may—as petitioner did in this case—file successive state habeas petitions after § 2254 proceedings are complete. See *Harbison* v. *State*, No. E2004–00885–CCA–R28–PD, 2005 WL 1521910, *1 (Tenn. Crim. App., June 27, 2005). These subsequent state proceedings are not rare but commonplace, and it is inconceivable (if state proceedings are covered) that subsection (e) does not refer to them. Indeed, one would think that subsection (e) refers especially to them. And what kind of an incoherent statute would it be that allows counsel for *de-facto*-subsequent federal habeas claims that *should have been* brought earlier (see § 3599(a)(2)) but does not allow counsel for subsequent state habeas claims that have the same defect?

If § 3599(e) includes state proceedings (as the Court holds), and if "subsequent" is given its proper scope (rather than the tortured one adopted by the Court)—then § 3599(a)(2)'s limitation of federally provided counsel to only *federal* habeas proceedings would amount to a dead letter. A capital convict could file for federal habeas without first exhausting state postconviction remedies, obtain a stay or dismissal of that federal petition, and return to state court along with his federally funded lawyer. Indeed, under our decision in *McFarland* v. *Scott*, 512 U. S. 849 (1994), he need not even file an unexhausted federal habeas petition; he can file a stand-alone "motion requesting the appointment of habeas counsel," *id.*, at 859, and obtain federally funded counsel that he can then take back for the subsequent state proceedings. The question persists: Why would § 3599(a)(2) provide counsel in only *federal* habeas proceedings, when § 3599(e) makes it so easy to obtain federally funded counsel for *state* habeas proceedings as well?

* * *

Concededly, § 3599 contains no express language limiting its application to proceedings in a federal forum. And yet Harbison, the Government, and the Court all read part of that section to refer to federal proceedings only. The Court's refusal to extend that limitation to the entirety of § 3599 is untenable. It lacks a textual basis and has the additional misfortune of producing absurd results, which the majority attempts to avoid by doing further violence to the statutory text. I would read the statute as providing federal counsel to capital convicts appearing in a federal forum, and I accordingly would affirm the judgment of the Sixth Circuit.

Syllabus

ENTERGY CORP. *v.* RIVERKEEPER, INC., ET AL.

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

No. 07–588. Argued December 2, 2008—Decided April 1, 2009*

Petitioners' powerplants have "cooling water intake structures" that threaten the environment by squashing against intake screens ("impingement") or suctioning into the cooling system ("entrainment") aquatic organisms from the water sources tapped to cool the plants. Thus, the facilities are subject to regulation under the Clean Water Act, which mandates that "[a]ny standard established pursuant to section 1311 . . . or section 1316 . . . and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U. S. C. § 1326(b). Sections 1311 and 1316, in turn, employ a variety of "best technology" standards to regulate effluent discharge into the Nation's waters. The Environmental Protection Agency (EPA) promulgated the § 1326(b) regulations at issue after nearly three decades of making the "best technology available" determination on a case-by-case basis. Its "Phase I" regulations govern new cooling water intake structures, while the "Phase II" rules at issue apply to certain large existing facilities. In the latter rules, the EPA set "national performance standards," requiring most Phase II facilities to reduce "impingement mortality for [aquatic organisms] by 80 to 95 percent from the calculation baseline," and requiring a subset of facilities to reduce entrainment of such organisms by "60 to 90 percent from [that] baseline." 40 CFR § 125.94(b)(1), (2). However, the EPA expressly declined to mandate closed-cycle cooling systems, or equivalent reductions in impingement and entrainment, as it had done in its Phase I rules, in part because the cost of rendering existing facilities closed-cycle compliant would be nine times the estimated cost of compliance with the Phase II performance standards, and because other technologies could approach the performance of closed-cycle operation. The Phase II rules also permit site-specific variances from the national performance standards, provided that the permit-issuing authority imposes remedial measures that yield results "as close as practicable to the appli-

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*Together with No. 07–589, *PSEG Fossil LLC et al.* v. *Riverkeeper, Inc., et al.*, and No. 07–597, *Utility Water Act Group* v. *Riverkeeper, Inc., et al.*, also on certiorari to the same court.

cable performance standards." § 125.94(a)(5)(i), (ii). Respondents—environmental groups and various States—challenged the Phase II regulations. Concluding that cost-benefit analysis is impermissible under 33 U. S. C. § 1326(b), the Second Circuit found the site-specific cost-benefit variance provision unlawful and remanded the regulations to the EPA for it to clarify whether it had relied on cost-benefit analysis in setting the national performance standards.

Held: The EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. Pp. 217–227.

(a) The EPA's view that § 1326(b)'s "best technology available for minimizing adverse environmental impact" standard permits consideration of the technology's costs and of the relationship between those costs and the environmental benefits produced governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844. The Second Circuit took "best technology" to mean the technology that achieves the greatest reduction in adverse environmental impacts at a reasonable cost to the industry, but it may also describe the technology that *most efficiently* produces a good, even if it produces a lesser quantity of that good than other available technologies. This reading is not precluded by the phrase "for minimizing adverse environmental impact." Minimizing admits of degree and is not necessarily used to refer exclusively to the "greatest possible reduction." Other Clean Water Act provisions show that when Congress wished to mandate the greatest feasible reduction in water pollution, it used plain language, *e. g.*, "elimination of discharges of all pollutants," § 1311(b)(2)(A). Thus, § 1326(b)'s use of the less ambitious goal of "minimizing adverse environmental impact" suggests that the EPA has some discretion to determine the extent of reduction warranted under the circumstances, plausibly involving a consideration of the benefits derived from reductions and the costs of achieving them. Pp. 217–220.

(b) Considering § 1326(b)'s text, and comparing it with the text and statutory factors applicable to parallel Clean Water Act provisions, prompts the conclusion that it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden. In the Phase II rules the EPA sought only to avoid extreme disparities between costs and benefits, limiting variances from Phase II's "national performance standards" to circumstances where the costs are "significantly greater than the benefits" of compli-

ance. 40 CFR § 125.94(a)(5)(ii). In defining "national performance standards" the EPA assumed the application of technologies whose benefits approach those estimated for closed-cycle cooling systems at a fraction of the cost. That the EPA has for over 30 years interpreted § 1326(b) to permit a comparison of costs and benefits, while not conclusive, also tends to show that its interpretation is reasonable and hence a legitimate exercise of its discretion. Even respondents and the Second Circuit ultimately recognize that some comparison of costs and benefits is permitted. The Second Circuit held that § 1326(b) mandates only those technologies whose costs can be reasonably borne by the industry. But whether it is reasonable to bear a particular cost can very well depend on the resulting benefits. Likewise, respondents concede that the EPA need not require that industry spend billions to save one more fish. This concedes the principle, and there is no statutory basis for limiting the comparison of costs and benefits to situations where the benefits are *de minimis* rather than significantly disproportionate. Pp. 220–226.

475 F. 3d 83, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 230. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 236.

Maureen E. Mahoney argued the cause for petitioners. With her on the briefs for petitioners Entergy Corp. et al. were *J. Scott Ballenger*, *Cassandra S. Bernstein*, *Elise N. Zoli*, *Kevin P. Martin*, *Abigail Hemani*, *Chuck D. Barlow*, and *John G. Valeri, Jr.* *Kristy A. N. Bulleit* filed briefs for petitioner Utility Water Act Group.

Deputy Solicitor General Joseffer argued the cause for the federal parties as respondents under this Court's Rule 12.6 in support of petitioners. With him on the briefs were former *Solicitor General Garre*, *Assistant Attorney General Tenpas*, *Deputy Solicitor General Kneedler*, *Cynthia J. Morris*, and *Jessica O'Donnell*.

Richard J. Lazarus argued the cause for respondents. With him on the brief for respondents Riverkeeper, Inc., et al. were *Reed W. Super*, *Edward Lloyd*, and *P. Kent Cor-*

rell. A brief for respondents State of Rhode Island et al. was filed by *Patrick C. Lynch*, Attorney General of Rhode Island, and *Tricia O'Hare Jedele*, Special Assistant Attorney General, *Richard Blumenthal*, Attorney General of Connecticut, and *Kimberly Massicotte* and *Matthew Levine*, Assistant Attorneys General, *Martha Coakley*, Attorney General of Massachusetts, and *Andrew Goldberg*, Assistant Attorney General, *Andrew M. Cuomo*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Andy D. Bing*, Deputy Solicitor General, *Denise A. Hartman*, Assistant Solicitor General, and *Maureen F. Leary*, Assistant Attorney General, *Joseph R. Biden III*, Attorney General of Delaware, and *Kevin Maloney*, Deputy Attorney General, *Anne Milgram*, Attorney General of New Jersey, and *Ellen Barney Balint*, Deputy Attorney General.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Nebraska et al. by *Jon Bruning*, Attorney General of Nebraska, and *David D. Cookson*, Chief Deputy Attorney General, and by the Attorneys General and other officials for their respective States as follows: *Troy King*, Attorney General of Alabama, *Dustin McDaniel*, Attorney General of Arkansas, *John W. Suthers*, Attorney General of Colorado, *Bill McCollum*, Attorney General of Florida, *Steve Carter*, Attorney General of Indiana, *Stephen N. Six*, Attorney General of Kansas, and *Jared S. Maag*, Deputy Solicitor General, *Jack Conway*, Attorney General of Kentucky, *James D. Caldwell*, Attorney General of Louisiana, *Michael A. Cox*, Attorney General of Michigan, *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *Gary K. King*, Attorney General of New Mexico, *Wayne Stenehjem*, Attorney General of North Dakota, *Henry McMaster*, Attorney General of South Carolina, *Robert E. Cooper, Jr.*, Attorney General of Tennessee, *Greg Abbott*, Attorney General of Texas, and *Robert F. McDonnell*, Attorney General of Virginia, and *William E. Thro*, State Solicitor General; for the American Chemistry Council et al. by *Russell S. Frye*, *Leslie A. Hulse*, *Richard S. Wasserstrom*, *Robin S. Conrad*, *Amar D. Sarwal*, *Jan S. Amundson*, and *Quentin Riegel;* for the American Petroleum Institute by *Daniel P. Albers*, *David T. Ballard*, *Harry Ng*, and *Michael See;* for the California Council for Environmental and Economic Balance by *Kevin M. Fong;* for the National Association of Home Builders by *Messrs. Albers* and *Ballard*, *Duane J. Desiderio*, and *Thomas J. Ward;* for the Nuclear Energy Institute by *Seth P. Waxman*, *Edward C. DuMont*, *Brian*

JUSTICE SCALIA delivered the opinion of the Court.

These cases concern a set of regulations adopted by the Environmental Protection Agency (EPA or agency) under § 316(b) of the Clean Water Act, 33 U. S. C. § 1326(b). 69 Fed. Reg. 41576 (2004). Respondents—environmental groups and various States [1]—challenged those regulations, and the Second Circuit set them aside. *Riverkeeper, Inc.* v. *EPA*, 475 F. 3d 83, 99–100 (2007). The issue for our decision is whether, as the Second Circuit held, the EPA is not permitted to use cost-benefit analysis in determining the content of regulations promulgated under § 1326(b).

I

Petitioners operate—or represent those who operate—large powerplants. In the course of generating power, those

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M. Boynton, and *Ellen C. Ginsberg;* and for the Pacific Legal Foundation by *M. Reed Hopper* and *Steven Geoffrey Gieseler*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, by *Susan Shinkman* and *Richard P. Mather*, and by the Attorneys General for their respective States as follows: *Tom Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Mike McGrath* of Montana, *Nancy H. Rogers* of Ohio, and *W. A. Drew Edmondson* of Oklahoma; for Commercial Fishermen of America, et al., by *Elizabeth J. Hubertz* and *Stephanie Tai;* for Environment America et al. by *Christopher J. Wright* and *Timothy J. Simeone;* for Environmental Law Professors by *Jared A. Goldstein;* for the National Wildlife Federation et al. by *David K. Mears;* for OMB Watch by *Amy Sinden;* and for Voices of the Wetlands et al. by *Deborah A. Sivas* and *Leah J. Russin*.

Briefs of *amici curiae* were filed for the AEI Center for Regulatory and Market Studies et al. by *Robert E. Litan;* for the Clean Air Task Force et al. by *Ann Brewster Weeks;* and for Frank Ackerman et al. by *David M. Driesen* and *Douglas A. Kysar*.

[1] The EPA and its Administrator appeared as respondents in support of petitioners. See Brief for Federal Parties as Respondents Supporting Petitioners. References to "respondents" throughout the opinion refer only to those parties challenging the EPA rules at issue in these cases.

plants also generate large amounts of heat. To cool their facilities, petitioners employ "cooling water intake structures" that extract water from nearby water sources. These structures pose various threats to the environment, chief among them the squashing against intake screens (elegantly called "impingement") or suction into the cooling system ("entrainment") of aquatic organisms that live in the affected water sources. See 69 Fed. Reg. 41586. Accordingly, the facilities are subject to regulation under the Clean Water Act, 33 U. S. C. § 1251 *et seq.*, which mandates:

> "Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." § 1326(b).

Sections 1311 and 1316, in turn, employ a variety of "best technology" standards to regulate the discharge of effluents into the Nation's waters.

The § 1326(b) regulations at issue here were promulgated by the EPA after nearly three decades in which the determination of the "best technology available for minimizing [cooling water intake structures'] adverse environmental impact" was made by permit-issuing authorities on a case-by-case basis, without benefit of a governing regulation. The EPA's initial attempt at such a regulation came to nought when the Fourth Circuit determined that the agency had failed to adhere to the procedural requirements of the Administrative Procedure Act. *Appalachian Power Co.* v. *Train*, 566 F. 2d 451, 457 (1977). The EPA withdrew the regulation, 44 Fed. Reg. 32956 (1979), and instead published "draft guidance" for use in implementing § 1326(b)'s requirements via site-specific permit decisions under § 1342. See EPA, Office of Water Enforcement Permits Div., {Draft} Guidance for Evaluating the Adverse Impact of Cooling

Water Intake Structures on the Aquatic Environment: Section 316(b) P. L. 92–500 (May 1, 1977), online at http://www.epa.gov/waterscience/316b/files/1977AEIguid.pdf (all Internet materials as visited Mar. 30, 2009, and available in Clerk of Court's case file); 69 Fed. Reg. 41584 (describing system of case-by-case permits under the draft guidance).

In 1995, the EPA entered into a consent decree which, as subsequently amended, set a multiphase timetable for the EPA to promulgate regulations under § 1326(b). See *Riverkeeper, Inc.* v. *Whitman*, No. 93 Civ. 0314 (AGS), 2001 WL 1505497, *1 (SDNY, Nov. 27, 2001). In the first phase the EPA adopted regulations governing certain new, large cooling water intake structures. 66 Fed. Reg. 65256 (2001) (Phase I rules); see 40 CFR §§ 125.80(a), 125.81(a) (2008). Those rules require new facilities with water-intake flow greater than 10 million gallons per day to, among other things, restrict their inflow "to a level commensurate with that which can be attained by a closed-cycle recirculating cooling water system."[2] § 125.84(b)(1). New facilities with water-intake flow between 2 million and 10 million gallons per day may alternatively comply by, among other things, reducing the volume and velocity of water removal to certain levels. § 125.84(c). And all facilities may alternatively comply by demonstrating, among other things, "that the technologies employed will reduce the level of adverse environmental impact . . . to a comparable level" to what would be achieved by using a closed-cycle cooling system. § 125.84(d). These regulations were upheld in large part by the Second Circuit in *Riverkeeper, Inc.* v. *EPA*, 358 F. 3d 174 (2004).

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[2] Closed-cycle cooling systems recirculate the water used to cool the facility, and consequently extract less water from the adjacent waterway, proportionately reducing impingement and entrainment. *Riverkeeper, Inc.* v. *EPA*, 358 F. 3d 174, 182, n. 5 (CA2 2004); 69 Fed. Reg. 41601, and n. 44 (2004).

The EPA then adopted the so-called "Phase II" rules at issue here.[3] 69 Fed. Reg. 41576. They apply to existing facilities that are point sources, whose primary activity is the generation and transmission (or sale for transmission) of electricity, and whose water-intake flow is more than 50 million gallons of water per day, at least 25 percent of which is used for cooling purposes. *Ibid.* Over 500 facilities, accounting for approximately 53 percent of the Nation's electric-power generating capacity, fall within Phase II's ambit. See EPA, Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule, p. A3–13 (Table A3–4, Feb. 2004), online at http://www.epa.gov/waterscience/316b/phase2/econbenefits/final/a3.pdf. Those facilities remove on average more than 214 billion gallons of water per day, causing impingement and entrainment of over 3.4 billion aquatic organisms per year. 69 Fed. Reg. 41586.

To address those environmental impacts, the EPA set "national performance standards," requiring Phase II facilities (with some exceptions) to reduce "impingement mortality for all life stages of fish and shellfish by 80 to 95 percent from the calculation baseline"; a subset of facilities must also reduce entrainment of such aquatic organisms by "60 to 90 percent from the calculation baseline." 40 CFR § 125.94(b)(1), (2); see § 125.93 (defining "calculation baseline"). Those targets are based on the environmental improvements achievable through deployment of a mix of remedial technologies, 69 Fed. Reg. 41599, which the EPA determined were "commercially available and economically practicable," *id.*, at 41602.

In its Phase II rules, however, the EPA expressly declined to mandate adoption of closed-cycle cooling systems or equiv-

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[3] The EPA has also adopted Phase III rules for facilities not subject to the Phase I and Phase II regulations. 71 Fed. Reg. 35006 (2006). A challenge to those regulations is currently before the Fifth Circuit, where proceedings have been stayed pending disposition of these cases. See *ConocoPhillips Co.* v. *EPA,* No. 06–60662.

alent reductions in impingement and entrainment, as it had done for new facilities subject to the Phase I rules. *Id.*, at 41601. It refused to take that step in part because of the "generally high costs" of converting existing facilities to closed-cycle operation, and because "other technologies approach the performance of this option." *Id.*, at 41605. Thus, while closed-cycle cooling systems could reduce impingement and entrainment mortality by up to 98 percent, *id.*, at 41601 (compared to the Phase II targets of 80 to 95 percent impingement reduction), the cost of rendering all Phase II facilities closed-cycle-compliant would be approximately $3.5 billion per year, *id.*, at 41605, nine times the estimated cost of compliance with the Phase II performance standards, *id.*, at 41666. Moreover, Phase II facilities compelled to convert to closed-cycle cooling systems "would produce 2.4 percent to 4.0 percent less electricity even while burning the same amount of coal," possibly requiring the construction of "20 additional 400–MW plants . . . to replace the generating capacity lost." *Id.*, at 41605. The EPA thus concluded that "[a]lthough not identical, the ranges of impingement and entrainment reduction are similar under both options . . . . [Benefits of compliance with the Phase II rules] can approach those of closed-cycle recirculating systems at less cost with fewer implementation problems." *Id.*, at 41606.

The regulations permit the issuance of site-specific variances from the national performance standards if a facility can demonstrate either that the costs of compliance are "significantly greater than" the costs considered by the agency in setting the standards, 40 CFR § 125.94(a)(5)(i), or that the costs of compliance "would be significantly greater than the benefits of complying with the applicable performance standards," § 125.94(a)(5)(ii). Where a variance is warranted, the permit-issuing authority must impose remedial measures that yield results "as close as practicable to the applicable performance standards." § 125.94(a)(5)(i), (ii).

Respondents challenged the EPA's Phase II regulations, and the Second Circuit granted their petition for review and remanded the regulations to the EPA. The Second Circuit identified two ways in which the EPA could permissibly consider costs under 33 U. S. C. § 1326(b): (1) in determining whether the costs of remediation "can be 'reasonably borne' by the industry," and (2) in determining which remedial technologies are the most cost effective, that is, the technologies that reach a specified level of benefit at the lowest cost. 475 F. 3d, at 99–100. See also *id.*, at 98, and n. 10. It concluded, however, that cost-benefit analysis, which "compares the costs and benefits of various ends, and chooses the end with the best net benefits," *id.*, at 98, is impermissible under § 1326(b), *id.*, at 100.

The Court of Appeals held the site-specific cost-benefit variance provision to be unlawful. *Id.*, at 114. Finding it unclear whether the EPA had relied on cost-benefit analysis in setting the national performance standards, or had only used cost-effectiveness analysis, it remanded to the agency for clarification of that point. *Id.*, at 104–105. (The remand was also based on other grounds which are not at issue here.) The EPA suspended operation of the Phase II rules pending further rulemaking. 72 Fed. Reg. 37107 (2007). We then granted certiorari limited to the following question: "Whether [§ 1326(b)] . . . authorizes the [EPA] to compare costs with benefits in determining 'the best technology available for minimizing adverse environmental impact' at cooling water intake structures." 552 U. S. 1309 (2008).

II

In setting the Phase II national performance standards and providing for site-specific cost-benefit variances, the EPA relied on its view that § 1326(b)'s "best technology available" standard permits consideration of the technology's costs, 69 Fed. Reg. 41626, and of the relationship between those costs and the environmental benefits produced, *id.*, at

41603. That view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984).[4]

As we have described, § 1326(b) instructs the EPA to set standards for cooling water intake structures that reflect "the best technology available for minimizing adverse environmental impact." The Second Circuit took that language to mean the technology that achieves the greatest reduction in adverse environmental impacts at a cost that can reasonably be borne by the industry. 475 F. 3d, at 99–100. That is certainly a plausible interpretation of the statute. The "best" technology—that which is "most advantageous," Webster's New International Dictionary 258 (2d ed. 1953)—may well be the one that produces the most of some good, here a reduction in adverse environmental impact. But "best technology" may also describe the technology that *most efficiently* produces some good. In common parlance one could certainly use the phrase "best technology" to refer to that which produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good than other available technologies.

Respondents contend that this latter reading is precluded by the statute's use of the phrase "for minimizing adverse

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[4] The dissent finds it "puzzling" that we invoke this proposition (that a reasonable agency interpretation prevails) at the "outset," omitting the supposedly prior inquiry of " 'whether Congress has directly spoken to the precise question at issue.' " *Post*, at 241, n. 5 (opinion of STEVENS, J.) (quoting *Chevron*, 467 U. S., at 842). But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.

What is truly "puzzling" is the dissent's accompanying charge that the Court's failure to conduct the *Chevron* step-one inquiry at the outset "reflects [its] reluctance to consider the possibility . . . that Congress' silence may have meant to foreclose cost-benefit analysis." *Post*, at 241, n. 5. Our discussion of that issue, *infra*, at 222–223, speaks for itself.

environmental impact." Minimizing, they argue, means reducing to the smallest amount possible, and the "best technology available for minimizing adverse environmental impacts" must be the economically feasible technology that achieves the greatest possible reduction in environmental harm. Brief for Respondent Riverkeeper, Inc., et al. 25–26. But "minimize" is a term that admits of degree and is not necessarily used to refer exclusively to the "greatest possible reduction." For example, elsewhere in the Clean Water Act, Congress declared that the procedures implementing the Act "shall encourage the drastic minimization of paperwork and interagency decision procedures." 33 U. S. C. § 1251(f). If respondents' definition of the term "minimize" is correct, the statute's use of the modifier "drastic" is superfluous.

Other provisions in the Clean Water Act also suggest the agency's interpretation. When Congress wished to mandate the greatest feasible reduction in water pollution, it did so in plain language: The provision governing the discharge of toxic pollutants into the Nation's waters requires the EPA to set "effluent limitations [which] shall require the *elimination* of discharges of all pollutants if the Administrator finds . . . that such elimination is technologically and economically achievable," § 1311(b)(2)(A) (emphasis added). See also § 1316(a)(1) (mandating "where practicable, a standard [for new point sources] permitting *no discharge* of pollutants" (emphasis added)). Section 1326(b)'s use of the less ambitious goal of "minimizing adverse environmental impact" suggests, we think, that the agency retains some discretion to determine the extent of reduction that is warranted under the circumstances. That determination could plausibly involve a consideration of the benefits derived from reductions and the costs of achieving them. Cf. 40 CFR § 125.83 (defining "minimize" for purposes of the Phase I regulations as "reduc[ing] to the smallest amount, extent, or degree reasonably possible"). It seems to us, therefore, that the phrase

"best technology available," even with the added specification "for minimizing adverse environmental impact," does not unambiguously preclude cost-benefit analysis.[5]

Respondents' alternative (and, alas, also more complex) argument rests upon the structure of the Clean Water Act. The Act provided that during its initial implementation period existing "point sources"—discrete conveyances from which pollutants are or may be discharged, 33 U. S. C. § 1362(14)—were subject to "effluent limitations . . . which shall require the application of the *best practicable control technology* currently available." § 1311(b)(1)(A) (emphasis added). (We shall call this the "BPT" test.) Following that transition period, the Act initially mandated adoption, by July 1, 1983 (later extended to March 31, 1989), of stricter effluent limitations requiring "application of the *best available technology economically achievable* for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." § 1311(b)(2)(A) (emphasis added); see *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 69–70 (1980). (We shall call this the "BATEA" test.) Subsequent amendment limited application of this standard to toxic and nonconventional pollutants, and for the remainder established a (presumably laxer) test of "best conventional-pollutant control technology." § 1311(b)(2)(E).[6] (We shall call this "BCT.")

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[5] Respondents concede that the term "available" is ambiguous, as it could mean either technologically feasible or economically feasible. But any ambiguity in the term "available" is largely irrelevant. Regardless of the criteria that render a technology "available," the EPA would still have to determine which available technology is the "best" one. And as discussed above, that determination may well involve consideration of the technology's relative costs and benefits.

[6] The statute does not contain a hyphen between the words "conventional" and "pollutant." "Conventional pollutant" is a statutory term, however, see 33 U. S. C. § 1314(a)(4), and it is clear that in § 1311(b)(2)(E) the adjective modifies "pollutant" rather than "control technology." The hyphen makes that clear.

Finally, § 1316 subjected certain categories of new point sources to "the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the *best available demonstrated control technology.*" § 1316(a)(1) (emphasis added); § 1316(b)(1)(B). (We shall call this the "BADT" test.) The provision at issue here, applicable not to effluents but to cooling water intake structures, requires, as we have described, "the *best technology available for minimizing adverse environmental impact,*" § 1326(b) (emphasis added). (We shall call this the "BTA" test.)

The first four of these tests are elucidated by statutory factor lists that guide their implementation. To take the standards in (presumed) order of increasing stringency, see *Crushed Stone, supra,* at 69–70: In applying the BPT test the EPA is instructed to consider, among other factors, "the total cost of application of technology in relation to the effluent reduction benefits to be achieved." § 1314(b)(1)(B). In applying the BCT test it is instructed to consider "the *reasonableness of the relationship* between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." § 1314(b)(4)(B) (emphasis added). And in applying the BATEA and BADT tests the EPA is instructed to consider the "cost of achieving such effluent reduction." §§ 1314(b)(2)(B), 1316(b)(1)(B). There is no such elucidating language applicable to the BTA test at issue here. To facilitate comparison, the texts of these five tests, the clarifying factors applicable to them, and the entities to which they apply are set forth in the Appendix, *infra.*

The Second Circuit, in rejecting the EPA's use of cost-benefit analysis, relied in part on the propositions that (1) cost-benefit analysis is precluded under the BATEA and BADT tests; and (2) that, insofar as the permissibility of cost-benefit analysis is concerned, the BTA test (the one at issue here) is to be treated the same as those two. See 475 F. 3d, at 98. It is not obvious to us that the first of these

propositions is correct, but we need not pursue that point, since we assuredly do not agree with the second. It is certainly reasonable for the agency to conclude that the BTA test need not be interpreted to permit only what those other two tests permit. Its text is not identical to theirs. It has the relatively modest goal of "minimizing adverse environmental impact" as compared with the BATEA's goal of "eliminating the discharge of all pollutants." And it is unencumbered by specified statutory factors of the sort provided for those other two tests, which omission can reasonably be interpreted to suggest that the EPA is accorded greater discretion in determining its precise content.

Respondents and the dissent argue that the mere fact that § 1326(b) does not expressly authorize cost-benefit analysis for the BTA test, though it does so for two of the other tests, displays an intent to forbid its use. This surely proves too much. For while it is true that two of the other tests authorize cost-benefit analysis, it is also true that *all four* of the other tests expressly authorize *some* consideration of costs. Thus, if respondents' and the dissent's conclusion regarding the import of § 1326(b)'s silence is correct, it is *a fortiori* true that the BTA test permits *no consideration of cost whatsoever*, not even the "cost-effectiveness" and "feasibility" analysis that the Second Circuit approved, see *supra*, at 217, that the dissent would approve, *post*, at 237, and that respondents acknowledge. The inference that respondents and the dissent would draw from the silence is, in any event, implausible, as § 1326(b) is silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing § 1326(b)—an obvious logical impossibility. It is eminently reasonable to conclude that § 1326(b)'s silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree.

Contrary to the dissent's suggestion, see *post*, at 238–240, our decisions in *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457 (2001), and *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490 (1981), do not undermine this conclusion. In *American Trucking*, we held that the text of § 109 of the Clean Air Act, "interpreted in its statutory and historical context . . . , unambiguously bars cost considerations" in setting air quality standards under that provision. 531 U. S., at 471. The relevant "statutory context" included other provisions in the Clean Air Act that expressly authorized consideration of costs, whereas § 109 did not. *Id.*, at 467–468. *American Trucking* thus stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion. For the reasons discussed earlier, § 1326(b)'s silence cannot bear that interpretation.

In *American Textile*, the Court relied in part on a statute's failure to mention cost-benefit analysis in holding that the relevant agency was not required to engage in cost-benefit analysis in setting certain health and safety standards. 452 U. S., at 510–512. But under *Chevron*, that an agency is not *required* to do so does not mean that an agency is not *permitted* to do so.

This extended consideration of the text of § 1326(b), and comparison of that with the text and statutory factors applicable to four parallel provisions of the Clean Water Act, lead us to the conclusion that it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden. Other arguments may be available to preclude such a rigorous form of cost-benefit analysis as that which was prescribed under the statute's former BPT standard, which required weighing "the total cost of application of technology" against "the . . . benefits to be achieved." See *supra*, at 221. But that question is not before us.

In the Phase II requirements challenged here the EPA sought only to avoid extreme disparities between costs and benefits. The agency limited variances from the Phase II "national performance standards" to circumstances where the costs are "significantly greater than the benefits" of compliance. 40 CFR § 125.94(a)(5)(ii). In defining the "national performance standards" themselves the EPA assumed the application of technologies whose benefits "approach those estimated" for closed-cycle cooling systems at a fraction of the cost: $389 million per year, 69 Fed. Reg. 41666, as compared with (1) at least $3.5 billion per year to operate compliant closed-cycle cooling systems, *id.*, at 41605 (or $1 billion per year to impose similar requirements on a subset of Phase II facilities, *id.*, at 41606), and (2) significant reduction in the energy output of the altered facilities, *id.*, at 41605. And finally, the EPA's assessment of the relatively meager financial benefits of the Phase II regulations that it adopted—reduced impingement and entrainment of 1.4 billion aquatic organisms, *id.*, at 41661, Exh. XII–6, with annualized use benefits of $83 million, *id.*, at 41662, and nonuse benefits of indeterminate value, *id.*, at 41660–41661—when compared to annual costs of $389 million, demonstrates quite clearly that the agency did not select the Phase II regulatory requirements because their benefits equaled their costs.

While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years. See *Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 487 (2004); *Barnhart* v. *Walton*, 535 U. S. 212, 219–220 (2002). As early as 1977, the agency determined that, while § 1326(b) does not *require* cost-benefit analysis, it is also not reasonable to "interpret Section [1326(b)] as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained." *In re Public Service Co. of New Hampshire*, 1

E. A. D. 332, 340 (1977). See also *In re Central Hudson Gas and Electric Corp.*, EPA General Counsel Opinions, NPDES Permits, No. 63, pp. 371, 381 (July 29, 1977) ("EPA ultimately must demonstrate that the present value of the cumulative annual cost of modifications to cooling water intake structures is not wholly out of proportion to the magnitude of the estimated environmental gains"); *Seacoast Anti-Pollution League* v. *Costle*, 597 F. 2d 306, 311 (CA1 1979) (rejecting challenge to an EPA permit decision that was based in part on the agency's determination that further restrictions would be "'wholly disproportionate to any environmental benefit'"). While the EPA's prior "wholly disproportionate" standard may be somewhat different from its current "significantly greater than" standard, there is nothing in the statute that would indicate that the former is a permissible interpretation while the latter is not.

Indeed, in its review of the EPA's Phase I regulations, the Second Circuit seemed to recognize that § 1326(b) permits some form of cost-benefit analysis. In considering a challenge to the EPA's rejection of dry cooling systems[7] as the "best technology available" for Phase I facilities, the Second Circuit noted that "while it certainly sounds substantial that dry cooling is 95 percent more effective than closed-cycle cooling, it is undeniably relevant that that difference represents a relatively small improvement over closed-cycle cooling at a very significant cost." *Riverkeeper*, 358 F. 3d, at 194, n. 22. And in the decision below rejecting the use of cost-benefit analysis in the Phase II regulations, the Second Circuit nonetheless interpreted "best technology available" as mandating only those technologies that can "be reasonably borne by the industry." 475 F. 3d, at 99. But whether it is "reasonable" to bear a particular cost may well depend on

[7] Dry cooling systems use air drafts to remove heat, and accordingly remove little or no water from surrounding water sources. See 66 Fed. Reg. 65282 (2001).

the resulting benefits; if the only relevant factor was the feasibility of the costs, their reasonableness would be irrelevant.

In the last analysis, even respondents ultimately recognize that some form of cost-benefit analysis is permissible. They acknowledge that the statute's language is "plainly not so constricted as to require EPA to require industry petitioners to spend billions to save one more fish or plankton." Brief for Respondent Riverkeeper, Inc., et al. 29. This concedes the principle—the permissibility of at least some cost-benefit analysis—and we see no statutory basis for limiting its use to situations where the benefits are *de minimis* rather than significantly disproportionate.

* * *

We conclude that the EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. The Court of Appeals' reliance in part on the agency's use of cost-benefit analysis in invalidating the site-specific cost-benefit variance provision, 475 F. 3d, at 114, was therefore in error, as was its remand of the national performance standards for clarification of whether cost-benefit analysis was impermissibly used, *id.*, at 104–105. We of course express no view on the remaining bases for the Second Circuit's remand which did not depend on the permissibility of cost-benefit analysis. See *id.*, at 108, 110, 113, 115, 117, 120.[8] The judgment of the

[8] JUSTICE BREYER would remand for the additional reason of what he regards as the agency's inadequate explanation of the change in its criterion for variances—from a relationship of costs to benefits that is "'wholly disproportionate'" to one that is "'significantly greater.'" *Post*, at 236 (opinion concurring in part and dissenting in part). That question can have no bearing upon whether the EPA can use cost-benefit analysis, which is the only question presented here. It seems to us, in any case, that the EPA's explanation was ample. It explained that the "wholly out of proportion" standard was inappropriate for the existing facilities subject to the Phase II rules because those facilities lack "the greater flexibil-

Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

Statutory Standard	**Statutorily Mandated Factors**	**Entities Subject to Regulation**
BPT: "[E]ffluent limitations . . . which shall require the application of the *best practicable control technology currently available.*" 33 U. S. C. § 1311(b)(1)(A) (emphasis added).	"Factors relating to the assessment of best practicable control technology currently available . . . shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved." 33 U. S. C. § 1314(b)(1)(B).	Existing point sources during the Clean Water Act's initial implementation phase.
BCT: "[E]ffluent limitations . . . which . . . shall require application of the *best conventional pollutant control*	"Factors relating to the assessment of best conventional pollutant control technology . . . shall include consideration of the	Existing point sources that discharge "conventional pollutants" as defined by the

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ity available to new facilities for selecting the location of their intakes and installing technologies at lower costs relative to the costs associated with retrofitting existing facilities," and because "economically impracticable impacts on energy prices, production costs, and energy production . . . could occur if large numbers of Phase II existing facilities incurred costs that were more than 'significantly greater' than but not 'wholly out of proportion' to the costs in the EPA's record." 68 Fed. Reg. 13541 (2003).

Appendix to opinion of the Court

Statutory Standard	**Statutorily Mandated Factors**	**Entities Subject to Regulation**
BCT (continued): *technology.*" 33 U. S. C. § 1311(b)(2)(E) (emphasis added).	reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." 33 U. S. C. § 1314(b)(4)(B).	EPA under 33 U. S. C. § 1314(a)(4).
BATEA: "[E]ffluent limitations . . . which . . . shall require application of the *best available technology economically achievable* . . . which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." 33 U. S. C. § 1311(b)(2)(A) (emphasis added).	"Factors relating to the assessment of best available technology shall take into account . . . the cost of achieving such effluent reduction." 33 U. S. C. § 1314(b)(2)(B).	Existing point sources that discharge toxic pollutants and non-conventional pollutants.
BADT: "[A] standard for the control of the discharge of	"[T]he Administrator shall take into consideration the cost of achieving such effluent	New point sources within the categories of sources

Statutory Standard	**Statutorily Mandated Factors**	**Entities Subject to Regulation**
BADT (continued): pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the *best available demonstrated control technology*." 33 U. S. C. § 1316(a)(1) (emphasis added).	reduction, and any non-water quality, environmental impact and energy requirements." 33 U. S. C. § 1316(b)(1)(B).	identified by the EPA under 33 U. S. C. § 1316(b)(1)(A).
BTA: "Any standard . . . applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U. S. C. § 1326(b).	N/A	Point sources that operate cooling water intake structures.

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with the Court that the relevant statutory language authorizes the Environmental Protection Agency (EPA or Agency) to compare costs and benefits. *Ante*, at 217–223. Nonetheless the drafting history and legislative history of related provisions, Pub. L. 92–500, §§ 301, 304, 86 Stat. 844, 850, as amended, 33 U. S. C. §§ 1311, 1314, make clear that those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost-benefit comparisons. And I would apply that text accordingly.

I

Section 301 provides that, not later than 1977, effluent limitations for point sources shall require the application of "*best practicable* control technology," § 301(b)(1)(A), 86 Stat. 845 (emphasis added); and that, not later than 1983 (later extended to 1989), effluent limitations for categories and classes of point sources shall require application of the "*best available* technology economically achievable," § 301(b)(2)(A), *ibid.* (emphasis added). Section 304(b), in turn, identifies the factors that the Agency shall take into account in determining (1) "*best practicable* control technology" and (2) "*best available* technology." 86 Stat. 851 (emphasis added).

With respect to the first, the statute provides that the factors taken into account by the Agency "shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application . . . and such other factors as the Administrator deems appropriate." § 304(b)(1)(B), *ibid.* With respect to the second, the statute says that the Agency "shall take into account . . . the cost of achieving such effluent reduction" and "such other factors as the Administrator deems appropriate." § 304(b)(2)(B), *ibid.*

The drafting history makes clear that the statute reflects a compromise. In the House version of the legislation, the Agency was to consider "the cost and the economic, social, and environmental impact of achieving such effluent reduction" when determining both "*best practicable*" and "*best available*" technology. H. R. 11896, 92d Cong., 2d Sess., §§ 304(b)(1)(B), (b)(2)(B) (1972) (as reported from Committee). The House Report explained that the "*best available* technology" standard was needed—as opposed to mandating the elimination of discharge of pollutants—because "the difference in the cost of 100 percent elimination of pollutants as compared to the cost of removal of 97–99 percent of the pollutants in an effluent can far exceed any reasonable benefit to be achieved. In most cases, the cost of removal of the last few percentage points increases expo[n]entially." H. R. Rep. No. 92–911, p. 103 (1972).

In the Senate version, the Agency was to consider "the cost of achieving such effluent reduction" when determining both "*best practicable*" and "*best available*" technology. S. 2770, 92d Cong., 1st Sess., §§ 304(b)(1)(B), (b)(2)(B) (1971) (as reported from Committee). The Senate Report explains that "the technology must be available at a cost . . . which the Administrator determines to be reasonable." S. Rep. No. 92–414, p. 52 (1971) (hereinafter S. Rep.). But it said nothing about comparing costs and benefits.

The final statute reflects a modification of the House's language with respect to "*best practicable,*" and an adoption of the Senate's language with respect to "*best available.*" S. Conf. Rep. No. 92–1236, pp. 124–125 (1972). The final statute does not *require* the Agency to compare costs to benefits when determining "*best available* technology," but neither does it expressly *forbid* such a comparison.

The strongest evidence in the legislative history supporting the respondents' position—namely, that Congress intended to forbid comparisons of costs and benefits when determining the "*best available* technology"—can be found in

a written discussion of the Act's provisions distributed to the Senate by Senator Edmund Muskie, the Act's principal sponsor, when he submitted the Conference Report for the Senate's consideration. 118 Cong. Rec. 33693 (1972). The relevant part of that discussion points out that, as to "*best practicable* technology," the statute requires application of a "balancing test between total cost and effluent reduction benefits." *Id.*, at 33696; see § 304(b)(1)(B). But as to "*best available* technology," it states: "While cost should be a factor in the Administrator's judgment, no balancing test will be required." *Ibid.*; see § 304(b)(2)(B). And Senator Muskie's discussion later speaks of the Agency "evaluat[ing] . . . what needs to be done" to eliminate pollutant discharge and "what is achievable," both "without regard to cost." *Ibid.*

As this language suggests, the Act's sponsors had reasons for minimizing the EPA's investigation of, and reliance upon, cost-benefit comparisons. The preparation of formal cost-benefit analyses can take too much time, thereby delaying regulation. And the sponsors feared that such analyses would emphasize easily quantifiable factors over more qualitative factors (particularly environmental factors, for example, the value of preserving nonmarketable species of fish). See S. Rep., at 47. Above all, they hoped that minimizing the use of cost-benefit comparisons would force the development of cheaper control technologies; and doing so, whatever the initial inefficiencies, would eventually mean cheaper, more effective cleanup. See *id.*, at 50–51.

Nonetheless, neither the sponsors' language nor the underlying rationale requires the Act to be read in a way that would *forbid* cost-benefit comparisons. Any such total prohibition would be difficult to enforce, for every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs. Moreover, an absolute prohibition would bring about irrational results. As the respondents themselves say, it would make no sense to require plants to

"spend billions to save one more fish or plankton." Brief for Respondent Riverkeeper, Inc., et al. 29. That is so even if the industry might somehow afford those billions. And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.

Thus Senator Muskie used nuanced language, which one can read as leaving to the Agency a degree of authority to make cost-benefit comparisons in a manner that is sensitive both to the need for such comparisons and to the concerns that the law's sponsors expressed. The relevant statement begins by listing various factors that the statute *requires* the Administrator to take into account when applying the phrase "practicable" to "classes and categories." 118 Cong. Rec. 33696. It states that, when doing so, the Administrator *must* apply (as the statute specifies) a "balancing test between total cost and effluent reduction benefits." *Ibid.* At the same time, it seeks to reduce the likelihood that the Administrator will place too much weight upon high costs by adding that the balancing test "is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving" a "marginal level of reduction." *Ibid.*

Senator Muskie's statement then considers the "*different test*" that the statute requires the Administrator to apply when determining the "'*best available*'" technology. *Ibid.* (emphasis added). Under that test, the Administrator "may consider a broader range of technological alternatives." *Ibid.* And in determining what is "'*best available*' for a category or class, the Administrator is expected to apply the same principles involved in making the determination of '*best practicable*' . . . except as to cost-benefit analysis." *Ibid.* (emphasis added). That is, "[w]hile cost should be a factor . . . no balancing test will be *required.*" *Ibid.* (empha-

sis added). Rather, "*[t]he Administrator will be bound by a test of reasonableness.*" *Ibid.* (emphasis added). The statement adds that the "'*best available*'" standard "is intended to reflect the need to press toward increasingly higher levels of control." *Ibid.* (emphasis added). And "the reasonableness of what is 'economically achievable' should *reflect* an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology—without regard to cost." *Ibid.* (emphasis added).

I believe, as I said, that this language is deliberately nuanced. The statement says that where the statute uses the term "*best practicable,*" the statute *requires* comparisons of costs and benefits; but where the statute uses the term "*best available,*" such comparisons are not "*required.*" *Ibid.* (emphasis added). Senator Muskie does not say that all efforts to compare costs and benefits are *forbidden.*

Moreover, the statement points out that where the statute uses the term "*best available,*" the Administrator "will be bound by a test of *reasonableness.*" *Ibid.* (emphasis added). It adds that the Administrator should apply this test in a way that *reflects* its ideal objective, moving as closely as is technologically possible to the elimination of pollution. It thereby says the Administrator should consider, *i. e.*, take into account, how much pollution would still remain if the *best available* technology were to be applied everywhere—"without regard to cost." *Ibid.* It does not say that the Administrator *must* set the standard based solely on the result of that determination. (It would be difficult to reconcile the alternative, more absolute reading of this language with the Senator's earlier "test of reasonableness.")

I say that one *may,* not that one *must,* read Senator Muskie's statement this way. But to read it differently would put the Agency in conflict with the test of reasonableness by threatening to impose massive costs far in excess of any benefit. For 30 years the EPA has read the statute and its his-

tory in this way. The EPA has thought that it would not be "reasonable to interpret Section 316(b) as requiring use of technology whose cost is *wholly disproportionate* to the environmental benefit to be gained." *In re Pub. Serv. Co. of N. H. (Seabrook Station, Units 1 and 2)*, 1 E. A. D. 332, 340 (1977), remanded on other grounds, *Seacoast Anti-Pollution League* v. *Costle*, 572 F. 2d 872 (CA1 1978) (emphasis added); see also *In re Central Hudson Gas & Elec. Corp.*, EPA General Counsel Opinions, NPDES Permits, No. 63, p. 371 (July 29, 1977) (also applying a "wholly disproportionate" test); *In re Pub. Serv. Co. of N. H.*, 1 E. A. D. 455 (1978) (same). "[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration." *Barnhart* v. *Walton*, 535 U. S. 212, 220 (2002). And for the last 30 years, the EPA has given the statute a permissive reading without suggesting that in doing so it was ignoring or thwarting the intent of the Congress that wrote the statute.

The EPA's reading of the statute would seem to permit it to describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge. The Agency can thereby avoid lengthy formal cost-benefit proceedings and futile attempts at comprehensive monetization, see 69 Fed. Reg. 41661–41662 (2004); take account of Congress' technology-forcing objectives; and still prevent results that are absurd or unreasonable in light of extreme disparities between costs and benefits. This approach, in my view, rests upon a "reasonable interpretation" of the statute—legislative history included. Hence it is lawful. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). Most of what the majority says is consistent with this view, and to that extent I agree with its opinion.

II

The cases before us, however, present an additional problem. We here consider a rule that permits variances from

national standards if a facility demonstrates that its costs would be "significantly greater than the benefits of complying." 40 CFR § 125.94(a)(5)(ii) (2008). The words "significantly greater" differ from the words the EPA has traditionally used to describe its standard, namely, "wholly disproportionate." Perhaps the EPA does not mean to make much of that difference. But if it means the new words to set forth a new and different test, the EPA must adequately explain why it has changed its standard. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 42–43 (1983); *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981 (2005); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 524, n. 3 (1994) (THOMAS, J., dissenting).

I am not convinced the EPA has successfully explained the basis for the change. It has referred to the fact that existing facilities have less flexibility than new facilities with respect to installing new technologies, and it has pointed to special, energy-related impacts of regulation. 68 Fed. Reg. 13541 (2003) (proposed rule). But it has not explained why the traditional "wholly disproportionate" standard cannot do the job now, when the EPA has used that standard (for existing facilities and otherwise) with apparent success in the past. See, *e. g.*, *Central Hudson*, *supra.*

Consequently, like the majority, I would remand these cases to the Court of Appeals. But unlike the majority I would permit that court to remand the cases to the EPA so that the EPA can either apply its traditional "wholly disproportionate" standard or provide an adequately reasoned explanation for the change.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

Section 316(b) of the Clean Water Act (CWA), 33 U. S. C. § 1326(b), which governs industrial powerplant water intake

structures, provides that the Environmental Protection Agency (EPA or Agency) "shall require" that such structures "reflect the best technology available for minimizing adverse environmental impact." The EPA has interpreted that mandate to authorize the use of cost-benefit analysis in promulgating regulations under § 316(b). For instance, under the Agency's interpretation, technology that would otherwise qualify as the best available need not be used if its costs are "significantly greater than the benefits" of compliance. 40 CFR § 125.94(a)(5)(ii) (2008).

Like the Court of Appeals, I am convinced that the EPA has misinterpreted the plain text of § 316(b). Unless costs are so high that the best technology is not "available," Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. Section 316(b) neither expressly nor implicitly authorizes the EPA to use cost-benefit analysis when setting regulatory standards; fairly read, it prohibits such use.

I

As typically performed by the EPA, cost-benefit analysis requires the Agency to first monetize the costs and benefits of a regulation, balance the results, and then choose the regulation with the greatest net benefits. The process is particularly controversial in the environmental context in which a regulation's financial costs are often more obvious and easier to quantify than its environmental benefits. And cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection.

For instance, although the EPA estimated that water intake structures kill 3.4 billion fish and shellfish each year,[1]

[1] To produce energy, industrial powerplants withdraw billions of gallons of water daily from our Nation's waterways. Thermoelectric powerplants alone demand 39 percent of all freshwater withdrawn nationwide. See Dept. of Energy, Addressing the Critical Link Between Fossil Energy and Water 2 (Oct. 2005), http://www.netl.doe.gov/technologies/coalpower/ewr/

see 69 Fed. Reg. 41586 (2004), the Agency struggled to calculate the value of the aquatic life that would be protected under its § 316(b) regulations, *id.*, at 41661. To compensate, the EPA took a shortcut: Instead of monetizing all aquatic life, the Agency counted only those species that are commercially or recreationally harvested, a tiny slice (1.8 percent to be precise) of all impacted fish and shellfish. This narrow focus in turn skewed the Agency's calculation of benefits. When the EPA attempted to value all aquatic life, the benefits measured $735 million.[2] But when the EPA decided to give zero value to the 98.2 percent of fish not commercially or recreationally harvested, the benefits calculation dropped dramatically—to $83 million. *Id.*, at 41666. The Agency acknowledged that its failure to monetize the other 98.2 percent of affected species " 'could result in serious misallocation of resources,' " *id.*, at 41660, because its "comparison of complete costs and incomplete benefits does not provide an accurate picture of net benefits to society."[3]

Because benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost-benefit analysis in crafting regulations. Indeed, this Court has recognized that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *American Textile Mfrs.*

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pubs/NETL_Water_Paper_Final_Oct.2005.pdf (all Internet materials as visited Mar. 18, 2009, and available in Clerk of Court's case file). The fish and shellfish are killed by "impingement" or "entrainment." Impingement occurs when aquatic organisms are trapped against the screens and grills of water intake structures. Entrainment occurs when these organisms are drawn into the intake structures. See *Riverkeeper, Inc.* v. *EPA*, 475 F. 3d 83, 89 (CA2 2007); 69 Fed. Reg. 41586 (2004).

[2] EPA, Economic and Benefits Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule, p. D1–4 (EPA–821–R–02–001, Feb. 2002), http://www.epa.gov/waterscience/316b/phase2/econbenefits.

[3] EPA, Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule, p. D1–5 (EPA–821–R–04–005, Feb. 2004), http://www.epa.gov/waterscience/316b/phase2/econbenefits/final.htm.

Institute, Inc. v. *Donovan*, 452 U. S. 490, 510 (1981). Accordingly, we should not treat a provision's silence as an implicit source of cost-benefit authority, particularly when such authority is elsewhere expressly granted and it has the potential to fundamentally alter an agency's approach to regulation. Congress, we have noted, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

When interpreting statutory silence in the past, we have sought guidance from a statute's other provisions. Evidence that Congress confronted an issue in some parts of a statute, while leaving it unaddressed in others, can demonstrate that Congress meant its silence to be decisive. We concluded as much in *American Trucking.* In that case, the Court reviewed a claim that § 109 of the Clean Air Act (CAA), 42 U. S. C. § 7409(a) (2000 ed.), authorized the EPA to consider implementation costs in setting ambient air quality standards. We read § 109, which was silent on the matter, to prohibit Agency reliance on cost considerations. After examining other provisions in which Congress had given the Agency authority to consider costs, the Court "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." 531 U. S., at 467. Studied silence, we thus concluded, can be as much a prohibition as an explicit "no."

Further motivating the Court in *American Trucking* was the fact that incorporating implementation costs into the Agency's calculus risked countermanding Congress' decision to protect public health. The cost of implementation, we said, "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in [the text] had Congress meant it to be considered." *Id.*, at 469.

American Trucking's approach should have guided the Court's reading of § 316(b). Nowhere in the text of § 316(b) does Congress explicitly authorize the use of cost-benefit analysis as it does elsewhere in the CWA. And the use of cost-benefit analysis, like the consideration of implementation costs in *American Trucking*, "pad[s]" § 316(b)'s environmental mandate with tangential economic efficiency concerns. *Id.*, at 468. Yet the majority fails to follow *American Trucking* despite that case's obvious relevance to our inquiry.

II

In 1972, Congress amended the CWA to strike a careful balance between the country's energy demands and its desire to protect the environment. The Act required industry to adopt increasingly advanced technology capable of mitigating its detrimental environmental impact. Not all point sources were subject to strict rules at once. Existing plants were granted time to retrofit with the best technology while new plants were required to incorporate such technology as a matter of design. Although Congress realized that technology standards would necessarily put some firms out of business, see *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 79 (1980), the statute's steady march was toward stricter rules and potentially higher costs.

Section 316(b) was an integral part of the statutory scheme. The provision instructs that "[a]ny standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available for minimizing adverse environmental impact.*" 33 U. S. C. § 1326(b) (2006 ed.) (emphasis added).[4] The "best technology

[4] The two cross-referenced provisions, §§ 1311 and 1316, also establish "best technology" standards, the first applicable to existing point sources and the second to new facilities. The reference to these provisions in § 316(b) merely requires any rule promulgated under those provisions, when applied to a point source with a water intake structure, to incorporate § 316(b) standards.

available," or "BTA," standard delivers a clear command: To minimize the adverse environmental impact of water intake structures, the EPA must require industry to adopt the best technology available.

Based largely on the observation that § 316(b)'s text offers little guidance and therefore delegates some amount of gap-filling authority to the EPA, the Court concludes that the Agency has discretion to rely on cost-benefit analysis. See *ante*, at 222–223. The Court assumes that, by not specifying how the EPA is to determine BTA, Congress intended to give considerable discretion to the EPA to decide how to proceed. Silence, in the majority's view, represents ambiguity and an invitation for the Agency to decide for itself which factors should govern its regulatory approach.

The appropriate analysis requires full consideration of the CWA's structure and legislative history to determine whether Congress contemplated cost-benefit analysis and, if so, under what circumstances it directed the EPA to utilize it. This approach reveals that Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others, and that Congress intended to control, not delegate, when cost-benefit analysis should be used. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984).[5]

Powerful evidence of Congress' decision not to authorize cost-benefit analysis in the BTA standard lies in the series of

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[5] The majority announces at the outset that the EPA's reading of the BTA standard "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Ante*, at 218. This observation is puzzling in light of the commonly understood practice that, as a first step, we ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U. S., at 842. Only later, if Congress' intent is not clear, do we consider the reasonableness of the agency's action. *Id.*, at 843. Assuming ambiguity and moving to the second step reflects the Court's reluctance to consider the possibility, which it later laments is "more complex," *ante*, at 220, that Congress' silence may have meant to foreclose cost-benefit analysis.

standards adopted to regulate the outflow, or effluent, from industrial powerplants. Passed at the same time as the BTA standard at issue here, the effluent limitation standards imposed increasingly strict technology requirements on industry. In each effluent limitation provision, Congress distinguished its willingness to allow the EPA to consider costs from its willingness to allow the Agency to conduct a cost-benefit analysis. And to the extent Congress permitted cost-benefit analysis, its use was intended to be temporary and exceptional.

The first tier of technology standards applied to existing plants—facilities for which retrofitting would be particularly costly. Congress required these plants to adopt "effluent limitations . . . which shall require the application of the best practicable control technology currently available." 33 U. S. C. § 1311(b)(1)(A). Because this "best practicable," or "BPT," standard was meant to ease industry's transition to the new technology-based regime, Congress gave BPT two unique features: First, it would be temporary, remaining in effect only until July 1, 1983.[6] Second, it specified that the EPA was to conduct a cost-benefit analysis in setting BPT requirements by considering "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application."[7] § 1314(b)(1)(B). Permitting cost-benefit analysis in BPT gave the EPA the ability to cushion the new technology requirement. For a limited

[6] Congress later extended the deadline to March 31, 1989.

[7] Senator Muskie, the Senate sponsor of the legislation, described the cost-benefit analysis permitted under BPT as decidedly narrow, asserting that "[t]he balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources." 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 170 (1973) (hereinafter Leg. Hist.)

time, a technology with costs that exceeded its benefits would not be considered "best."

The second tier of technology standards required existing powerplants to adopt the "best available technology economically achievable" to advance "the national goal of eliminating the discharge of all pollutants." § 1311(b)(2)(A). In setting this "best available technology," or "BAT,"[8] standard, Congress gave the EPA a notably different command for deciding what technology would qualify as "best": The EPA was to consider, among other factors, "the cost of achieving such effluent reduction," but Congress did not grant it authority to balance costs with the benefits of stricter regulation. § 1314(b)(2)(B). Indeed, in *Crushed Stone* this Court explained that the difference between BPT and BAT was the existence of cost-benefit authority in the first and the absence of that authority in the second. See 449 U. S., at 71 ("Similar directions are given the Administrator for determining effluent reductions attainable from the BAT except that in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits").

The BAT standard's legislative history strongly supports the view that Congress purposefully withheld cost-benefit authority for this tier of regulation. See *ibid.*, n. 10. The House of Representatives and the Senate split over the role cost-benefit analysis would play in the BAT provision. The House favored the tool, see H. R. Rep. No. 92–911, p. 107 (1972), 1 Leg. Hist. 794, while the Senate rejected it, see 2 *id.*, at 1183; *id.*, at 1132. The Senate view ultimately prevailed in the final legislation, resulting in a BAT standard that was "not subject to any test of cost in relation to effluent reduction benefits or any form of cost/benefit analysis." 3 Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act (Committee Print compiled for the

[8] Although the majority calls this "BATEA," the parties refer to the provision as "BAT," and for simplicity, so will I.

Senate Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–14, p. 427 (1978).

The third and strictest regulatory tier was reserved for new point sources—facilities that could incorporate technology improvements into their initial design. These new facilities were required to adopt "the best available demonstrated control technology," or "BADT," which Congress described as "a standard . . . which reflect[s] the greatest degree of effluent reduction." § 1316(a)(1). In administering BADT, Congress directed the EPA to consider "the cost of achieving such effluent reduction." § 1316(b)(1)(B). But because BADT was meant to be the most stringent standard of all, Congress made no mention of cost-benefit analysis. Again, the silence was intentional. The House's version of BADT originally contained an exemption for point sources for which "the economic, social, and environmental costs bear no reasonable relationship to the economic, social, and environmental benefit to be obtained." 1 Leg. Hist. 798. That this exemption did not appear in the final legislation demonstrates that Congress considered, and rejected, reliance on cost-benefit analysis for BADT.

It is in this light that the BTA standard regulating water intake structures must be viewed. The use of cost-benefit analysis was a critical component of the CWA's structure and a key concern in the legislative process. We should therefore conclude that Congress intended to forbid cost-benefit analysis in one provision of the Act in which it was silent on the matter when it expressly authorized its use in another.[9]

[9] The Court argues that, if silence in § 316(b) signals the prohibition of cost-benefit analysis, it must also foreclose the consideration of *all* other potentially relevant discretionary factors in setting BTA standards. *Ante,* at 222. This all-or-nothing reasoning rests on the deeply flawed assumption that Congress treated cost-benefit analysis as just one among many factors upon which the EPA could potentially rely to establish BTA. Yet, as explained above, the structure and legislative history of the CWA demonstrate that Congress viewed cost-benefit analysis with special skepticism and controlled its use accordingly. The Court's assumption of

See, *e. g.*, *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U. S. 662, 671 (2008); *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)). This is particularly true given Congress' decision that cost-benefit analysis would play a temporary and exceptional role in the CWA to help existing plants transition to the Act's ambitious environmental standards.[10] Allowing cost-benefit analysis in the BTA standard, a permanent mandate applicable to all powerplants, serves no such purpose and instead fundamentally weakens the provision's mandate.[11]

Accordingly, I would hold that the EPA is without authority to perform cost-benefit analysis in setting BTA stand-

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equivalence is thus plainly incorrect. Properly read, Congress' silence in § 316(b) forbids reliance on the cost-benefit tool but does not foreclose reliance on all other considerations, such as a determination whether a technology is so costly that it is not "available" for industry to adopt.

[10] In 1977, Congress established an additional technology-based standard, commonly referred to as "best conventional pollutant control technology," or "BCT," to govern conventional pollutants previously covered by the BAT standard. See 33 U. S. C. § 1311(b)(2)(E). The BCT standard required the EPA to consider, among other factors, "the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." § 1314(b)(4)(B). That Congress expressly authorized cost-benefit analysis in BCT further confirms that Congress treated cost-benefit analysis as exceptional and reserved for itself the authority to decide when it would be used in the Act.

[11] The Court attempts to cabin its holding by suggesting that a "rigorous form of cost-benefit analysis," such as the form "prescribed under the statute's former BPT standard," may not be permitted for setting BTA regulations. *Ante*, at 223. Thus the Court has effectively instructed the Agency that it can perform a cost-benefit analysis so long as it does not resemble the kind of cost-benefit analysis Congress elsewhere authorized in the CWA. The majority's suggested limit on the Agency's discretion can only be read as a concession that cost-benefit analysis, as typically performed, may be inconsistent with the BTA mandate.

ards. To the extent the EPA relied on cost-benefit analysis in establishing its BTA regulations,[12] that action was contrary to law, for Congress directly foreclosed such reliance in the statute itself.[13] *Chevron*, 467 U. S., at 843. Because we granted certiorari to decide only whether the EPA has authority to conduct cost-benefit analysis, there is no need to define the universe of considerations upon which the EPA can properly rely in administering the BTA standard. I would leave it to the Agency to decide how to proceed in the first instance.

III

Because the Court unsettles the scheme Congress established, I respectfully dissent.

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[12] The "national performance standards" the EPA adopted were shaped by economic efficiency concerns at the expense of finding the technology that best minimizes adverse environmental impact. In its final rulemaking, the Agency declined to require industrial plants to adopt closed-cycle cooling technology, which by recirculating cooling water requires less water to be withdrawn and thus fewer aquatic organisms to be killed. *Riverkeeper, Inc.* v. *EPA*, 358 F. 3d 174, 182, n. 5 (CA2 2004); 69 Fed. Reg. 41601, and n. 44. This the Agency decided despite its acknowledgment that "closed-cycle, recirculating cooling systems . . . can reduce mortality from impingement by up to 98 percent and entrainment by up to 98 percent." *Id.*, at 41601. The EPA instead permitted individual plants to resort to a "suite" of options so long as the method used reduced impingement and entrainment by the more modest amounts of 80 and 60 percent, respectively. See 40 CFR § 125.94(b) (2008). The Agency also permitted individual plants to obtain a site-specific variance from the national performance standards if they could prove (1) that compliance costs would be "significantly greater than" those the Agency considered when establishing the standards, or (2) that compliance costs "would be significantly greater than the benefits of complying with the applicable performance standards," § 125.94(a)(5).

[13] Thus, the Agency's past reliance on a "wholly disproportionate" standard, a mild variant of cost-benefit analysis, is irrelevant. See *ante*, at 224–225 (majority opinion). Because "Congress has directly spoken to the precise question at issue," *Chevron*, 467 U. S., at 842, longstanding yet impermissible agency practice cannot ripen into permissible agency practice.

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14 PENN PLAZA LLC ET AL. *v.* PYETT ET AL.

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

No. 07–581. Argued December 1, 2008—Decided April 1, 2009

Respondents are members of the Service Employees International Union, Local 32BJ (Union). Under the National Labor Relations Act, the Union is the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. The Union has exclusive authority to bargain on behalf of its members over their "rates of pay, wages, hours of employment, or other conditions of employment," 29 U. S. C. § 159(a), and engages in industrywide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement for Contractors and Building Owners (CBA). The CBA requires Union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures.

Petitioner 14 Penn Plaza LLC is a member of the RAB. It owns and operates the New York City office building where respondents worked as night lobby watchmen and in other similar capacities. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor. After 14 Penn Plaza, with the Union's consent, engaged a unionized security contractor affiliated with Temco to provide licensed security guards for the building, Temco reassigned respondents to jobs as porters and cleaners. Contending that these reassignments led to a loss in income, other damages, and were otherwise less desirable than their former positions, respondents asked the Union to file grievances alleging, among other things, that petitioners violated the CBA's ban on workplace discrimination by reassigning respondents on the basis of their age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.* The Union requested arbitration under the CBA, but after the initial hearing, withdrew the age-discrimination claims on the ground that its consent to the new security contract precluded it from objecting to respondents' reassignments as discriminatory. Respondents then filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their ADEA

rights, and the EEOC issued each of them a right-to-sue notice. In the ensuing lawsuit, the District Court denied petitioners' motion to compel arbitration of respondents' age-discrimination claims. The Second Circuit affirmed, holding that *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, forbids enforcement of collective-bargaining provisions requiring arbitration of ADEA claims.

Held: A provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. Pp. 255–274.

(a) Examination of the two federal statutes at issue here, the ADEA and the National Labor Relations Act (NLRA), yields a straightforward answer to the question presented. The Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including ADEA claims, would be resolved in arbitration. This freely negotiated contractual term easily qualifies as a "conditio[n] of employment" subject to mandatory bargaining under the NLRA, 29 U. S. C. § 159(a). See, *e. g.*, *Litton Financial Printing Div., Litton Business Systems, Inc.* v. *NLRB*, 501 U. S. 190, 199. As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer, and courts generally may not interfere in this bargained-for exchange. See *NLRB* v. *Magnavox Co.*, 415 U. S. 322, 328. Thus, the CBA's arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628. It does not. This Court has squarely held that the ADEA does not preclude arbitration of claims brought under the statute. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 26–33. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Pp. 255–260.

(b) The CBA's arbitration provision is also fully enforceable under the *Gardner-Denver* line of cases. Respondents incorrectly interpret *Gardner-Denver* and its progeny as holding that an agreement to arbitrate ADEA claims provided for in a collective-bargaining agreement cannot waive an individual employee's right to a judicial forum under federal antidiscrimination statutes. Pp. 260–272.

(i) The facts underlying *Gardner-Denver* and its progeny reveal the narrow scope of the legal rule they engendered. Those cases "did not involve the issue of the enforceability of an agreement to arbitrate statu-

tory claims," but "the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer*, *supra*, at 35. *Gardner-Denver* does not control the outcome where, as here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims. Pp. 260–264.

(ii) Apart from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta highly critical of using arbitration to vindicate statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned. First, contrary to *Gardner-Denver*'s erroneous assumption, 415 U. S., at 51, the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance, see, *e. g.*, *Gilmer*, *supra*, at 26. Second, *Gardner-Denver*'s mistaken suggestion that certain informal features of arbitration made it a forum "well suited to the resolution of contractual disputes," but "a comparatively inappropriate forum for the final resolution of [employment] rights," 415 U. S., at 56, has been corrected. See, *e. g.*, *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 232. Third, *Gardner-Denver*'s concern that, in arbitration, a union may subordinate an individual employee's interests to the collective interests of all employees in the bargaining unit, 415 U. S., at 58, n. 19, cannot be relied on to introduce a qualification into the ADEA that is not found in its text. Until Congress amends the ADEA to meet the conflict-of-interest concern identified in the *Gardner-Denver* dicta, there is "no reason to color the lens through which the arbitration clause is read." *Mitsubishi*, *supra*, at 628. In any event, the conflict-of-interest argument amounts to an unsustainable collateral attack on the NLRA, see *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U. S. 50, 62, and Congress has accounted for the conflict in several ways: Union members may bring a duty of fair representation claim against the union; a union can be subjected to direct liability under the ADEA if it discriminates on the basis of age; and union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board. Pp. 265–272.

(c) Because respondents' arguments that the CBA does not clearly and unmistakably require them to arbitrate their ADEA claims were not raised in the lower courts, they have been forfeited. Moreover, although a substantive waiver of federally protected civil rights will not be upheld, see, *e. g.*, *Mitsubishi*, *supra*, at 637, and n. 19, this Court is not positioned to resolve in the first instance respondents' claim that the CBA allows the Union to prevent them from effectively vindicating

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their federal statutory rights in the arbitral forum, given that this question would require resolution of contested factual allegations, was not fully briefed here or below, and is not fairly encompassed within the question presented. Resolution now would be particularly inappropriate in light of the Court's hesitation to invalidate arbitration agreements based on speculation. See, *e. g.*, *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79. Pp. 272–274.

498 F. 3d 88, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 274. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 277.

Paul Salvatore argued the cause for petitioners. With him on the briefs were *Edward A. Brill*, *Charles S. Sims*, *Mark D. Harris*, *Brian S. Rauch*, *Ian C. Schaefer*, *James F. Berg*, and *Howard Rothschild*.

David C. Frederick argued the cause for respondents. With him on the brief were *Jeffrey L. Kreisberg*, *Michael F. Sturley*, and *Lynn E. Blais*.

Curtis E. Gannon argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Becker*, *Dennis J. Dimsey*, *Ronald S. Cooper*, and *Lorraine C. Davis*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Samuel Estreicher* and *Robin S. Conrad;* and for the Equal Employment Advisory Council by *Rae T. Vann*.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Matthew D. Slater*, *Michael Byars*, *Andrew Weaver*, and *Michael Foreman;* for the National Employment Lawyers Association et al. by *Kathleen Phair Barnard*, *Jeffrey L. Needle*, *Laurie A. McCann*, and *Deborah Zuckerman;* for the National Right to Work Legal Defense Foundation, Inc., by *Raymond J. La-*

JUSTICE THOMAS delivered the opinion of the Court.

The question presented by this case is whether a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, is enforceable. The United States Court of Appeals for the Second Circuit held that this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), forbids enforcement of such arbitration provisions. We disagree and reverse the judgment of the Court of Appeals.

I

Respondents are members of the Service Employees International Union, Local 32BJ (Union). Under the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, the Union is the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. See 29 U. S. C. § 159(a). In this role, the Union has exclusive authority to bargain on behalf of its members over their "rates of pay, wages, hours of employment, or other conditions of employment." *Ibid.* Since the 1930's, the Union has engaged in industrywide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement for Contractors and Building Owners (CBA). The CBA requires Union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures:

Jeunesse, Jr.; and for the Service Employees International Union, Local 32BJ, by *Larry Engelstein.*

Matthew W. Finkin, *Barry Winograd*, and *James Oldham* filed a brief for the National Academy of Arbitrators as *amicus curiae.*

> "30. NO DISCRIMINATION
>
> "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." App. to Pet. for Cert. 48a.[1]

Petitioner 14 Penn Plaza LLC is a member of the RAB. It owns and operates the New York City office building where, prior to August 2003, respondents worked as night lobby watchmen and in other similar capacities. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor. In August 2003, with the Union's consent, 14 Penn Plaza engaged Spartan Security, a unionized security services contractor and affiliate of Temco, to provide licensed security guards to staff the lobby and entrances of its building. Because this rendered respondents' lobby services unnecessary, Temco reassigned them to jobs as night porters

[1] Article V establishes the grievance process, which applies to all claims regardless of whether they are subject to arbitration under the CBA. Article VI establishes the procedures for arbitration and postarbitration judicial review, and, in particular, provides that the arbitrator "shall . . . decide all differences arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement." App. to Pet. for Cert. 43a–47a.

and light-duty cleaners in other locations in the building. Respondents contend that these reassignments led to a loss in income, caused them emotional distress, and were otherwise less desirable than their former positions.

At respondents' request, the Union filed grievances challenging the reassignments. The grievances alleged that petitioners: (1) violated the CBA's ban on workplace discrimination by reassigning respondents on account of their age; (2) violated seniority rules by failing to promote one of the respondents to a handyman position; and (3) failed to equitably rotate overtime. After failing to obtain relief on any of these claims through the grievance process, the Union requested arbitration under the CBA.

After the initial arbitration hearing, the Union withdrew the first set of respondents' grievances—the age-discrimination claims—from arbitration. Because it had consented to the contract for new security personnel at 14 Penn Plaza, the Union believed that it could not legitimately object to respondents' reassignments as discriminatory. But the Union continued to arbitrate the seniority and overtime claims, and, after several hearings, the claims were denied.

In May 2004, while the arbitration was ongoing but after the Union withdrew the age-discrimination claims, respondents filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their rights under the ADEA. Approximately one month later, the EEOC issued a Dismissal and Notice of Rights, which explained that the agency's "'review of the evidence . . . fail[ed] to indicate that a violation ha[d] occurred,'" and notified each respondent of his right to sue. *Pyett* v. *Pennsylvania Building Co.*, 498 F. 3d 88, 91 (CA2 2007).

Respondents thereafter filed suit against petitioners in the United States District Court for the Southern District of New York, alleging that their reassignment violated the

ADEA and state and local laws prohibiting age discrimination.[2] Petitioners filed a motion to compel arbitration of respondents' claims pursuant to §§ 3 and 4 of the Federal Arbitration Act (FAA), 9 U. S. C. §§ 3, 4.[3] The District Court denied the motion because under Second Circuit precedent, "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." App. to Pet. for Cert. 21a. Respondents immediately appealed the ruling under § 16 of the FAA, which authorizes an interlocutory appeal of "an order . . . refusing a stay of any action under section 3 of this title" or "denying a petition under section 4 of this title to order arbitration to proceed." 9 U. S. C. §§ 16(a)(1)(A)–(B).

The Court of Appeals affirmed. 498 F. 3d 88. According to the Court of Appeals, it could not compel arbitration of the dispute because *Gardner-Denver*, which "remains good law," held "that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress." 498 F. 3d, at 92, 91, n. 3 (citing *Gardner-Denver*, 415 U. S., at 49–51). The Court of Appeals observed that the *Gardner-Denver* decision was in tension with this Court's more recent decision in *Gilmer* v.

[2] Respondents also filed a "hybrid" lawsuit against the Union and petitioners under § 301 of the Labor Management Relations Act, 1947, 29 U. S. C. § 185, see also *DelCostello* v. *Teamsters*, 462 U. S. 151, 164–165 (1983), alleging that the Union breached its "duty of fair representation" under the NLRA by withdrawing support for the age-discrimination claims during the arbitration and that petitioners breached the CBA by reassigning respondents. Respondents later voluntarily dismissed this suit with prejudice.

[3] Petitioners also filed a motion to dismiss the complaint for failure to state a claim. The District Court denied the motion, holding that respondents had sufficiently alleged an ADEA claim by claiming that they "were over the age of 40, . . . they were reassigned to positions which led to substantial losses in income, and . . . their replacements were both younger and had less seniority at the building." App. to Pet. for Cert. 20a (footnote omitted). Petitioners have not appealed that ruling.

Interstate/Johnson Lane Corp., 500 U. S. 20 (1991), which "held that an individual employee who had agreed individually to waive his right to a federal forum *could* be compelled to arbitrate a federal age discrimination claim." 498 F. 3d, at 91, n. 3 (citing *Gilmer*, *supra*, at 33–35; emphasis in original). The Court of Appeals also noted that this Court previously declined to resolve this tension in *Wright* v. *Universal Maritime Service Corp.*, 525 U. S. 70, 82 (1998), where the waiver at issue was not "clear and unmistakable." 498 F. 3d, at 91, n. 3.

The Court of Appeals attempted to reconcile *Gardner-Denver* and *Gilmer* by holding that arbitration provisions in a collective-bargaining agreement, "which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." 498 F. 3d, at 93–94. As a result, an individual employee would be free to choose compulsory arbitration under *Gilmer*, but a labor union could not collectively bargain for arbitration on behalf of its members. We granted certiorari, 552 U. S. 1178 (2008), to address the issue left unresolved in *Wright*, which continues to divide the Courts of Appeals,[4] and now reverse.

II

A

The NLRA governs federal labor-relations law. As permitted by that statute, respondents designated the Union as their "exclusive representativ[e] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U. S. C. § 159(a). As the employees' exclusive bargaining representative, the Union "enjoys broad authority . . . in the

[4] Compare, *e. g.*, *Rogers* v. *New York Univ.*, 220 F. 3d 73, 75 (CA2 2000) *(per curiam); O'Brien* v. *Agawam*, 350 F. 3d 279, 285 (CA1 2003); *Mitchell* v. *Chapman*, 343 F. 3d 811, 824 (CA6 2003); *Tice* v. *American Airlines, Inc.*, 288 F. 3d 313, 317 (CA7 2002), with, *e. g.*, *Eastern Associated Coal Corp.* v. *Massey*, 373 F. 3d 530, 533 (CA4 2004).

negotiation and administration of [the] collective bargaining contract." *Communications Workers* v. *Beck*, 487 U. S. 735, 739 (1988) (internal quotation marks omitted). But this broad authority "is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964). The employer has a corresponding duty under the NLRA to bargain in good faith "with the representatives of his employees" on wages, hours, and conditions of employment. 29 U. S. C. § 158(a)(5); see also § 158(d).

In this instance, the Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration. This freely negotiated term between the Union and the RAB easily qualifies as a "conditio[n] of employment" that is subject to mandatory bargaining under § 159(a). See *Litton Financial Printing Div., Litton Business Systems, Inc.* v. *NLRB*, 501 U. S. 190, 199 (1991) ("[A]rrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining"); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578 (1960) ("[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself"); *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike"). The decision to fashion a collective-bargaining agreement to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery.[5]

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[5] JUSTICE SOUTER claims that this understanding is "impossible to square with our conclusion in [*Alexander* v.] *Gardner-Denver* [*Co.*, 415 U. S. 36 (1974),] that 'Title VII . . . stands on plainly different ground' from 'statutory rights related to collective activity': 'it concerns not majoritarian processes, but an individual's right to equal employment opportuni-

Respondents, however, contend that the arbitration clause here is outside the permissible scope of the collective-bargaining process because it affects the "employees' individual, non-economic statutory rights." Brief for Respondents 22; see also *post*, at 281–283 (SOUTER, J., dissenting). We disagree. Parties generally favor arbitration precisely because of the economics of dispute resolution. See *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts"). As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange. "Judicial nullification of contractual concessions . . . is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act—freedom of contract." *NLRB* v. *Magnavox Co.*, 415 U. S. 322, 328 (1974) (Stewart, J., concurring in part and dissenting in part) (internal quotation marks and brackets omitted).

As a result, the CBA's arbitration provision must be honored unless the ADEA itself removes this particular class of

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ties.'" *Post*, at 282 (dissenting opinion) (quoting *Gardner-Denver*, *supra*, at 51). As explained below, however, JUSTICE SOUTER repeats the key analytical mistake made in *Gardner-Denver*'s dicta by equating the decision to arbitrate Title VII and ADEA claims to a decision to forgo these substantive guarantees against workplace discrimination. See *infra*, at 265–267. The right to a judicial forum is not the nonwaivable "substantive" right protected by the ADEA. See *infra*, at 259. Thus, although Title VII and ADEA rights may well stand on "different ground" than statutory rights that protect "majoritarian processes," *Gardner-Denver*, *supra*, at 51, the voluntary decision to collectively bargain for arbitration does not deny those statutory antidiscrimination rights the full protection they are due.

grievances from the NLRA's broad sweep. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985). It does not. This Court has squarely held that the ADEA does not preclude arbitration of claims brought under the statute. See *Gilmer*, 500 U. S., at 26–33.

In *Gilmer*, the Court explained that "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.*, at 26 (quoting *Mitsubishi Motors Corp.*, *supra*, at 628). And "[i]f Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." 500 U. S., at 29 (internal quotation marks and some brackets omitted). The Court determined that "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Id.*, at 26–27. The Court also concluded that arbitrating ADEA disputes would not undermine the statute's "remedial and deterrent function." *Id.*, at 28 (internal quotation marks omitted). In the end, the employee's "generalized attacks" on "the adequacy of arbitration procedures" were "insufficient to preclude arbitration of statutory claims," *id.*, at 30, because there was no evidence that "Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act," *id.*, at 35.

The *Gilmer* Court's interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be "explicitly stated" in the collective-bargaining agreement. *Wright*, 525 U. S., at 80 (internal

quotation marks omitted). The CBA under review here meets that obligation. Respondents incorrectly counter that an individual employee must personally "waive" a "[substantive] right" to proceed in court for a waiver to be "knowing and voluntary" under the ADEA. 29 U. S. C. § 626(f)(1). As explained below, however, the agreement to arbitrate ADEA claims is not the waiver of a "substantive right" as that term is employed in the ADEA. *Wright*, *supra*, at 80; see *infra*, at 265–266. Indeed, if the "right" referred to in § 626(f)(1) included the prospective waiver of the right to bring an ADEA claim in court, even a waiver signed by an individual employee would be invalid as the statute also prevents individuals from "waiv[ing] rights or claims that may arise after the date the waiver is executed." § 626(f)(1)(C).[6]

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[6] Respondents' contention that § 118 of the Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1081, note following 42 U. S. C. § 1981 (2000 ed.), precludes the enforcement of this arbitration agreement also is misplaced. See Brief for Respondents 31–32. Section 118 expresses Congress' support for alternative dispute resolution: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under" the ADEA. 105 Stat. 1081, note following 42 U. S C. § 1981. Respondents argue that the legislative history actually signals Congress' intent to preclude arbitration waivers in the collective-bargaining context. In particular, respondents point to a House Report that, in spite of the statute's plain language, interprets § 118 to support their position. See H. R. Rep. No. 102–40, pt. 1, p. 97 (1991) ("[A]ny agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974)"). But the legislative history mischaracterizes the holding of *Gardner-Denver*, which does not prohibit collective bargaining for arbitration of ADEA claims. See *infra*, at 260–264. Moreover, reading the legislative history in the manner suggested by respondents would create a direct conflict with the statutory text, which encourages the use of arbitration for dispute resolution without imposing any constraints on collective bargaining. In such a contest, the

Examination of the two federal statutes at issue in this case, therefore, yields a straightforward answer to the question presented: The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.

B

The CBA's arbitration provision is also fully enforceable under the *Gardner-Denver* line of cases. Respondents interpret *Gardner-Denver* and its progeny to hold that "a union cannot waive an employee's right to a judicial forum under the federal antidiscrimination statutes" because "allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights." Brief for Respondents 12. The "combination of union control over the process and inherent conflict of interest with respect to discrimination claims," they argue, "provided the foundation for the Court's holding [in *Gardner-Denver*] that arbitration under a collective bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim." *Id.*, at 15. We disagree.

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The holding of *Gardner-Denver* is not as broad as respondents suggest. The employee in that case was covered by a

text must prevail. See *Ratzlaf* v. *United States*, 510 U. S. 135, 147–148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear").

collective-bargaining agreement that prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry" and that guaranteed that "[n]o employee will be discharged . . . except for just cause." 415 U. S., at 39 (internal quotation marks omitted). The agreement also included a "multistep grievance procedure" that culminated in compulsory arbitration for any "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant." *Id.*, at 40–41 (internal quotation marks omitted).

The employee was discharged for allegedly producing too many defective parts while working for the respondent as a drill operator. He filed a grievance with his union claiming that he was "'unjustly discharged'" in violation of the "'just cause'" provision within the collective-bargaining agreement. *Id.*, at 39, 42. Then at the final prearbitration step of the grievance process, the employee added a claim that he was discharged because of his race. *Id.*, at 38–42.

The arbitrator ultimately ruled that the employee had been "'discharged for just cause,'" but "made no reference to [the] claim of racial discrimination." *Id.*, at 42. After obtaining a right-to-sue letter from the EEOC, the employee filed a claim in Federal District Court, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court issued a decision, affirmed by the Court of Appeals, which granted summary judgment to the employer because it concluded that "the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to [the employee]." *Id.*, at 43. In the District Court's view, "having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement," the employee was "bound by the arbitral decision" and precluded from suing his employer on any other grounds, such as a statutory claim under Title VII. *Ibid.*

This Court reversed the judgment on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims. As a result, the lower courts erred in relying on the "doctrine of election of remedies" to bar the employee's Title VII claim. *Id.*, at 49. "That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent" with each other, did not apply to the employee's dual pursuit of arbitration and a Title VII discrimination claim in district court. *Ibid.* The employee's collective-bargaining agreement did not mandate arbitration of statutory antidiscrimination claims. *Id.*, at 49–50. "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties." *Id.*, at 53. Because the collective-bargaining agreement gave the arbitrator "authority to resolve only questions of contractual rights," his decision could not prevent the employee from bringing the Title VII claim in federal court "regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII." *Id.*, at 53–54; see also *id.*, at 50.

The Court also explained that the employee had not waived his right to pursue his Title VII claim in federal court by participating in an arbitration that was premised on the same underlying facts as the Title VII claim. See *id.*, at 52. Thus, whether the legal theory of preclusion advanced by the employer rested on "the doctrines of election of remedies" or was recast "as resting instead on the doctrine of equitable estoppel and on themes of res judicata and collateral estoppel," *id.*, at 49, n. 10 (internal quotation marks omitted), it could not prevail in light of the collective-bargaining agreement's failure to address arbitration of Title VII claims. See *id.*, at 46, n. 6 ("[W]e hold that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a *contractual* claim is dispositive of a statutory claim under Title VII" (emphasis added)).

The Court's decisions following *Gardner-Denver* have not broadened its holding to make it applicable to the facts of this case. In *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981), the Court considered "whether an employee may bring an action in federal district court, alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, . . . after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement." *Id.*, at 729–730. The Court held that the unsuccessful arbitration did not preclude the federal lawsuit. Like the collective-bargaining agreement in *Gardner-Denver*, the arbitration provision under review in *Barrentine* did not expressly reference the statutory claim at issue. See 450 U. S., at 731, n. 5. The Court thus reiterated that an "arbitrator's power is both derived from, and limited by, the collective-bargaining agreement" and "[h]is task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties." *Id.*, at 744.

McDonald v. *West Branch*, 466 U. S. 284 (1984), was decided along similar lines. The question presented in that case was "whether a federal court may accord preclusive effect to an unappealed arbitration award in a case brought under [42 U. S. C. § 1983]." *Id.*, at 285. The Court declined to fashion such a rule, again explaining that "because an arbitrator's authority derives solely from the contract, *Barrentine*, *supra*, at 744, an arbitrator may not have the authority to enforce § 1983" when that provision is left unaddressed by the arbitration agreement. *Id.*, at 290. Accordingly, as in both *Gardner-Denver* and *Barrentine*, the Court's decision in *McDonald* hinged on the scope of the collective-bargaining agreement and the arbitrator's parallel mandate.

The facts underlying *Gardner-Denver*, *Barrentine*, and *McDonald* reveal the narrow scope of the legal rule arising from that trilogy of decisions. Summarizing those opinions

in *Gilmer*, this Court made clear that the *Gardner-Denver* line of cases "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." 500 U. S., at 35. Those decisions instead "involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Ibid.;* see also *Wright*, 525 U. S., at 76; *Livadas* v. *Bradshaw*, 512 U. S. 107, 127, n. 21 (1994).[7] *Gardner-Denver* and its progeny thus do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims.[8]

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[7] JUSTICE SOUTER's reliance on *Wright* v. *Universal Maritime Service Corp.*, 525 U. S. 70 (1998), to support its view of *Gardner-Denver* is misplaced. See *post*, at 281, 283. *Wright* identified the "tension" between the two lines of cases represented by *Gardner-Denver* and *Gilmer*, but found "it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it [was] apparent . . . on the facts and arguments presented . . . that no such waiver [had] occurred." 525 U. S., at 76–77. And although his dissent describes *Wright*'s characterization of *Gardner-Denver* as "raising a 'seemingly absolute prohibition of union waiver of employees' federal forum rights,'" *post*, at 283 (quoting *Wright*, 525 U. S., at 80), it wrenches the statement out of context: "Although [the right to a judicial forum] is not a substantive right, see *Gilmer*, 500 U. S., at 26, and *whether or not Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights *survives Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA," *id.*, at 80 (emphasis added). *Wright* therefore neither endorsed *Gardner-Denver*'s broad language nor suggested a particular result in this case.

[8] Because today's decision does not contradict the holding of *Gardner-Denver*, we need not resolve the *stare decisis* concerns raised by the dissenting opinions. See *post*, at 280–281, 285–286 (opinion of SOUTER, J.); *post*, at 275–277 (opinion of STEVENS, J.). But given the development of

We recognize that apart from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta that were highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.

First, the Court in *Gardner-Denver* erroneously assumed that an agreement to submit statutory discrimination claims to arbitration was tantamount to a waiver of those rights. See 415 U. S., at 51 ("[T]here can be no prospective *waiver* of an employee's rights under Title VII" (emphasis added)). For this reason, the Court stated, "the rights conferred [by Title VII] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Ibid.;* see also *id.*, at 56 ("[W]e have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated' " (quoting *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U. S. 351, 359–360 (1971) (Harlan, J., concurring))).

The Court was correct in concluding that federal antidiscrimination rights may not be prospectively waived, see 29 U. S. C. § 626(f)(1)(C); see *supra*, at 259, but it confused an agreement to arbitrate those statutory claims with a prospective waiver of the substantive right. The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek re-

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this Court's arbitration jurisprudence in the intervening years, see *infra*, at 266–269, *Gardner-Denver* would appear to be a strong candidate for overruling if the dissents' broad view of its holding, see *post*, at 282–283 (opinion of SOUTER, J.), were correct. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989) (explaining that it is appropriate to overrule a decision where there "has been [an] intervening development of the law" such that the earlier "decision [is] irreconcilable with competing legal doctrines or policies").

lief from a court in the first instance. See *Gilmer*, *supra*, at 26 ("'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum'" (quoting *Mitsubishi Motors Corp.*, 473 U. S., at 628)). This "Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City Stores, Inc.*, 532 U. S., at 123. The suggestion in *Gardner-Denver* that the decision to arbitrate statutory discrimination claims was tantamount to a substantive waiver of those rights, therefore, reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration.

In this respect, *Gardner-Denver* is a direct descendant of the Court's decision in *Wilko* v. *Swan*, 346 U. S. 427 (1953), which held that an agreement to arbitrate claims under the Securities Act of 1933 was unenforceable. See *id.*, at 438. The Court subsequently overruled *Wilko* and, in so doing, characterized the decision as "pervaded by . . . 'the old judicial hostility to arbitration.'" *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 480 (1989). The Court added: "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.*, at 481; see also *Mitsubishi Motors Corp.*, *supra*, at 626–627 ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution"). The timeworn "mistrust of the arbitral process" harbored by the Court in *Gardner-Denver* thus weighs against reliance on

anything more than its core holding. *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 231–232 (1987); see also *Gilmer*, 500 U. S., at 34, n. 5 (reiterating that *Gardner-Denver*'s view of arbitration "has been undermined by [the Court's] recent arbitration decisions"). Indeed, in light of the "radical change, over two decades, in the Court's receptivity to arbitration," *Wright*, 525 U. S., at 77, reliance on any judicial decision similarly littered with *Wilko*'s overt hostility to the enforcement of arbitration agreements would be ill advised.[9]

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[9] JUSTICE STEVENS suggests that the Court is displacing its "earlier determination of the relevant provisions' meaning" based on a "preference for arbitration." *Post*, at 275. But his criticism lacks any basis. We are not revisiting a settled issue or disregarding an earlier determination; the Court is simply deciding the question identified in *Wright* as unresolved. See *supra*, at 255; see also *infra*, at 272–273. And, contrary to JUSTICE STEVENS' accusation, it is the Court's fidelity to the ADEA's text—not an alleged preference for arbitration—that dictates the answer to the question presented. As *Gilmer* explained, nothing in the text of Title VII or the ADEA precludes contractual arbitration, see *supra*, at 258, and JUSTICE STEVENS has never suggested otherwise. Rather, he has always contended that permitting the "compulsory arbitration" of employment-discrimination claims conflicts with his perception of "the congressional purpose animating the ADEA." *Gilmer*, 500 U. S., at 41 (STEVENS, J., dissenting); see also *id.*, at 42 ("Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts" (internal quotation marks omitted)). The *Gilmer* Court did not adopt JUSTICE STEVENS' personal view of the purposes underlying the ADEA, for good reason: That view is not embodied within the statute's text. Accordingly, it is not the statutory text that JUSTICE STEVENS has sought to vindicate—it is instead his own "preference" for mandatory judicial review, which he disguises as a search for congressional purpose. This Court is not empowered to incorporate such a preference into the text of a federal statute. See *infra*, at 270. It is for this reason, and not because of a "policy favoring arbitration," see *post*, at 274, 275 (STEVENS, J., dissenting), that the Court overturned *Wilko* v. *Swan*, 346 U. S. 427 (1953). And it is why we disavow the antiarbitration dicta of *Gardner-Denver* and its progeny today.

Second, *Gardner-Denver* mistakenly suggested that certain features of arbitration made it a forum "well suited to the resolution of contractual disputes," but "a comparatively inappropriate forum for the final resolution of rights created by Title VII." 415 U. S., at 56. According to the Court, the "factfinding process in arbitration" is "not equivalent to judicial factfinding" and the "informality of arbitral procedure . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." *Id.*, at 57, 58. The Court also questioned the competence of arbitrators to decide federal statutory claims. See *id.*, at 57 ("[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land"); *Barrentine*, 450 U. S., at 743 ("Although an arbitrator may be competent to resolve many preliminary factual questions, such as whether the employee 'punched in' when he said he did, he may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute has been violated"). In the Court's view, "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." *Gardner-Denver*, *supra*, at 57; see also *McDonald*, 466 U. S., at 290 ("An arbitrator may not . . . have the expertise required to resolve the complex legal questions that arise in § 1983 actions").

These misconceptions have been corrected. For example, the Court has "recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" and that "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, *supra*, at 232; *Mitsubishi Motors Corp.*, 473 U. S., at 634 ("We decline to indulge the presumption that the parties

and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators"). An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA. Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.*, at 628. In any event, "[i]t is unlikely . . . that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as [Racketeer Influenced and Corrupt Organizations Act] and antitrust claims." *Gilmer*, *supra*, at 31. At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.[10]

Third, the Court in *Gardner-Denver* raised in a footnote a "further concern" regarding "the union's exclusive control over the manner and extent to which an individual grievance is presented." 415 U. S., at 58, n. 19. The Court suggested that in arbitration, as in the collective-bargaining process, a union may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit. *Ibid.;* see also *McDonald*, *supra*, at 291 ("The union's interests and those of the individual employee are not always identical or even compatible. As a result, the

[10] Moreover, an arbitrator's decision as to whether a unionized employee has been discriminated against on the basis of age in violation of the ADEA remains subject to judicial review under the FAA. 9 U. S. C. § 10(a). "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 232 (1987).

union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee"); see also *Barrentine*, *supra*, at 742; *post*, at 284, n. 4 (SOUTER, J., dissenting).

We cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text. Absent a constitutional barrier, "it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress." *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 52 (2008) (internal quotation marks omitted). Congress is fully equipped "to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors Corp.*, *supra*, at 627. Until Congress amends the ADEA to meet the conflict-of-interest concern identified in the *Gardner-Denver* dicta, and seized on by respondents here, there is "no reason to color the lens through which the arbitration clause is read" simply because of an alleged conflict of interest between a union and its members. *Mitsubishi Motors Corp.*, *supra*, at 628. This is a "battl[e] that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002).

The conflict-of-interest argument also proves too much. Labor unions certainly balance the economic interests of some employees against the needs of the larger work force as they negotiate collective-bargaining agreements and implement them on a daily basis. But this attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment. This "principle of majority rule" to which respondents object is in fact the central premise of the NLRA. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U. S. 50, 62 (1975). "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collec-

tive strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Ibid.* (footnote omitted); see also *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953) ("The complete satisfaction of all who are represented is hardly to be expected"); *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, 498 (1957) (Frankfurter, J., concurring). It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands. Respondents' argument that they were deprived of the right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.

In any event, Congress has accounted for this conflict of interest in several ways. As indicated above, the NLRA has been interpreted to impose a "duty of fair representation" on labor unions, which a union breaches "when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Marquez* v. *Screen Actors*, 525 U. S. 33, 44 (1998). This duty extends to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *Beck*, 487 U. S., at 743 (citation omitted). Thus, a union is subject to liability under the NLRA if it illegally discriminates against older workers in either the formation or governance of the collective-bargaining agreement, such as by deciding not to pursue a grievance on behalf of one of its members for discriminatory reasons. See *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967) (describing the duty of fair representation as the "statutory obligation to serve the interests of *all* members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct" (emphasis added)). Respondents in fact brought a fair representation suit against the Union based on its withdrawal of support for their age-

discrimination claims. See n. 2, *supra.* Given this avenue that Congress has made available to redress a union's violation of its duty to its members, it is particularly inappropriate to ask this Court to impose an artificial limitation on the collective-bargaining process.

In addition, a union is subject to liability under the ADEA if the union itself discriminates against its members on the basis of age. See 29 U. S. C. § 623(d); see also 1 B. Lindemann & P. Grossman, Employment Discrimination Law 1575–1581 (4th ed. 2007) (explaining that a labor union may be held jointly liable with an employer under federal antidiscrimination laws for discriminating in the formation of a collective-bargaining agreement, knowingly acquiescing in the employer's discrimination, or inducing the employer to discriminate); cf. *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 669 (1987). Union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board, which may then seek judicial intervention under this Court's precedent. See *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 295–296 (2002). In sum, Congress has provided remedies for the situation where a labor union is less than vigorous in defense of its members' claims of discrimination under the ADEA.

III

Finally, respondents offer a series of arguments contending that the particular CBA at issue here does not clearly and unmistakably require them to arbitrate their ADEA claims. See Brief for Respondents 44–47. But respondents did not raise these contract-based arguments in the District Court or the Court of Appeals. To the contrary, respondents acknowledged on appeal that the CBA provision requiring arbitration of their federal antidiscrimination statutory claims "is sufficiently explicit" in precluding their federal lawsuit. Brief for Plaintiffs-Appellees in No. 06–3047–cv(L) etc. (CA2), p. 9. In light of respondents' litigating position, both lower courts assumed that the CBA's arbitration clause

clearly applied to respondents and proceeded to decide the question left unresolved in *Wright*. We granted review of the question presented on that understanding.

"Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'" *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 38–39 (1989) (quoting *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 476, n. 20 (1979)). But this Court will affirm on grounds that have "'not been raised below . . . "only in exceptional cases."'" *Nordberg*, *supra*, at 39 (quoting *Heckler* v. *Campbell*, 461 U. S. 458, 468–469, n. 12 (1983)). This is not an "exceptional case." As a result, we find that respondents' alternative arguments for affirmance have been forfeited. See, *e. g.*, *Rita* v. *United States*, 551 U. S. 338, 360 (2007); *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002). We will not resurrect them on respondents' behalf.

Respondents also argue that the CBA operates as a substantive waiver of their ADEA rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. Brief for Respondents 28–30. Petitioners contest this characterization of the CBA, see Reply Brief for Petitioners 23–27, and offer record evidence suggesting that the Union has allowed respondents to continue with the arbitration even though the Union has declined to participate, see App. to Pet. for Cert. 42a. But not only does this question require resolution of contested factual allegations, it was not fully briefed to this or any court and is not fairly encompassed within the question presented, see this Court's Rule 14.1(a). Thus, although a substantive waiver of federally protected civil rights will not be upheld, see *Mitsubishi Motors Corp.*, 473 U. S., at 637, and n. 19; *Gilmer*, 500 U. S., at 29, we are not positioned to resolve in the first instance whether the CBA allows the Union

to prevent respondents from "effectively vindicating" their "federal statutory rights in the arbitral forum," *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79, 90 (2000). Resolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation. See *id.*, at 91.

IV

We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

JUSTICE SOUTER's dissenting opinion, which I join in full, explains why our decision in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), answers the question presented in this case. My concern regarding the Court's subversion of precedent to the policy favoring arbitration prompts these additional remarks.

Notwithstanding the absence of change in any relevant statutory provision, the Court has recently retreated from, and in some cases reversed, prior decisions based on its changed view of the merits of arbitration. Previously, the Court approached with caution questions involving a union's waiver of an employee's right to raise statutory claims in a federal judicial forum. After searching the text and purposes of Title VII of the Civil Rights Act of 1964, the Court in *Gardner-Denver* held that a clause of a collective-bargaining agreement (CBA) requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum for statutory claims. See 415 U. S., at 51. The Court's decision rested on several features of the stat-

ute, including the individual nature of the rights it confers, the broad remedial powers it grants federal courts, and its expressed preference for overlapping remedies. See *id.*, at 44–48. The Court also noted the problem of entrusting a union with certain arbitration decisions given the potential conflict between the collective interest and the interests of an individual employee seeking to assert his rights. See *id.*, at 58, n. 19. That concern later provided a basis for our decisions in *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 742 (1981), and *McDonald* v. *West Branch*, 466 U. S. 284, 291 (1984), which similarly held that a CBA may not commit enforcement of certain rights-creating statutes exclusively to a union-controlled arbitration process. Congress has taken no action signaling disagreement with those decisions.

The statutes construed by the Court in the foregoing cases and in *Wilko* v. *Swan*, 346 U. S. 427 (1953), have not since been amended in any relevant respect. But the Court has in a number of cases replaced our predecessors' statutory analysis with judicial reasoning espousing a policy favoring arbitration and thereby reached divergent results. I dissented in those cases to express concern that my colleagues were making policy choices not made by Congress. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 640 (1985); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 486 (1989); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 36 (1991); and *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 124 (2001).

Today the majority's preference for arbitration again leads it to disregard our precedent. Although it purports to ascertain the relationship between the Age Discrimination in Employment Act of 1967 (ADEA), the National Labor Relations Act, and the Federal Arbitration Act, the Court ignores our earlier determination of the relevant provisions' meaning. The Court concludes that "[i]t was Congress' verdict

that the benefits of organized labor outweigh the sacrifice of individual liberty" that the system of organized labor "necessarily demands," even when the sacrifice demanded is a judicial forum for asserting an individual statutory right. *Ante*, at 271. But in *Gardner-Denver* we determined that "Congress' verdict" was otherwise when we held that Title VII does not permit a CBA to waive an employee's right to a federal judicial forum. Because the purposes and relevant provisions of Title VII and the ADEA are not meaningfully distinguishable, it is only by reexamining the statutory questions resolved in *Gardner-Denver* through the lens of the policy favoring arbitration that the majority now reaches a different result.*

Under the circumstances, I believe a passage from one of my earlier dissents merits repetition. The Court in *Rodriguez de Quijas* overruled our decision in *Wilko* and held that predispute agreements to arbitrate claims under the Securities Act of 1933 are enforceable. 490 U. S., at 484; see also *id.*, at 481 (noting *Wilko*'s reliance on "the outmoded presumption of disfavoring arbitration proceedings"). I observed in dissent:

> "In the final analysis, a Justice's vote in a case like this depends more on his or her views about the respective lawmaking responsibilities of Congress and this Court than on conflicting policy interests. Judges who have confidence in their own ability to fashion public policy

*Referring to the potential conflict between individual and collective interests, the Court asserts that it "cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text." *Ante*, at 270. That potential conflict of interests, however, was a basis for our decision in several pertinent cases, including *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 35 (1991), and in the intervening years Congress has not seen fit to correct that interpretation. The Court's derision of that "policy concern" is particularly disingenuous given its subversion of *Gardner-Denver*'s holding in the service of an extratextual policy favoring arbitration.

> are less hesitant to change the law than those of us who are inclined to give wide latitude to the views of the voters' representatives on nonconstitutional matters. Cf. *Boyle* v. *United Technologies Corp.*, 487 U. S. 500 (1988). As I pointed out years ago, *Alberto-Culver Co.* v. *Scherk*, 484 F. 2d 611, 615–620 (CA7 1973) (dissenting opinion), rev'd, 417 U. S. 506 (1974), there are valid policy and textual arguments on both sides regarding the interrelation of federal securities and arbitration Acts. None of these arguments, however, carries sufficient weight to tip the balance between judicial and legislative authority and overturn an interpretation of an Act of Congress that has been settled for many years." *Rodriguez de Quijas*, 490 U. S., at 487 (footnote and citation omitted).

As was true in *Rodriguez de Quijas*, there are competing arguments in this case regarding the interaction of the relevant statutory provisions. But the Court in *Gardner-Denver* considered these arguments, including "the federal policy favoring arbitration of labor disputes," 415 U. S., at 59, and held that Congress did not intend to permit the result petitioners seek. In the absence of an intervening amendment to the relevant statutory language, we are bound by that decision. It is for Congress, rather than this Court, to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The issue here is whether employees subject to a collective-bargaining agreement (CBA) providing for conclusive arbitration of all grievances, including claimed breaches of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, lose their statutory right to bring an ADEA claim in court, § 626(c). Under the 35-year-old holding in *Alexander* v. *Gardner-Denver Co.*, 415

U. S. 36 (1974), they do not, and I would adhere to *stare decisis* and so hold today.

I

Like Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, the ADEA is aimed at "'the elimination of discrimination in the workplace,'" *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352, 358 (1995) (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 756 (1979)), and, again like Title VII, the ADEA "contains a vital element . . . : It grants an injured employee a right of action to obtain the authorized relief," 513 U. S., at 358. "Any person aggrieved" under the ADEA "may bring a civil action in any court of competent jurisdiction for such legal or equitable relief," 29 U. S. C. §626(c), thereby "not only redress[ing] his own injury but also vindicat[ing] the important congressional policy against discriminatory employment practices," *Gardner-Denver*, *supra*, at 45.

Gardner-Denver considered the effect of a CBA's arbitration clause on an employee's right to sue under Title VII. One of the employer's arguments was that the CBA entered into by the union had waived individual employees' statutory cause of action subject to a judicial remedy for discrimination in violation of Title VII. Although Title VII, like the ADEA, "does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements," 415 U. S., at 47, we unanimously held that "the rights conferred" by Title VII (with no exception for the right to a judicial forum) cannot be waived as "part of the collective bargaining process," *id.*, at 51. We stressed the contrast between two categories of rights in labor and employment law. There were "statutory rights related to collective activity," which "are conferred on employees collectively to foster the processes of bargaining[, which] properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Ibid.* But "Title VII . . . stands

on plainly different [categorical] ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities." *Ibid.* Thus, as the Court previously realized, *Gardner-Denver* imposed a "seemingly absolute prohibition of union waiver of employees' federal forum rights." *Wright* v. *Universal Maritime Service Corp.*, 525 U. S. 70, 80 (1998).[1]

We supported the judgment with several other lines of complementary reasoning. First, we explained that antidiscrimination statutes "have long evinced a general intent to accord parallel or overlapping remedies against discrimination," and Title VII's statutory scheme carried "no suggestion . . . that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Gardner-Denver*, 415 U. S., at 47. We accordingly concluded that "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.*, at 49.

Second, we rejected the District Court's view that simply participating in the arbitration amounted to electing the arbitration remedy and waiving the plaintiff's right to sue. We said that the arbitration agreement at issue covered only a contractual right under the CBA to be free from discrimination, not the "independent statutory rights accorded by Congress" in Title VII. *Id.*, at 49–50. Third, we rebuffed the employer's argument that federal courts should defer to arbitral rulings. We declined to make the "assumption that arbitral processes are commensurate with judicial processes," *id.*, at 56, and described arbitration as "a less appropriate forum for final resolution of Title VII issues than the federal courts," *id.*, at 58.

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[1] *Gardner-Denver* also contained some language seemingly prohibiting even individual prospective waiver of federal forum rights, see 415 U. S., at 51–52, an issue revisited in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20 (1991), and not disputed here.

Finally, we took note that "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," *ibid.*, n. 19, a result we deemed unacceptable when it came to Title VII claims. In sum, *Gardner-Denver* held that an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond a union's power to waive.

Our analysis of Title VII in *Gardner-Denver* is just as pertinent to the ADEA in this case. The "interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII,'" and indeed neither petitioners nor the Court points to any relevant distinction between the two statutes. *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978)); see also *McKennon*, 513 U. S., at 358 ("The ADEA and Title VII share common substantive features and also a common purpose"). Given the unquestionable applicability of the *Gardner-Denver* rule to this ADEA issue, the argument that its precedent be followed in this case of statutory interpretation is equally unquestionable. "Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457 (2008). And "[c]onsiderations of *stare decisis* have special force" over an issue of statutory interpretation, which is unlike constitutional interpretation owing to the capacity of Congress to alter any reading we adopt simply by amending the statute. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). Once we have construed a statute, stability is the rule, and "we will not depart from [it] without some compelling justification." *Hilton* v. *South Carolina Public Railways*

Comm'n, 502 U. S. 197, 202 (1991). There is no argument for abandoning precedent here, and *Gardner-Denver* controls.

II

The majority evades the precedent of *Gardner-Denver* as long as it can simply by ignoring it. The Court never mentions the case before concluding that the ADEA and the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, "yiel[d] a straightforward answer to the question presented," *ante*, at 260, that is, that unions can bargain away individual rights to a federal forum for antidiscrimination claims. If this were a case of first impression, it would at least be possible to consider that conclusion, but the issue is settled and the time is too late by 35 years to make the bald assertion that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative," *ante*, at 258. In fact, we recently and unanimously said that the principle that "federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts . . . assuredly finds support in" our case law, *Wright*, *supra*, at 77, and every Court of Appeals save one has read our decisions as holding to this position, *Air Line Pilots Assn., Int'l* v. *Northwest Airlines, Inc.*, 199 F. 3d 477, 484 (CADC 1999) ("We see a clear rule of law emerging from *Gardner-Denver* and *Gilmer* [v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20 (1991)]: . . . an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of *Gardner-Denver* after *Gilmer*, other than the Fourth, are in accord with this view").

Equally at odds with existing law is the majority's statement that "[t]he decision to fashion a [CBA] to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing

grievance machinery." *Ante*, at 256. That is simply impossible to square with our conclusion in *Gardner-Denver* that "Title VII . . . stands on plainly different ground" from "statutory rights related to collective activity": "it concerns not majoritarian processes, but an individual's right to equal employment opportunities." 415 U. S., at 51; see also *Atchison, T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 565 (1987) ("[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers'" (quoting *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 737 (1981))).

When the majority does speak to *Gardner-Denver*, it misreads the case in claiming that it turned solely "on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims." *Ante*, at 262. That, however, was merely one of several reasons given in support of the decision, see *Gardner-Denver*, 415 U. S., at 47–59, and we raised it to explain why the District Court made a mistake in thinking that the employee lost his Title VII rights by electing to pursue the contractual arbitration remedy, see *id.*, at 49–50. One need only read *Gardner-Denver* itself to know that it was not at all so narrowly reasoned, and we have noted already how later cases have made this abundantly clear. *Barrentine*, *supra*, at 737, provides further testimony:

> "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on

> rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.
>
> "These considerations were the basis for our decision in *[Gardner-Denver]*."

See also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 35 (1991) ("An important concern" in *Gardner-Denver* "was the tension between collective representation and individual statutory rights . . . "). Indeed, if the Court can read *Gardner-Denver* as resting on nothing more than a contractual failure to reach as far as statutory claims, it must think the Court has been wreaking havoc on the truth for years, since (as noted) we have unanimously described the case as raising a "seemingly absolute prohibition of union waiver of employees' federal forum rights." *Wright*, 525 U. S., at 80.[2] Human ingenuity is not equal to the task of reconciling statements like this with the majority's representation that *Gardner-Denver* held only that "the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims." *Ante*, at 262.[3]

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[2] The majority seems inexplicably to think that the statutory right to a federal forum is not a right, or that *Gardner-Denver* failed to recognize it because it is not "substantive." *Ante*, at 256–257, n. 5. But *Gardner-Denver* forbade union waiver of employees' federal forum rights in large part because of the importance of such rights and a fear that unions would too easily give them up to benefit the many at the expense of the few, a far less salient concern when only economic interests are at stake. See, *e. g.*, *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 737 (1981).

[3] There is no comfort for the Court in making the one point on which we are in accord, that *Gardner-Denver* relied in part on what the majority describes as "broad dicta that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights." *Ante*, at 265. I agree that *Gardner-Denver*'s " 'mistrust of the arbitral process' . . . has been undermined by our recent arbitration decisions," *Gilmer*, 500 U. S., at 34, n. 5 (quoting *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 231 (1987)), but if the statements are "dicta," their obsolescence is as irrelevant to *Gardner-Denver*'s continued vitality as their currency

Nor, finally, does the majority have any better chance of being rid of another of *Gardner-Denver*'s statements supporting its rule of decision, set out and repeated in previous quotations: "in arbitration, as in the collective-bargaining process, a union may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit," *ante,* at 269 (citing 415 U. S., at 58, n. 19), an unacceptable result when it comes to "an individual's right to equal employment opportunities," *id.*, at 51. The majority tries to diminish this reasoning, and the previously stated holding it supported, by making the remarkable rejoinder that "[w]e cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text." *Ante,* at 270.[4] It is enough to recall that respondents are not seeking

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was to the case's holding when it came down; in *Gardner-Denver* itself we acknowledged "the federal policy favoring arbitration," 415 U. S., at 46, n. 6, but nonetheless held that a union could not waive its members' statutory right to a federal forum in a CBA.

[4] The majority says it would be "particularly inappropriate" to consider *Gardner-Denver*'s conflict-of-interest rationale because "Congress has made available" another "avenue" to protect workers against union discrimination, namely, a duty of fair representation claim. *Ante,* at 272. This answer misunderstands the law, for unions may decline for a variety of reasons to pursue potentially meritorious discrimination claims without succumbing to a member's suit for failure of fair representation. See, *e. g., Barrentine,* 450 U. S., at 742 ("[E]ven if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration"). More importantly, we have rejected precisely this argument in the past, making this yet another occasion where the majority ignores precedent. See, *e. g., ibid.; Gardner-Denver, supra,* at 58, n. 19 (noting that a duty of fair representation claim would often "prove difficult to establish"). And we were wise to reject it. When the Court construes statutes to allow a union to eliminate a statutory right to sue in favor of arbitration in which the union cannot represent the employee because it agreed to the employer's challenged action, it is not very consoling to add that the employee can sue the union for being unfair.

to "introduc[e] a qualification into" the law; they are justifiably relying on statutory-interpretation precedent decades old, never overruled, and serially reaffirmed over the years. See, *e. g.*, *McDonald* v. *West Branch*, 466 U. S. 284, 291 (1984); *Barrentine*, 450 U. S., at 742. With that precedent on the books, it makes no sense for the majority to claim that "judicial policy concern[s]" about unions sacrificing individual antidiscrimination rights should be left to Congress.

For that matter, Congress has unsurprisingly understood *Gardner-Denver* the way we have repeatedly explained it and has operated on the assumption that a CBA cannot waive employees' rights to a judicial forum to enforce antidiscrimination statutes. See, *e. g.*, H. R. Rep. No. 102–40, pt. 1, p. 97 (1991) (stating that, "consistent with the Supreme Court's interpretation of Title VII in *[Gardner-Denver]*," "any agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII"). And Congress apparently does not share the Court's demotion of *Gardner-Denver*'s holding to a suspect judicial policy concern: "Congress has had [over] 30 years in which it could have corrected our decision . . . if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding." *Hilton*, 502 U. S., at 202; see also *Patterson*, 491 U. S., at 172–173.

III

On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, *ante*, at 273–274, which "is usually the case," *McDonald*, *supra*, at 291. But as a treatment of precedent in statutory interpretation, the majority's opinion cannot be

reconciled with the *Gardner-Denver* Court's own view of its holding, repeated over the years and generally understood, and I respectfully dissent.

Syllabus

UNITED STATES *v.* NAVAJO NATION

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

No. 07–1410. Argued February 23, 2009—Decided April 6, 2009

The Navajo Nation has long sought damages under the Indian Tucker Act (ITA) for an asserted breach of fiduciary duty by the Secretary of the Interior in connection with his failure promptly to approve a royalty rate increase under a coal lease (Lease 8580) the Tribe executed in 1964. Six years ago, this Court held that "the Tribe's claim for compensation . . . fails." *United States* v. *Navajo Nation*, 537 U. S. 488, 493 *(Navajo I)*. The Court explained that in order to invoke the ITA and thereby bypass federal sovereign immunity, a tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.*, at 506. Holding that such duties were not imposed by the Indian Mineral Leasing Act of 1938 (IMLA), by the Indian Mineral Development Act of 1982 (IMDA), or by 25 U. S. C. § 399, the Court reversed a judgment for the Tribe and remanded. The Court of Federal Claims then dismissed the Tribe's claim, but the Federal Circuit reversed, finding violations of duties imposed by the Navajo-Hopi Rehabilitation Act of 1950, 25 U. S. C. §§ 635(a), 638, and the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1300(e), as well as common-law duties arising from the Government's "comprehensive control" over tribal coal.

Held: The Tribe's claim for compensation fails. None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its lawsuit than those analyzed in *Navajo I*. Pp. 295–302.

(a) *Navajo I* did not definitively terminate the Tribe's claim. Because the Court in that case did not analyze statutes other than the IMLA, the IMDA, and § 399, it is conceivable, albeit unlikely, that another relevant statute might have provided a basis for the suit. However, *Navajo I*'s reasoning—particularly its instruction to "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions," 537 U. S., at 506—left no room for that result based on the sources of law relied on below. Pp. 295–296.

(b) Lease 8580 was not issued under § 635(a), so the Tribe cannot invoke that law as a source of money-mandating duties. Section 635(a)

authorizes leases only for terms of up to 25 years, renewable for up to another 25 years. In contrast, the IMLA allows "terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." § 396a. Mirroring the latter language, Lease 8580's indefinite term strongly suggests that it was negotiated and approved under the IMLA. This conclusion is not refuted by § 635(a)'s saving clause or by testimony that coal leasing was a centerpiece of the Rehabilitation Act's program. Pp. 296–299.

(c) Also unavailing is the argument that the Secretary violated § 638's requirement that he follow the Tribe's recommendations in administering the "program authorized by this subchapter." The word "program" refers back to § 631, which directs the Secretary to undertake "a program of basic improvements for the conservation and development of the [Tribe's] resources" and lists various projects to be included in the program. The statute certainly does not require the Secretary to follow recommendations of the Tribe as to royalty rates under coal leases executed pursuant to another Act. Pp. 299–300.

(d) Title 30 U. S. C. § 1300(e) is irrelevant. That provision applies only "[w]ith respect to leases issued after" the statute was enacted in 1977. Lease 8580 was issued in 1964; § 1300(e) is therefore inapplicable. P. 300.

(e) The Government's "comprehensive control" over Indian coal, alone, does not create enforceable fiduciary duties. The ITA limits cognizable claims to those arising under, *inter alia*, "the . . . laws . . . of the United States," 28 U. S. C. § 1505, and *Navajo I* reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions," 537 U. S., at 506. If a statute or regulation imposes a trust relationship, then common-law principles are relevant in determining whether damages are available for breach of the duty, but the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, so trust principles do not come into play here. Pp. 301–302.

501 F. 3d 1327, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. SOUTER, J., filed a concurring opinion, in which STEVENS, J., joined, *post,* p. 302.

Then-*Acting Solicitor General Kneedler* argued the cause for the United States. With him on the briefs were former *Solicitor General Garre*, *Assistant Attorney General Tenpas*, *Anthony A. Yang*, and *Elizabeth A. Peterson.*

Carter G. Phillips argued the cause for respondent. With him on the brief were *Virginia A. Seitz*, *Robert A. Parker*, *Paul E. Frye*, *Lisa M. Enfield*, and *Louis Denetsosie*.*

JUSTICE SCALIA delivered the opinion of the Court.

For over 15 years, the Indian Tribe known as the Navajo Nation has been pursuing a claim for money damages against the Federal Government based on an asserted breach of trust by the Secretary of the Interior in connection with his approval of amendments to a coal lease executed by the Tribe. The original lease took effect in 1964. The amendments were approved in 1987. The litigation was initiated in 1993. Six years ago, we held that "the Tribe's claim for compensation . . . fails," *United States* v. *Navajo Nation*, 537 U. S. 488, 493 (2003) *(Navajo I)*, but after further proceedings on remand the United States Court of Appeals for the Federal Circuit resuscitated it. 501 F. 3d 1327 (2007). Today we hold, once again, that the Tribe's claim for compensation fails. This matter should now be regarded as closed.

I. Legal Background

The Federal Government cannot be sued without its consent. *FDIC* v. *Meyer*, 510 U. S. 471, 475 (1994). Limited consent has been granted through a variety of statutes, including one colloquially referred to as the Indian Tucker Act:

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*A brief of *amici curiae* urging reversal was filed for Peabody Western Coal Co. et al. by *Charles G. Cole*, *Antonia B. Ianniello*, *Shannen W. Coffin*, *Paul R. Hurst*, *G. Michael Halfenger*, and *Lawrence G. McBride*.

Briefs of *amici curiae* urging affirmance were filed for the State of New Mexico et al. by *Gary King*, Attorney General of New Mexico, and *David Thomson*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona and *Mark Shurtleff* of Utah; for Law Professors by *Richard B. Collins* and *Carole E. Goldberg*, both *pro se;* for the National Congress of American Indians et al. by *Reid Peyton Chambers*, *Douglas B. L. Endreson*, *William R. Perry*, and *John T. Harrison;* and for former Secretary of the Interior Cecil D. Andrus et al. by *Kathleen M. Sullivan*, *Daniel H. Bromberg*, and *Margret M. Caruso*.

> "The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." 28 U. S. C. § 1505.

The last clause refers to the (ordinary) Tucker Act, which waives immunity with respect to any claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." § 1491(a)(1).

Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (*e. g.*, statutes or contracts). *United States* v. *Testan*, 424 U. S. 392, 400 (1976); *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980) *(Mitchell I)*. The other source of law need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it "'can fairly be interpreted as mandating compensation by the Federal Government.'" *Testan*, *supra*, at 400 (quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967)); see also *United States* v. *Mitchell*, 463 U. S. 206, 218 (1983) *(Mitchell II)*; *Navajo I*, 537 U. S., at 503.

As we explained in *Navajo I*, there are thus two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act. First, the tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.*, at 506. "If that

threshold is passed, the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Ibid.* (alteration in original). At the second stage, principles of trust law might be relevant "in drawing the inference that Congress intended damages to remedy a breach." *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 477 (2003).

II. History of the Present Case

A. The Facts

A comprehensive recitation of the facts can be found in *Navajo I*, *supra*, at 495–502. By way of executive summary: The Tribe occupies a large Indian reservation in the American Southwest, on which there are significant coal deposits. In 1964 the Secretary of the Interior approved a lease (Lease 8580), executed by the Tribe and the predecessor of Peabody Coal Company, allowing the company to engage in coal mining on a tract of the reservation in exchange for royalty payments to the Tribe. The term of the lease was set at "ten (10) years from the date hereof, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities," App. 189; it is still in effect today. The royalty rates were originally set at a maximum of 37.5 cents per ton of coal, but the lease also said that the rates were "subject to reasonable adjustment by the Secretary of the Interior" after 20 years and again "at the end of each successive ten-year period thereafter." *Id.*, at 194.

The dispute in this case concerns the Tribe's attempt to secure such an adjustment to the royalty rate after the initial 20-year period elapsed in 1984. At that point, the Tribe requested that the Secretary exercise his power to increase the royalty rate, and the Director of the Bureau of Indian Affairs for the Navajo Area issued an opinion letter imposing

a new rate of 20 percent of gross proceeds. *Id.*, at 8–9. But Peabody filed an administrative appeal, and while it was pending the Tribe and the company reached a negotiated agreement to set a rate of 12.5 percent of gross proceeds instead. As a result, the Area Director's decision was vacated, the administrative appeal was dismissed, and the Secretary approved the amendments to the lease.

B. This Litigation Through *Navajo I*

The Tribe launched the present lawsuit in 1993, claiming that the Secretary's actions in connection with the approval of the lease amendments constituted a breach of trust. In particular, the Tribe alleged that the Secretary, following upon improper *ex parte* contacts with Peabody, had delayed action on Peabody's administrative appeal in order to pressure the economically desperate Tribe to return to the bargaining table. This, the complaint charged, was in violation of the United States' fiduciary duty to act in the Indians' best interests. The Tribe sought $600 million in damages, invoking the Indian Tucker Act to bypass sovereign immunity.

The Court of Federal Claims granted summary judgment to the United States, concluding that "the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs," *Navajo Nation* v. *United States*, 46 Fed. Cl. 217, 236 (2000), and therefore could not sue under the Indian Tucker Act. The Federal Circuit reversed that ruling and held that the Indian Mineral Leasing Act of 1938 (IMLA), Ch. 198, 52 Stat. 347, 25 U. S. C. § 396a *et seq.*, among other statutes, gave the Government broad control over mineral leasing on Indian lands, thus creating a fiduciary duty enforceable through suits for monetary damages. *Navajo Nation* v. *United States*, 263 F. 3d 1325, 1330–1332 (2001). Finding that the Government had in fact violated its obligations, the Court of Appeals reinstated the suit.

We granted certiorari, *United States* v. *Navajo Nation*, 535 U. S. 1111 (2002), and (as described by the author of the ensuing opinion, concurring in a companion case) considered "the threshold question" presented by the Tribe's attempt to invoke the Indian Tucker Act: "whether the IMLA and its regulations impose any concrete substantive obligations, fiduciary or otherwise, on the Government," *White Mountain*, *supra*, at 480 (GINSBURG, J., concurring). The answer was an unequivocal no.

The relevant provision of the IMLA provided as follows:

> "[U]nallotted lands within any Indian reservation or lands owned by any tribe . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U. S. C. § 396a.

Another provision of the IMLA authorized the Secretary to promulgate regulations governing operations under such leases, § 396d, but during the relevant period the regulations applicable to coal leases, beyond setting a minimum royalty rate of 10 cents per ton, 25 CFR § 211.15(c) (1985), did not limit the Secretary's approval authority.

We construed the IMLA in light of its purpose: to "enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Navajo I*, 537 U. S., at 508. Consistent with that goal, the IMLA gave the Secretary not a "comprehensive managerial role," *id.*, at 507, but only the power to approve coal leases already negotiated by Tribes. That authority did not create, expressly or otherwise, a trust duty with respect to coal leasing and so there existed no enforceable fiduciary obligations that the Tribe could sue the Government for having neglected. *Id.*, at 507–508.

We distinguished *Mitchell II*, which involved a series of statutes and regulations that gave the Federal Government "full responsibility to manage Indian resources and land for the benefit of the Indians." 463 U. S., at 224. Title 25 U. S. C. § 406(a) permitted Indians to sell timber with the consent of the Secretary of the Interior, but directed the Secretary to base his decisions on "a consideration of the needs and best interests of the Indian owner and his heirs" and enumerated specific factors to guide that decision-making. We understood that statute—in combination with several other provisions and the applicable regulations—to create a fiduciary duty with respect to Indian timber. *Mitchell II*, *supra*, at 219–224. But neither the IMLA nor its regulations established any analogous duties or obligations in the coal context. *Navajo I*, *supra*, at 507–508.

Nor did the other statutes cited by the Tribe—25 U. S. C. § 399 and the Indian Mineral Development Act of 1982 (IMDA), 96 Stat. 1938, 25 U. S. C. § 2101 *et seq.*—help its case. Section 399 "is not part of the IMLA and [did] not govern Lease 8580," *Navajo I*, 537 U. S., at 509; rather, it granted to the Secretary the power to lease Indian land on his own say-so. We therefore found it irrelevant to the question whether "the Secretary's more limited *approval* role under the IMLA" created any enforceable duties. *Ibid.* And while the IMDA did set standards to govern the Secretary's approval of other mining-related agreements, Lease 8580 "falls outside the IMDA's domain," *ibid.;* that law was accordingly beside the point.

Having resolved that "we ha[d] no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act," this Court reversed the Federal Circuit's judgment in favor of the Tribe and "remanded for further proceedings consistent with this opinion." *Id.*, at 514.

C. Proceedings on Remand

On remand, the Tribe argued that even if its suit could not be maintained on the basis of the IMLA, the IMDA, or § 399, a "network" of other statutes, treaties, and regulations could provide the basis for its claims. The Government objected that our opinion foreclosed that possibility, but the Federal Circuit disagreed and remanded for consideration of the argument in the first instance. 347 F. 3d 1327 (2003). The Court of Federal Claims, however, persisted in its original decision to dismiss the Tribe's claim, explaining that nothing in the suggested "network" succeeded in tying "specific laws or regulatory provisions to the issue at hand," namely, the Secretary's approval of royalty rates in coal leases negotiated by tribes. 68 Fed. Cl. 805, 811 (2005).

Once again the Federal Circuit reversed, this time relying primarily on three statutory provisions—two sections of the Navajo-Hopi Rehabilitation Act of 1950, §§5, 8, 64 Stat. 46, 25 U. S. C. §§ 635(a), 638; and one section of the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1300(e)—to allow the Tribe's claim to proceed. The court held that the Government had violated the specific duties created by those statutes, as well as "common law trust duties of care, candor, and loyalty" that arise from the comprehensive control over tribal coal that is exercised by the Government. 501 F. 3d 1327, 1346 (2007).

Once again we granted the Government's petition for a writ of certiorari. 554 U. S. 944 (2008).

III. Analysis

A. Threshold Matter

The Government points to our categorical concluding language in *Navajo I:* "[W]e have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act," 537 U. S., at 514. This proves, the Government claims, that this Court definitively

terminated the Tribe's claim last time around, so that the lower court's later resurrection of the suit was flatly inconsistent with our mandate. But, to be fair, our opinion (like the Court of Appeals decision we were reviewing, *Navajo Nation*, 263 F. 3d, at 1327, 1330–1331) did not analyze any statutes beyond the IMLA, the IMDA, and § 399. It is thus conceivable, albeit unlikely, that some other relevant statute, though invoked by the Tribe at the outset of the litigation, might have gone unmentioned by the Federal Circuit and unanalyzed by this Court.

So we cannot say that our mandate completely foreclosed the possibility that such a statute might allow for the Tribe to succeed on remand. What we can say, however, is that our reasoning in *Navajo I*—in particular, our emphasis on the need for courts to "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions," 537 U. S., at 506—left no room for that result based on the sources of law that the Court of Appeals relied upon.

B. 25 U. S. C. § 635(a)

The first of the two discussed provisions of the Navajo-Hopi Rehabilitation Act of 1950—like the IMLA—permits Indians to lease reservation lands if the Secretary approves of the deal:

> "Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members . . . may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. . . . Nothing

> contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law." 25 U. S. C. § 635(a).

The Tribe contends that this section renders the Government liable for any breach of trust in connection with the approval of leases executed pursuant to the authority it grants. Whether or not that is so, the provision only even *arguably* matters if Lease 8580 was issued under its authority.

In *Navajo I* we presumed, as did the parties, that the lease had been issued pursuant to the IMLA. 537 U. S., at 495. But now the Tribe has changed its tune, and contends that Lease 8580 was approved under § 635(a), not under the IMLA at all. Brief for Respondent 39. The Government says otherwise. Section 635(a) permits leasing only for "public, religious, educational, recreational, or business purposes," and the Government contends that mining is not embraced by those terms. While leases under § 635(a) may provide for "the development or utilization of natural resources," they may do so only "in connection with operations under such leases," *i. e.*, in connection with operations for the enumerated purposes. By contrast, *mining* leases were permitted and governed by the IMLA even before the Navajo-Hopi Rehabilitation Act was enacted in 1950.

We need not decide whether the Government is correct on that point, or whether mining could ever qualify as a "business purpos[e]" under the statute, because the Tribe's argument suffers from a more fundamental problem. Section 635(a) authorizes leases only for terms of up to 25 years, renewable for up to another 25 years. In contrast, the IMLA allows "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U. S. C. § 396a. Lease 8580, mirroring the latter language, sets a term of "ten (10) years from the date hereof, and for so long thereafter as the substances produced are

being mined by the Lessee in accordance with its terms, in paying quantities." App. 189. That indefinite lease term strongly suggests that it was negotiated by the Tribe and approved by the Secretary under the powers authorized by the IMLA, not the Rehabilitation Act.

The Tribe's only responses to this apparently fatal defect in its argument are (1) that § 635(a) expressly leaves unaffected "any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law," including the authority to lease for indefinite terms; and (2) that Stewart Udall, who served as Secretary of the Interior during the 1960's, recently testified that "coal leasing and related development was the centerpiece of the resources development program" under the Rehabilitation Act, *id.*, ¶3, at 569.

As to the former: That is precisely the point. Section 635(a) creates a *supplemental* authority for leasing Indian land; it does not displace authority granted elsewhere. But in light of the different conditions attached to the different grants, it is apparent that a *particular* lease must be executed and approved pursuant to a *particular* authorization. The saving clause in § 635(a) does not allow the Tribe to mix-and-match, to combine the (allegedly) duty-creating mechanism of the Rehabilitation Act with the indefinite lease term of the IMLA. It must be one or the other, and the record persuasively demonstrates that Lease 8580 is an IMLA lease.

As to Secretary Udall's testimony: That is not inconsistent with our conclusion. The Interior Department may have viewed coal leasing as an important part of the program to rehabilitate the Navajo Tribe but that does not prove that Lease 8580 was issued pursuant to the supplemental leasing authority granted by the Rehabilitation Act, rather than the pre-existing leasing authority of the IMLA preserved by the Rehabilitation Act. The latter, perhaps because of its longer lease terms, was evidently preferable to the Tribe or the coal company or both.

Because the lease in this case "falls outside" § 635(a)'s "domain," *Navajo I*, *supra*, at 509, the Tribe cannot invoke it as a source of money-mandating rights or duties.

C. 25 U. S. C. § 638

Next, the Tribe points to a second provision in the Navajo-Hopi Rehabilitation Act:

> "The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter." 25 U. S. C. § 638.

In the Tribe's view, the Secretary violated this provision by failing promptly to abide by its wishes to affirm the Area Director's order increasing the royalty rate under Lease 8580 to a full 20 percent of gross proceeds.

We cannot agree. The "program" twice mentioned in § 638 refers back to the Act's opening provision, which directs the Secretary to undertake "a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation." § 631. The statute then enumerates various projects to be included in that program, and authorizes appropriation of funds (in specific amounts) for each. *E. g.*, "Soil and water conservation and range improvement work, $10,000,000." § 631(1).

The only listed project even remotely related to this case is "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." § 631(3). Of course a lease

is neither a survey nor a study. To read § 638 as imposing a money-mandating duty on the Secretary to follow recommendations of the Tribe as to royalty rates under coal leases executed pursuant to another Act, and to allow for the enforcement of that duty through the Indian Tucker Act, would simply be too far a stretch.

D. 30 U. S. C. § 1201 *et seq.*

The final statute invoked by the Tribe is the most easily dispensed with. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 91 Stat. 445, 30 U. S. C. § 1201 *et seq.*, is a comprehensive statute that regulates all surface coal mining operations. See generally § 1202; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 268–272 (1981). One section of the Act, § 1300, deals with coal mining specifically on Indian lands, and the Tribe cites subsection (e): "With respect to leases issued after [the date of enactment of this Act], the Secretary shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) of this section as may be requested by the Indian tribe in such leases."

According to the Tribe, this provision requires the Secretary to enforce *whatever* terms the Indians request with respect to coal leases. In light of the fact that the referenced subsections (c) and (d) refer exclusively to environmental protection standards, that interpretation is highly suspect. In any event, because Lease 8580 was issued in 1964—some 13 years before the date of enactment of the SMCRA—the provision is categorically inapplicable. The Federal Circuit concluded otherwise on the theory that the *amendments* to the lease were approved after 1977. But § 1300(e) is limited to leases "issued" after that date; and even the Tribe does not contend that a lease is "issued" whenever it is amended. The SMCRA is irrelevant here.

E. Government's "Comprehensive Control" Over Coal

The Federal Circuit's opinion also suggested that the Government's "comprehensive control" over coal on Indian land gives rise to fiduciary duties based on common-law trust principles. It noted that the Government had conducted surveys and studies of the Tribe's coal resources, 501 F. 3d, at 1341; that the Interior Department imposed various requirements on coal mining operations on Indian land—regulating, for example, "signs and markers, postmining use of land, backfilling and grading, waste disposal, topsoil handling, protection of hydrologic systems, revegetation, and steep-slope mining," *id.*, at 1342; and that the Government in practice exercised control over the calculation of coal values and quantities for royalty purposes, even though such control was codified by regulation only after the events at issue here, *id.*, at 1342–1343.

The Federal Government's liability cannot be premised on control alone. The text of the Indian Tucker Act makes clear that only claims arising under "the Constitution, laws or treaties of the United States, or Executive orders of the President" are cognizable (unless the claim could be brought by a non-Indian plaintiff under the ordinary Tucker Act). 28 U. S. C. § 1505. In *Navajo I* we reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U. S., at 506. *If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a "conventional fiduciary relationship," *White Mountain*, 537 U. S., at 473, *then* trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages," *id.*, at 477. But that must be the second step of the analysis, not (as the Federal Circuit made it) the starting point.

Navajo I determined that the IMLA, which governs the lease at issue here, does not create even a "'limited trust

relationship'" with respect to coal leasing. 537 U. S., at 508 (quoting *Mitchell I*, 445 U. S., at 542). Since the statutes discussed in the preceding subparts, *supra*, at 296–300, do not apply to the lease at all, they likewise create no such relationship. Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating. Thus, neither the Government's "control" over coal nor common-law trust principles matter.

* * *

None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its breach-of-trust lawsuit against the Federal Government than those we analyzed in *Navajo I*. This case is at an end. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to affirm the Court of Federal Claims' dismissal of the Tribe's complaint.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, concurring.

I am not through regretting that my position in *United States* v. *Navajo Nation*, 537 U. S. 488, 514–521 (2003) (dissenting opinion), did not carry the day. But it did not, and I agree that the precedent of that case calls for the result reached here.

Syllabus

CORLEY *v.* UNITED STATES

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

No. 07–10441. Argued January 21, 2009—Decided April 6, 2009

McNabb v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449, "generally rende[r] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of [Federal Rule of Criminal Procedure] 5(a)." *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 354. Rule 5(a), in turn, provides that a "person making an arrest . . . must take the defendant without unnecessary delay before a magistrate judge . . . ." Congress enacted 18 U. S. C. § 3501 in response to *Miranda* v. *Arizona*, 384 U. S. 436, and some applications of the *McNabb-Mallory* rule. In an attempt to eliminate *Miranda*, § 3501(a) provides that "a confession . . . shall be admissible in evidence if it is voluntarily given," and § 3501(b) lists several considerations for courts to address in assessing voluntariness. Subsection (c), which focuses on *McNabb-Mallory*, provides that "a confession made . . . by . . . a defendant . . . , while . . . under arrest . . . , shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession is found by the trial judge to have been made voluntarily and . . . within six hours [of arrest]"; it extends that time limit when further delay is "reasonable considering the means of transportation and the distance to . . . the nearest available [magistrate judge]."

Petitioner Corley was arrested for assaulting a federal officer at about 8 a.m. Around 11:45 Federal Bureau of Investigation (FBI) agents took him to a Philadelphia hospital to treat a minor injury. At 3:30 p.m. he was taken from the hospital to the local FBI office and told that he was a suspect in a bank robbery. Though the office was in the same building as the nearest magistrate judges, the agents did not bring him before a magistrate judge, but questioned him, hoping for a confession. At 5:27 p.m., some 9.5 hours after his arrest, Corley began an oral confession that he robbed the bank. He asked for a break at 6:30 and was held overnight. The interrogation resumed the next morning, ending with his signed written confession. He was finally presented to a Magistrate Judge at 1:30 p.m., 29.5 hours after his arrest, and charged with armed bank robbery and related charges. The District Court denied his motion to suppress his confessions under Rule 5(a) and *McNabb-Mallory*. It reasoned that the oral confession occurred within § 3501(c)'s 6-hour

window because the time of Corley's medical treatment should be excluded from the delay. It also found the written confession admissible, explaining there was no unreasonable delay under Rule 5(a) because Corley had requested the break. He was convicted of conspiracy and bank robbery. The Third Circuit affirmed. Relying on Circuit precedent to the effect that § 3501 abrogated *McNabb-Mallory* and replaced it with a pure voluntariness test, it concluded that if a district court found a confession voluntary after considering the points listed in § 3501(b), it would be admissible, even if the presentment delay was unreasonable.

Held: Section 3501 modified *McNabb-Mallory* but did not supplant it. Pp. 313–323.

(a) The Government claims that because § 3501(a) makes a confession "admissible" "if it is voluntarily given," it entirely eliminates *McNabb-Mallory* with its bar to admitting even a voluntary confession if given during an unreasonable presentment delay. Corley argues that § 3501(a) was only meant to overrule *Miranda*, and notes that only § 3501(c) touches on *McNabb-Mallory*, making the rule inapplicable to confessions given within six hours of an arrest. He has the better argument. Pp. 313–321.

(1) The Government's reading renders § 3501(c) nonsensical and superfluous. If subsection (a) really meant that any voluntary confession was admissible, then subsection (c) would add nothing; if a confession was "made voluntarily" it would be admissible, period, and never "inadmissible solely because of delay," even a delay beyond six hours. The Government's reading is thus at odds with the basic interpretive canon that "'[a] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Hibbs* v. *Winn*, 542 U. S. 88, 101. The Government claims that in providing that a confession "shall not be admissible," Congress meant that a confession "shall not be [involuntary]." Thus read, (c) would specify a bright-line rule applying (a) to cases of delay: it would tell courts that delay alone does not make a confession involuntary unless the delay exceeds six hours. But "'Congress did not write the statute that way.'" *Russello* v. *United States*, 464 U. S. 16, 23. The terms "inadmissible" and "involuntary" are not synonymous. Congress used both in (c), and this Court "would not presume to ascribe this difference to a simple mistake in draftsmanship." *Ibid.* There is also every reason to believe that Congress used the distinct terms deliberately, specifying two criteria that must be satisfied to prevent a confession from being "inadmissible solely because of delay": the confession must be "[1] made voluntarily and . . . [2] within six hours [of arrest]." Moreover, under

the *McNabb-Mallory* rule, "inadmissible" and "involuntary" mean different things. Corley's position, in contrast, gives effect to both (c) and (a), by reading (a) as overruling *Miranda* and (c) as qualifying *McNabb-Mallory.* The Government's counterargument—that Corley's reading would also create a conflict, since (a) makes all voluntary confessions admissible while (c) would leave some voluntary confessions inadmissible—falls short. First, (a) is a broad directive while (c) aims only at *McNabb-Mallory,* and "a more specific statute [is] given precedence over a more general one." *Busic* v. *United States,* 446 U. S. 398, 406. Second, reading (a) to create a conflict with (c) not only would make (c) superfluous, but would also create conflicts with so many other Rules of Evidence that the subsection cannot possibly be given its literal scope. Pp. 313–317.

(2) The legislative history strongly favors Corley's reading. The Government points to nothing in this history supporting its contrary view. Pp. 317–320.

(3) The Government's position would leave the Rule 5 presentment requirement without teeth, for if there is no *McNabb-Mallory* there is no apparent remedy for a presentment delay. The prompt presentment requirement is not just an administrative nicety. It dates back to the common law. Under Rule 5, presentment is the point at which the judge must take several key steps to foreclose Government overreaching: *e. g.,* informing the defendant of the charges against him and giving the defendant a chance to consult with counsel. Without *McNabb-Mallory,* federal agents would be free to question suspects for extended periods before bringing them out in the open, even though "custodial police interrogation, by its very nature, isolates and pressures the individual," *Dickerson* v. *United States,* 530 U. S. 428, 435, inducing people to confess to crimes they never committed. Pp. 320–321.

(b) There is no merit to the Government's fallback claim that even if § 3501 preserved a limited version of *McNabb-Mallory,* Congress cut it out by enacting Federal Rule of Evidence 402, which provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court . . . ." The Advisory Committee's Notes expressly identified *McNabb-Mallory* as a statutorily authorized rule that would survive Rule 402, and the Government has previously conceded before this Court that Rule 402 preserved *McNabb-Mallory.* Pp. 321–322.

500 F. 3d 210, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting

opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 323.

David L. McColgin argued the cause for petitioner. With him on the briefs were *Leigh M. Skipper*, *Maureen K. Rowley*, *Joseph M. Miller*, and *Brett G. Sweitzer*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, *Toby J. Heytens*, and *Thomas E. Booth*.*

JUSTICE SOUTER delivered the opinion of the Court.

The question here is whether Congress intended 18 U. S. C. § 3501 to discard, or merely to narrow, the rule in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957), under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge. We hold that Congress meant to limit, not eliminate, *McNabb-Mallory*.

I

A

The common law obliged an arresting officer to bring his prisoner before a magistrate as soon as he reasonably could. See *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 61–62 (1991) (SCALIA, J., dissenting). This "presentment" requirement tended to prevent secret detention and served to inform a suspect of the charges against him, and it was the law in nearly every American State and the National Government. See *id.*, at 60–61; *McNabb*, *supra*, at 342, and n. 7.

McNabb v. *United States* raised the question of how to enforce a number of federal statutes codifying the present-

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ment rule. 318 U. S., at 342 (citing, among others, 18 U. S. C. § 595 (1940 ed.), which provided that "'[i]t shall be the duty of the marshal . . . who may arrest a person . . . to take the defendant before the nearest . . . judicial officer . . . for a hearing'"). There, federal agents flouted the requirement by interrogating several murder suspects for days before bringing them before a magistrate, and then only after they had given the confessions that convicted them. 318 U. S., at 334–338, 344–345.

On the defendants' motions to exclude the confessions from evidence, we saw no need to reach any constitutional issue. Instead we invoked the supervisory power to establish and maintain "civilized standards of procedure and evidence" in federal courts, *id.*, at 340, which we exercised for the sake of making good on the traditional obligation embodied in the federal presentment legislation. We saw both the statutes and the traditional rule as aimed not only at checking the likelihood of resort to the third degree but meant generally to "avoid all the evil implications of secret interrogation of persons accused of crime." *Id.*, at 344. We acknowledged that "Congress ha[d] not explicitly forbidden the use of evidence . . . procured" in derogation of the presentment obligation, *id.*, at 345, but we realized that "permit[ting] such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress ha[d] enacted into law," *ibid.*, and in the exercise of supervisory authority we held confessions inadmissible when obtained during unreasonable presentment delay.

Shortly after *McNabb*, the combined action of the Judicial Conference of the United States and Congress produced Federal Rule of Criminal Procedure 5(a), which pulled the several statutory presentment provisions together in one place. See *Mallory*, *supra*, at 452 (describing Rule 5(a) as "a compendious restatement, without substantive change, of several prior specific federal statutory provisions"). As first enacted, the rule told "[a]n officer making an arrest under a

warrant issued upon a complaint or any person making an arrest without a warrant [to] take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." Fed. Rule Crim. Proc. 5(a) (1946). The rule remains much the same today: "A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge . . . ." Fed. Rule Crim. Proc. 5(a)(1)(A) (2007).

A case for applying *McNabb* and Rule 5(a) together soon arose in *Upshaw* v. *United States*, 335 U. S. 410 (1948). Despite the Government's confession of error, the D. C. Circuit had thought *McNabb*'s exclusionary rule applied only to involuntary confessions obtained by coercion during the period of delay, 335 U. S., at 411–412, and so held the defendant's voluntary confession admissible into evidence. This was error, and we reiterated the reasoning of a few years earlier. "In the *McNabb* case we held that the plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to 'secret interrogation of persons accused of crime.'" *Id.*, at 412 (quoting *McNabb*, *supra*, at 344). *Upshaw* consequently emphasized that even voluntary confessions are inadmissible if given after an unreasonable delay in presentment. 335 U. S., at 413.

We applied Rule 5(a) again in *Mallory* v. *United States*, holding a confession given seven hours after arrest inadmissible for "unnecessary delay" in presenting the suspect to a magistrate, where the police questioned the suspect for hours "within the vicinity of numerous committing magistrates." 354 U. S., at 455. Again, we repeated the reasons for the rule and explained, as we had before and have since, that delay for the purpose of interrogation is the epitome of "unnecessary delay." *Id.*, at 455–456; see also *McLaughlin*, *supra*, at 61 (SCALIA, J., dissenting) ("It was clear" at com-

mon law "that the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate"); *Upshaw*, *supra*, at 414. Thus, the rule known simply as *McNabb-Mallory* "generally render[s] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of Rule 5(a)." *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 354 (1994).

There the law remained until 1968, when Congress enacted 18 U. S. C. § 3501 in response to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and to the application of *McNabb-Mallory* in some federal courts. Subsections (a) and (b) of § 3501 were meant to eliminate *Miranda*.[1] See *Dickerson* v. *United States*, 530 U. S. 428, 435–437 (2000); *infra*, at 318. Subsection (a) provides that "[i]n any criminal prosecution brought by the United States . . . , a confession . . . shall be admissible in evidence if it is voluntarily given," while subsection (b) lists several considerations for courts to address in assessing voluntariness.[2] Subsection (c), which fo-

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[1] We rejected this attempt to overrule *Miranda* in *Dickerson* v. *United States*, 530 U. S. 428 (2000).

[2] In full, subsections (a) and (b) provide:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the of-

cused on *McNabb-Mallory*, see *infra*, at 318, provides that in any federal prosecution, "a confession made . . . by . . . a defendant therein, while such person was under arrest . . . , shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made . . . within six hours [of arrest]"; the 6-hour time limit is extended when further delay is "reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge]."[3]

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fense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

[3] In full, subsection (c) provides:

"In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer."

The issue in this case is whether Congress intended § 3501(a) to sweep *McNabb-Mallory*'s exclusionary rule aside entirely, or merely meant § 3501(c) to provide immunization to voluntary confessions given within six hours of a suspect's arrest.

B

Petitioner Johnnie Corley was suspected of robbing a bank in Norristown, Pennsylvania. After federal agents learned that Corley was subject to arrest on an unrelated local matter, some federal and state officers went together to execute the state warrant on September 17, 2003, and found him just as he was pulling out of a driveway in his car. Corley nearly ran over one officer, then jumped out of the car, pushed the officer down, and ran. The agents gave chase and caught and arrested him for assaulting a federal officer. The arrest occurred about 8 a.m. 500 F. 3d 210, 212 (CA3 2007).

Federal Bureau of Investigation (FBI) agents first kept Corley at a local police station while they questioned residents near the place he was captured. Around 11:45 a.m. they took him to a Philadelphia hospital to treat a minor cut on his hand that he got during the chase. At 3:30 p.m. the agents took him from the hospital to the Philadelphia FBI office and told him that he was a suspect in the Norristown bank robbery. Though the office was in the same building as the chambers of the nearest magistrate judges, the agents did not bring Corley before a magistrate judge, but questioned him instead, in hopes of getting a confession. App. 68–69, 83, 138–139.

The agents' repeated arguments sold Corley on the benefits of cooperating with the Government, and he signed a form waiving his *Miranda* rights. At 5:27 p.m., some 9.5 hours after his arrest, Corley began an oral confession that he robbed the bank, App. 62, and spoke on in this vein until about 6:30, when agents asked him to put it all in writing. Corley said he was tired and wanted a break, so the agents

decided to hold him overnight and take the written statement the next morning. At 10:30 a.m. on September 18 they began the interrogation again, which ended when Corley signed a written confession. He was finally presented to a Magistrate Judge at 1:30 p.m. that day, 29.5 hours after his arrest. 500 F. 3d, at 212.

Corley was charged with armed bank robbery, 18 U. S. C. §§ 2113(a), (d), conspiracy to commit armed bank robbery, § 371, and using a firearm in furtherance of a crime of violence, § 924(c). When he moved to suppress his oral and written confessions under Rule 5(a) and *McNabb-Mallory*, the District Court denied the motion, with the explanation that the time Corley was receiving medical treatment should be excluded from the delay, and that the oral confession was thus given within the 6-hour window of § 3501(c). Crim. No. 03–775 (ED Pa., May 10, 2004), App. 97. The District Court also held Corley's written confession admissible, reasoning that "a break from interrogation requested by an arrestee who has already begun his confession does not constitute unreasonable delay under Rule 5(a)." *Id.*, at 97–98. Corley was convicted of conspiracy and armed robbery but acquitted of using a firearm during a crime of violence. 500 F. 3d, at 212–213.

A divided panel of the Court of Appeals for the Third Circuit affirmed the conviction, though its rationale for rejecting Corley's Rule 5(a) argument was different from the District Court's. The panel majority considered itself bound by Circuit precedent to the effect that § 3501 entirely abrogated the *McNabb-Mallory* rule and replaced it with a pure voluntariness test. See 500 F. 3d, at 212 (citing *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914 (CA3 1974)). As the majority saw it, if a district court found a confession voluntary after considering the points listed in § 3501(b), it would be admissible, regardless of whether delay in presentment was unnecessary or unreasonable. 500 F. 3d, at 217. Judge

Sloviter read *Gereau* differently and dissented with an opinion that "§ 3501 does not displace Rule 5(a)" or abrogate *McNabb-Mallory* for presentment delays beyond six hours. 500 F. 3d, at 236.

We granted certiorari to resolve a division in the Courts of Appeals on the reach of § 3501. 554 U. S. 945 (2008). Compare *United States* v. *Glover*, 104 F. 3d 1570, 1583 (CA10 1997) (§ 3501 entirely supplanted *McNabb-Mallory*); *United States* v. *Christopher*, 956 F. 2d 536, 538–539 (CA6 1991) *(per curiam)* (same), with *United States* v. *Mansoori*, 304 F. 3d 635, 660 (CA7 2002) (§ 3501 limited the *McNabb-Mallory* rule to periods more than six hours after arrest); *United States* v. *Perez*, 733 F. 2d 1026, 1031–1032 (CA2 1984) (same).[4] We now vacate and remand.

II

The Government's argument focuses on § 3501(a), which provides that any confession "shall be admissible in evidence" in federal court "if it is voluntarily given." To the Government, subsection (a) means that once a district court looks to the considerations in § 3501(b) and finds a confession voluntary, in it comes; (a) entirely eliminates *McNabb-Mallory* with its bar to admitting even a voluntary confession if given during an unreasonable delay in presentment.

Corley argues that § 3501(a) was meant to overrule *Miranda* and nothing more, with no effect on *McNabb-Mallory*, which § 3501 touches only in subsection (c). By providing that a confession "shall not be inadmissible solely because of delay" in presentment if "made voluntarily and . . . within six hours [of arrest]," subsection (c) leaves *McNabb-Mallory* inapplicable to confessions given within the six hours, but when a confession comes even later, the exclusionary rule

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[4] We granted certiorari to resolve this question once before, in *United States* v. *Alvarez-Sanchez*, 511 U. S. 350 (1994), but ultimately resolved that case on a different ground, *id.*, at 355–360.

applies and courts have to see whether the delay was unnecessary or unreasonable.

Corley has the better argument.

A

The fundamental problem with the Government's reading of § 3501 is that it renders § 3501(c) nonsensical and superfluous. Subsection (c) provides that a confession "shall not be inadmissible solely because of delay" in presentment if the confession is "made voluntarily and . . . within six hours [of arrest]." If (a) really meant that any voluntary confession was admissible, as the Government contends, then (c) would add nothing; if a confession was "made voluntarily" it would be admissible, period, and never "inadmissible solely because of delay," no matter whether the delay went beyond six hours. There is no way out of this, and the Government concedes it. Tr. of Oral Arg. 33 ("Congress never needed (c); (c) in the [G]overnment's view was always superfluous").

The Government's reading is thus at odds with one of the most basic interpretive canons, that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'" *Hibbs* v. *Winn*, 542 U. S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–186 (rev. 6th ed. 2000); footnote omitted).[5]

[5] The dissent says that the antisuperfluousness canon has no place here because "there is nothing ambiguous about the language of § 3501(a)." *Post*, at 324 (opinion of ALITO, J.). But this response violates "the cardinal rule that a statute is to be read as a whole," *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991). Section 3501(a) seems clear only if one ignores the absurd results of a literal reading, *infra*, at 316–317, and only until one reads § 3501(c) and recognizes that if (a) means what it literally says, (c) serves no purpose. Even the dissent concedes that when (a) and (c) are read together, "[t]here is simply no perfect solution to the problem before us." *Post*, at 326. Thus, the dissent's point that subsection (a) seems clear when read in isolation proves nothing, for "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed

The Government attempts to mitigate its problem by rewriting (c) into a clarifying, if not strictly necessary, provision: although Congress wrote that a confession "shall not be inadmissible solely because of delay" if the confession is "made voluntarily and . . . within six hours [of arrest]," the Government tells us that Congress actually meant that a confession "shall not be [involuntary] solely because of delay" if the confession is "[otherwise voluntary] and . . . [made] within six hours [of arrest]." Thus rewritten, (c) would coexist peacefully (albeit inelegantly) with (a), with (c) simply specifying a bright-line rule applying (a) to cases of delay: it would tell courts that delay alone does not make a confession involuntary unless the delay exceeds six hours.

To this proposal, "'[t]he short answer is that Congress did not write the statute that way.'" *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (quoting *United States* v. *Naftalin*, 441 U. S. 768, 773 (1979)). The Government may say that we can sensibly read "inadmissible" as "involuntary" because the words are "virtually synonymous . . . in this statutory context," Brief for United States 23, but this is simply not so. To begin with, Congress used both terms in (c) itself, and "[w]e would not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello*, *supra*, at 23. And there is, in fact, every reason to believe that Congress used the distinct terms very deliberately. Subsection (c) specifies two criteria that must be satisfied to prevent a confession from being "inadmissible solely because of delay": the confession must be "[1] made voluntarily and . . . [2] within six hours [of arrest]." Because voluntariness is thus only one of several criteria for admissibility under (c), "involuntary" and "inadmissible" plainly cannot be synonymous.

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in context." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132 (2000). When subsection (a) is read in context, there is no avoiding the question, "What could Congress have been getting at with both (a) and (c)?" The better answer is that Congress meant to do just what Members explicitly said in the legislative record. See *infra*, at 318–320.

What is more, the Government's argument ignores the fact that under the *McNabb-Mallory* rule, which we presume Congress was aware of, *Cannon* v. *University of Chicago*, 441 U. S. 677, 699 (1979), "inadmissible" and "involuntary" mean different things. As we explained before and as the Government concedes, *McNabb-Mallory* makes even voluntary confessions inadmissible if given after an unreasonable delay in presentment, *Upshaw*, 335 U. S., at 413; Tr. of Oral Arg. 33 ("[I]t was well understood that *McNabb-Mallory* . . . excluded totally voluntary confessions"). So we cannot accept the Government's attempt to confuse the critically distinct terms "involuntary" and "inadmissible" by rewriting (c) into a bright-line rule doing nothing more than applying (a).

Corley's position, in contrast, gives effect to both (c) and (a), by reading (a) as overruling *Miranda* and (c) as qualifying *McNabb-Mallory*. The Government answers, however, that accepting Corley's argument would result in a different problem: it would create a conflict between (c) and (a), since (a) provides that all voluntary confessions are admissible while Corley's reading of (c) leaves some voluntary confessions inadmissible. But the Government's counterargument falls short for two reasons. First, even if (a) is read to be at odds with (c), the conflict is resolved by recognizing that (a) is a broad directive while (c) aims only at *McNabb-Mallory*, and "a more specific statute will be given precedence over a more general one . . . ." *Busic* v. *United States*, 446 U. S. 398, 406 (1980). Second, and more fundamentally, (a) cannot prudently be read to create a conflict with (c), not only because it would make (c) superfluous, as explained, but simply because reading (a) that way would create conflicts with so many other rules that the subsection cannot possibly be given its literal scope. Subsection (a) provides that "[i]n any criminal prosecution brought by the United States . . . , a confession . . . shall be admissible in evidence if it is voluntarily given," and § 3501(e) defines "confession" as "any con-

fession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." Thus, if the Government seriously urged a literal reading, (a) would mean that "[i]n any criminal prosecution brought by the United States . . . , ['any self-incriminating statement' with respect to 'any criminal offense'] . . . shall be admissible in evidence if it is voluntarily given." Thus would many a Rule of Evidence be overridden in case after case: a defendant's self-incriminating statement to his lawyer would be admissible despite his insistence on attorney-client privilege; a fourth-hand hearsay statement the defendant allegedly made would come in; and a defendant's confession to an entirely unrelated crime committed years earlier would be admissible without more. These are some of the absurdities of literalism that show that Congress could not have been writing in a literalistic frame of mind.[6]

B

As it turns out, there is more than *reductio ad absurdum* and the antisuperfluousness canon to confirm that subsection (a) leaves *McNabb-Mallory* alone, for that is what legislative history says. In fact, the Government concedes that subsections (a) and (b) were aimed at *Miranda*, while subsection (c) was meant to modify the presentment exclusionary rule.

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[6] The dissent seeks to avoid these absurd results by claiming that "§ 3501(a) does not supersede ordinary evidence Rules," *post*, at 331, but its only argument for this conclusion is that "there is no reason to suppose that Congress meant any such thing," *ibid.* The dissent is certainly correct that there is no reason to suppose that Congress meant any such thing; that is what our *reductio ad absurdum* shows. But that leaves the dissent saying, "§ 3501(a) must be read literally" (rendering § 3501(c) superfluous), "but not too literally" (so that it would override other Rules of Evidence). The dissent cannot have it both ways. If it means to profess literalism it will have to take the absurdity that literalism brings with it; "*credo quia absurdum*" (as Tertullian may have said). If it will not take the absurd, then its literalism is no alternative to our reading of the statute.

Tr. of Oral Arg. 38 ("I will concede to you . . . that section (a) was considered to overrule *Miranda*[,] and subsection (c) was addressed to *McNabb-Mallory*"). The concession is unavoidable. The Senate, where § 3501 originated, split the provision into two parts: division 1 contained subsections (a) and (b), and division 2 contained subsection (c). 114 Cong. Rec. 14171 (1968). In the debate on the Senate floor immediately before voting on these proposals, several Senators, including the section's prime sponsor, Senator McClellan, explained that division 1 "has to do with the Miranda decision," while division 2 related to *Mallory.* 114 Cong. Rec. 14171–14172. This distinct intent was confirmed by the separate Senate votes adopting the two measures, division 1 by 55 to 29 and division 2 by 58 to 26, *id.*, at 14171–14172, 14174–14175; if (a) did abrogate *McNabb-Mallory*, as the Government claims, then voting for division 2 would have been entirely superfluous, for the division 1 vote would already have done the job. That aside, a sponsor's statement to the full Senate carries considerable weight, and Senator McClellan's explanation that division 1 was specifically addressed to *Miranda* confirms that (a) and (b) were never meant to reach far enough to abrogate other background evidentiary rules including *McNabb-Mallory.*

Further legislative history not only drives that point home, but conclusively shows an intent that subsection (c) limit *McNabb-Mallory,* not replace it. In its original draft, subsection (c) would indeed have done away with *McNabb-Mallory* completely, for the bill as first written would have provided that "[i]n any criminal prosecution by the United States . . . , a confession made or given by a person who is a defendant therein . . . shall not be inadmissible solely because of delay in bringing such person before a [magistrate judge] if such confession is . . . made voluntarily." S. 917, 90th Cong., 2d Sess., 44–45 (1968) (as reported by Senate Committee on the Judiciary); 114 Cong. Rec. 14172. The provision so conceived was resisted, however, by a num-

ber of Senators worried about allowing indefinite presentment delays. See, *e. g.*, *id.*, at 11740, 13990 (Sen. Tydings) (the provision would "permit Federal criminal suspects to be questioned indefinitely before they are presented to a committing magistrate"); *id.*, at 12290 (Sen. Fong) (the provision "would open the doors to such practices as holding suspects incommunicado for an indefinite period"). After Senator Tydings proposed striking (c) from the bill altogether, *id.*, at 13651 (Amendment No. 788), Senator Scott introduced the compromise of qualifying (c) with the words: "'and if such confession was made or given by such person within six hours following his arrest or other detention,'" *id.*, at 14184–14185 (Amendment No. 805).[7] The amendment was intended to confine *McNabb-Mallory* to excluding only confessions given after more than six hours of delay, see 114 Cong. Rec. 14184 (remarks of Sen. Scott) ("My amendment provides that the period during which confessions may be received . . . shall in no case exceed 6 hours"), and it was explicitly modeled on the provision Congress had passed just months earlier to govern presentment practice in the District of Columbia, Title III of An Act Relating to Crime and Criminal Procedure in the District of Columbia (D. C. Crime Act), § 301(b), 81 Stat. 735–736, see, *e. g.*, 114 Cong. Rec. 14184 (remarks of Sen. Scott) ("My amendment is an attempt to conform, as nearly as practicable, to title III of [the D. C. Crime Act]"). By the terms of that Act, "[a]ny statement, admission, or confession made by an arrested person within three hours immediately following his arrest shall not be excluded from evidence in the courts of the District of Columbia solely because of delay in presentment." § 301(b), 81 Stat. 735–736. Given the clear intent that Title III modify but not eliminate *McNabb-Mallory* in the District of Columbia, see, *e. g.*, S. Rep. No. 912, 90th Cong., 1st Sess., 17–18

[7] The proviso at the end of (c) relating to reasonable delays caused by the means of transportation and distance to be traveled came later by separate amendment. 114 Cong. Rec. 14787.

(1967), using it as a model plainly shows how Congress meant as much but no more in § 3501(c).

In sum, the legislative history strongly favors Corley's reading. The Government points to nothing in this history supporting its view that (c) created a bright-line rule for applying (a) in cases with a presentment issue.

C

It also counts heavily against the position of the United States that it would leave the Rule 5 presentment requirement without any teeth, for as the Government again is forced to admit, if there is no *McNabb-Mallory* there is no apparent remedy for delay in presentment. Tr. of Oral Arg. 25. One might not care if the prompt presentment requirement were just some administrative nicety, but in fact the rule has always mattered in very practical ways and still does. As we said, it stretches back to the common law, when it was "one of the most important" protections "against unlawful arrest." *McLaughlin*, 500 U. S., at 60–61 (SCALIA, J., dissenting). Today presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching: informing the defendant of the charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing; giving the defendant a chance to consult with counsel; and deciding between detention or release. Fed. Rule Crim. Proc. 5(d); see also Rule 58(b)(2).

In a world without *McNabb-Mallory*, federal agents would be free to question suspects for extended periods before bringing them out in the open, and we have always known what custodial secrecy leads to. See *McNabb*, 318 U. S. 332. No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. "[C]ustodial police interrogation, by its very nature, isolates and pressures the individual," *Dick-*

erson, 530 U. S., at 435, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, *e. g.*, Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906–907 (2004).

Justice Frankfurter's point in *McNabb* is as fresh as ever: "The history of liberty has largely been the history of observance of procedural safeguards." 318 U. S., at 347. *McNabb-Mallory* is one of them, and neither the text nor the history of § 3501 makes out a case that Congress meant to do away with it.

III

The Government's fallback claim is that even if § 3501 preserved a limited version of *McNabb-Mallory*, Congress cut out the rule altogether by enacting Federal Rule of Evidence 402 in 1975. Act of Jan. 2, Pub. L. 93–595, 88 Stat. 1926. So far as it might matter here, that rule provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." *Id.*, at 1931. The Government says that *McNabb-Mallory* excludes relevant evidence in a way not "otherwise provided by" any of these four authorities, and so has fallen to the scythe.

The Government never raised this argument in the Third Circuit or the District Court, which would justify refusing to consider it here, but in any event it has no merit. The Advisory Committee's Notes on Rule 402, which were before Congress when it enacted the Rules of Evidence and which we have relied on in the past to interpret the rules, *Tome* v. *United States*, 513 U. S. 150, 160 (1995) (plurality opinion), expressly identified *McNabb-Mallory* as a statutorily authorized rule that would survive Rule 402: "The Rules of Civil and Criminal Procedure in some instances require the

exclusion of relevant evidence. For example, . . . the effective enforcement of . . . Rule 5(a) . . . is held to require the exclusion of statements elicited during detention in violation thereof." 28 U. S. C. App., pp. 325–326 (citing *Mallory,* 354 U. S. 449, and 18 U. S. C. § 3501(c)); see also *Mallory, supra,* at 451 ("Th[is] case calls for the proper application of Rule 5(a) of the Federal Rules of Criminal Procedure . . . "). Indeed, the Government has previously conceded before this Court that Rule 402 preserved *McNabb-Mallory.* Brief for United States in *United States* v. *Payner,* O. T. 1979, No. 78–1729, p. 32, and n. 13 (saying that Rule 402 "left to the courts . . . questions concerning the propriety of excluding relevant evidence as a method of implementing the Constitution, a federal statute, or a statutorily authorized rule," and citing *McNabb-Mallory* as an example). The Government was right the first time, and it would be bizarre to hold that Congress adopted Rule 402 with a purpose exactly opposite to what the Advisory Committee Notes said the rule would do.

IV

We hold that § 3501 modified *McNabb-Mallory* without supplanting it. Under the rule as revised by § 3501(c), a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge]"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and . . . the weight to be given [it] is left to the jury." *Ibid.* If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.

In this case, the Third Circuit did not apply this rule and in consequence never conclusively determined whether Corley's oral confession "should be treated as having been made within six hours of arrest," as the District Court held. 500 F. 3d, at 220, n. 7. Nor did the Circuit consider the justifiability of any delay beyond six hours if the oral confession should be treated as given outside the 6-hour window; and it did not make this enquiry with respect to Corley's written confession. We therefore vacate the judgment of the Court of Appeals and remand the case for consideration of those issues in the first instance, consistent with this opinion.

It is so ordered.

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

Section 3501(a) of Title 18, United States Code, directly and unequivocally answers the question presented in this case. After petitioner was arrested by federal agents, he twice waived his *Miranda*[1] rights and voluntarily confessed, first orally and later in writing, that he had participated in an armed bank robbery. He was then taken before a Magistrate Judge for an initial appearance. The question that we must decide is whether this voluntary confession may be suppressed on the ground that there was unnecessary delay in bringing petitioner before the Magistrate Judge. Unless the unambiguous language of § 3501(a) is ignored, petitioner's confession may not be suppressed.

I

Section 3501(a) states: "In any criminal prosecution brought by the United States . . . , a confession . . . shall be admissible in evidence if it is voluntarily given."

Applying "settled principles of statutory construction," "we must first determine whether the statutory text is plain

[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

and unambiguous," and "[i]f it is, we must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U. S. 379, 387 (2009). Here, there is nothing ambiguous about the language of § 3501(a), and the Court does not claim otherwise. Although we normally presume that Congress "means in a statute what it says there," *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992), the Court today concludes that § 3501(a) *does not* mean what it says and that a voluntary confession may be suppressed under the *McNabb-Mallory* rule.[2] This supervisory rule, which requires the suppression of a confession where there was unnecessary delay in bringing a federal criminal defendant before a judicial officer after arrest, was announced long before 18 U. S. C. § 3501(a) was adopted. According to the Court, this rule survived the enactment of § 3501(a) because Congress adopted that provision for the sole purpose of abrogating *Miranda* and apparently never realized that the provision's broad language would also do away with the *McNabb-Mallory* rule. I disagree with the Court's analysis and therefore respectfully dissent.

II

A

The Court's first and most substantial argument invokes "the antisuperfluousness canon," *ante*, at 317, under which a statute should be read, if possible, so that all of its provisions are given effect and none is superfluous. *Ante*, at 314–317. Section 3501(c) provides that a voluntary confession "shall not be inadmissible solely because of [the] delay" in bringing the defendant before a judicial officer if the defendant is brought before a judicial officer within six hours of arrest. If § 3501(a) means that a voluntary confession may never be excluded due to delay in bringing the defendant before a

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[2] See *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957).

judicial officer, the Court reasons, then § 3501(c), which provides a safe harbor for a subset of voluntary confessions (those made in cases in which the initial appearance occurs within six hours of arrest), is superfluous.

Canons of interpretation "are quite often useful in close cases, or when statutory language is ambiguous. But we have observed before that such 'interpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature.'" *United States* v. *Monsanto*, 491 U. S. 600, 611 (1989) (quoting *United States* v. *Albertini*, 472 U. S. 675, 680 (1985)). Like other canons, the antisuperfluousness canon is merely an interpretive aid, not an absolute rule. See *Connecticut Nat. Bank*, 503 U. S., at 254 ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'"). There are times when Congress enacts provisions that are superfluous, and this may be such an instance. Cf. *id.*, at 253 (noting that "[r]edundancies across statutes are not unusual events in drafting"); *Gutierrez de Martinez* v. *Lamagno*, 515 U. S. 417, 445–446 (1995) (SOUTER, J., dissenting) (noting that, although Congress "indulged in a little redundancy," the "inelegance may be forgiven" because "Congress could sensibly have seen some practical value in the redundancy").

Moreover, any superfluity created by giving subsection (a) its plain meaning may be minimized by interpreting subsection (c) to apply to confessions that are otherwise voluntary. The Government contends that § 3501(c), though inartfully drafted, is not superfluous because what the provision means is that a confession is admissible if it is given within six hours of arrest and it is *otherwise* voluntary—that is, if there is no basis other than prepresentment delay for concluding that the confession was coerced. Read in this way, § 3501(c) is not superfluous.

The Court rejects this argument on the ground that "'Congress did not write the statute that way,'" *ante*, at 315, and thus, in order to adhere to a narrow reading of § 3501(c),

the Court entirely disregards the unambiguous language of § 3501(a). Although § 3501(a) says that a confession is admissible if it is "voluntarily given," the Court reads that provision to mean that a voluntary confession may not be excluded on the ground that the confession was obtained in violation of *Miranda*. To this reading, the short answer is that Congress *really* did not write the statute that way.

As is true with most of the statutory interpretation questions that come before this Court, the question in this case is not like a jigsaw puzzle. There is simply no perfect solution to the problem before us.

Instead, we must choose between two imperfect solutions. The first (the one adopted by the Court) entirely disregards the clear and simple language of § 3501(a), rests on the proposition that Congress did not understand the plain import of the language it used in subsection (a), but adheres to a strictly literal interpretation of § 3501(c). The second option respects the clear language of subsection (a), but either accepts some statutory surplusage or interprets § 3501(c)'s reference to a voluntary confession to mean an otherwise voluntary confession. To my mind, the latter choice is far preferable.

B

In addition to the antisuperfluousness canon, the Court relies on the canon that favors a specific statutory provision over a conflicting provision cast in more general terms, *ante*, at 316, but that canon is inapplicable here. For one thing, § 3501(a) is quite specific; it specifically provides that if a confession is voluntary, it is admissible. More importantly, there is no other provision, specific or general, that conflicts with § 3501(a). See *National Cable & Telecommunications Assn., Inc.* v. *Gulf Power Co.*, 534 U. S. 327, 335–336 (2002) ("It is true that specific statutory language should control more general language *when there is a conflict between the two.* Here, however, there is no conflict" (emphasis added)). Subsection (c) is not conflicting because it does not authorize

the suppression of any voluntary confession. What the Court identifies is not a conflict between two statutory provisions but a conflict between the express language of one provision (§ 3501(a)) and the "negative implication" that the Court draws from another (§ 3501(c)). *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 355 (1994). Because § 3501(c) precludes the suppression of a voluntary confession based solely on a delay of less than six hours, the Court infers that Congress must have contemplated that a voluntary confession could be suppressed based solely on a delay of more than six hours. The Court cites no authority for a canon of interpretation that favors a "negative implication" of this sort over clear and express statutory language.

C

The Court contends that a literal interpretation of § 3501(a) would leave the prompt presentment requirement set out in Federal Rule of Criminal Procedure 5(a)(1) "without any teeth, for . . . if there is no *McNabb-Mallory* there is no apparent remedy for delay in presentment." *Ante*, at 320. There is nothing strange, however, about a prompt presentment requirement that is not enforced by a rule excluding voluntary confessions made during a period of excessive prepresentment delay. As the Court notes, "[t]he common law obliged an arresting officer to bring his prisoner before a magistrate as soon as he reasonably could," *ante*, at 306, but the *McNabb-Mallory* supervisory rule was not adopted until the middle of the 20th century. To this day, while the States are required by the Fourth Amendment to bring an arrestee promptly before a judicial officer, see, *e. g.*, *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 56 (1991), we have never held that this constitutional requirement is backed by an automatic exclusionary sanction, see, *e. g.*, *Hudson* v. *Michigan*, 547 U. S. 586, 592 (2006). And although the prompt presentment requirement serves interests in addition to the prevention of coerced confessions, the *McNabb-Mallory* rule pro-

vides no sanction for excessive prepresentment delay in those instances in which no confession is sought or obtained.

Moreover, the need for the *McNabb-Mallory* exclusionary rule is no longer clear. That rule, which was adopted long before *Miranda*, originally served a purpose that is now addressed by the giving of *Miranda* warnings upon arrest. As *Miranda* recognized, *McNabb* and *Mallory* were "responsive to the same considerations of Fifth Amendment policy" that the *Miranda* rule was devised to address. *Miranda* v. *Arizona*, 384 U. S. 436, 463 (1966).

In the pre-*Miranda* era, the requirement of prompt presentment ensured that persons taken into custody would, within a relatively short period, receive advice about their rights. See *McNabb* v. *United States*, 318 U. S. 332, 344 (1943). Now, however, *Miranda* ensures that arrestees receive such advice at an even earlier point, within moments of being taken into custody. Of course, arrestees, after receiving *Miranda* warnings, may waive their rights and submit to questioning by law enforcement officers, see, *e. g.*, *Davis* v. *United States*, 512 U. S. 452, 458 (1994), and arrestees may likewise waive the prompt presentment requirement, see, *e. g.*, *New York* v. *Hill*, 528 U. S. 110, 114 (2000) ("We have . . . 'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver, . . . and we have recognized that 'the most basic rights of criminal defendants are . . . subject to waiver' "). It seems unlikely that many arrestees who are willing to waive the right to remain silent and the right to the assistance of counsel during questioning would balk at waiving the right to prompt presentment. More than a few Courts of Appeals have gone as far as to hold that a waiver of *Miranda* rights also constitutes a waiver under *McNabb-Mallory*. See, *e. g.*, *United States* v. *Salamanca*, 990 F. 2d 629, 634 (CADC), cert. denied, 510 U. S. 928 (1993); *United States* v. *Barlow*, 693 F. 2d 954, 959 (CA6 1982), cert. denied, 461 U. S. 945 (1983); *United States*

v. *Indian Boy X*, 565 F. 2d 585, 591 (CA9 1977), cert. denied, 439 U. S. 841 (1978); *United States* v. *Duvall*, 537 F. 2d 15, 23–24, n. 9 (CA2), cert. denied, 426 U. S. 950 (1976); *United States* v. *Howell*, 470 F. 2d 1064, 1067, n. 1 (CA9 1972); *Pettyjohn* v. *United States*, 419 F. 2d 651, 656 (CADC 1969), cert. denied, 397 U. S. 1058 (1970); *O'Neal* v. *United States*, 411 F. 2d 131, 136–137 (CA5), cert. denied, 396 U. S. 827 (1969). Whether or not those decisions are correct, it is certainly not clear that the *McNabb-Mallory* rule adds much protection beyond that provided by *Miranda*.

D

The Court contends that the legislative history of § 3501 supports its interpretation, but the legislative history proves nothing that is not evident from the terms of the statute. With respect to § 3501(a), the legislative history certainly shows that the provision's chief backers meant to do away with *Miranda*,[3] but the Court cites no evidence that this was all that § 3501(a) was intended to accomplish. To the contrary, the Senate Report clearly says that § 3501(a) was meant to reinstate the traditional rule that a confession should be excluded only if involuntary, see S. Rep. No. 1097, 90th Cong., 2d Sess., 38 (1968) (Senate Report), a step that obviously has consequences beyond the elimination of *Miranda*. And the Senate Report repeatedly cited *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), as an example of an unsound limitation on the admission of voluntary confessions, see Senate Report 41–51, thus illustrating that § 3501(a) was not understood as simply an anti-*Miranda* provision. Whether a

[3] At argument, the Government conceded "that section (a) was considered to overrule *Miranda* and subsection (c) was addressed to *McNabb-Mallory*." See Tr. of Oral Arg. 38. It is apparent that the attorney for the Government chose his words carefully and did not concede, as the Court seems to suggest, that subsection (a) was intended to do no more than to overrule *Miranda* or that subsection (c) was the only part of § 3501 that affected the *McNabb-Mallory* rule.

majority of the Members of the House and Senate had the *McNabb-Mallory* rule specifically in mind when they voted for § 3501(a) is immaterial. Statutory provisions may often have a reach that is broader than the specific targets that the lawmakers might have had in mind at the time of enactment.

The legislative history relating to § 3501(c) suggests nothing more than that *some Members* of Congress may mistakenly have thought that the version of § 3501 that was finally adopted would not displace the *McNabb-Mallory* rule. As the Court relates, the version of § 3501(c) that emerged from the Senate Judiciary Committee would have completely eliminated that rule. See *ante*, at 318. Some Senators opposed this, and the version of this provision that was eventually passed simply trimmed the rule. It is possible to identify a few Senators who spoke out in opposition to the earlier version of subsection (c) and then voted in favor of the version that eventually passed, and it is fair to infer that these Senators likely thought that the amendment of subsection (c) had saved the rule. See 114 Cong. Rec. 14172–14175, 14798 (1968). But there is no evidence that a majority of the House and Senate shared that view, and any Member who took a few moments to read subsections (a) and (c) must readily have understood that subsection (a) would wipe away all nonconstitutionally based rules barring the admission of voluntary confessions, not just *Miranda*, and that subsection (c) did not authorize the suppression of any voluntary confessions. The Court unjustifiably attributes to a majority of the House and Senate a mistake that, the legislative history suggests, may have been made by only a few.

E

Finally, the Court argues that under a literal reading of § 3501(a), "many a Rule of Evidence [would] be overridden in case after case." *Ante*, at 317. In order to avoid this absurd result, the Court says, it is necessary to read § 3501(a)

as merely abrogating *Miranda* and not the *McNabb-Mallory* rule. There is no merit to this argument.[4]

The language that Congress used in § 3501(a)—a confession is "admissible" if "voluntarily given"—is virtually a verbatim quotation of the language used by this Court in describing the traditional rule regarding the admission of confessions. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 513 (1963) ("'In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort'" (quoting *Wilson* v. *United States*, 162 U. S. 613, 623 (1896))); *Lyons* v. *Oklahoma*, 322 U. S. 596, 602 (1944); *Ziang Sung Wan* v. *United States*, 266 U. S. 1, 15 (1924); *Bram* v. *United States*, 168 U. S. 532, 545 (1897). In making these statements, this Court certainly did not mean to suggest that a voluntary confession must be admitted in those instances in which a standard rule of evidence would preclude admission, and there is no reason to suppose that Congress meant any such thing either. In any event, the Federal Rules of Evidence now make it clear that § 3501(a) does not supersede ordinary evidence Rules, including Rules regarding privilege (Rule 501), hearsay (Rule 802), and restrictions on the use of character evidence (Rule 404). Thus, it is not necessary to disregard the plain language of § 3501(a), as the Court does, in order to avoid the sort of absurd results to which the Court refers.

For all these reasons, I would affirm the decision of the Court of Appeals, and I therefore respectfully dissent.

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[4] Contrary to the Court's suggestion, cases in which one of the standard Rules of Evidence might block the admission of a voluntary confession would seem quite rare, and the Court cites no real-world examples. The Court thus justifies its reading of § 3501, which totally disregards the clear language of subsection (a), based on a few essentially fanciful hypothetical cases that, in any event, have been covered since 1975 by the Federal Rules of Evidence.

Syllabus

ARIZONA *v.* GANT

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 07–542. Argued October 7, 2008—Decided April 21, 2009

Respondent Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. Reversing, the State Supreme Court distinguished *New York* v. *Belton*, 453 U. S. 454—which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest—on the ground that it concerned the scope of a search incident to arrest but did not answer the question whether officers may conduct such a search once the scene has been secured. Because *Chimel* v. *California*, 395 U. S. 752, requires that a search incident to arrest be justified by either the interest in officer safety or the interest in preserving evidence and the circumstances of Gant's arrest implicated neither of those interests, the State Supreme Court found the search unreasonable.

Held: Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. Pp. 338–351.

(a) Warrantless searches "are *per se* unreasonable," "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357. The exception for a search incident to a lawful arrest applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel*, 395 U. S., at 763. This Court applied that exception to the automobile context in *Belton*, the holding of which rested in large part on the assumption that articles inside a vehicle's passenger compartment are "generally . . . within 'the area into which an arrestee might reach.'" 453 U. S., at 460. Pp. 338–341.

(b) This Court rejects a broad reading of *Belton* that would permit a vehicle search incident to a recent occupant's arrest even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying *Chimel*'s exception authorize a vehicle search only when there is a reasonable possibility of such access. Although it does not follow from *Chimel*, circumstances unique to the automobile context also justify a

Syllabus

search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton* v. *United States*, 541 U. S. 615, 632 (SCALIA, J., concurring in judgment). Neither *Chimel*'s reaching-distance rule nor *Thornton*'s allowance for evidentiary searches authorized the search in this case. In contrast to *Belton*, which involved a single officer confronted with four unsecured arrestees, five officers handcuffed and secured Gant and the two other suspects in separate patrol cars before the search began. Gant clearly could not have accessed his car at the time of the search. An evidentiary basis for the search was also lacking. Belton and Thornton were both arrested for drug offenses, but Gant was arrested for driving with a suspended license—an offense for which police could not reasonably expect to find evidence in Gant's car. Cf. *Knowles* v. *Iowa*, 525 U. S. 113, 118. The search in this case was therefore unreasonable. Pp. 341–344.

(c) This Court is unpersuaded by the State's argument that its expansive reading of *Belton* correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The State seriously undervalues the privacy interests at stake, and it exaggerates both the clarity provided by a broad reading of *Belton* and its importance to law enforcement interests. A narrow reading of *Belton* and *Thornton*, together with this Court's other Fourth Amendment decisions, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032, and *United States* v. *Ross*, 456 U. S. 798, permit an officer to search a vehicle when safety or evidentiary concerns demand. Pp. 344–347.

(d) *Stare decisis* does not require adherence to a broad reading of *Belton*. The experience of the 28 years since *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded, and blind adherence to its faulty assumption would authorize myriad unconstitutional searches. Pp. 348–351.

216 Ariz. 1, 162 P. 3d 640, affirmed.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 351. BREYER, J., filed a dissenting opinion, *post*, p. 354. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and KENNEDY, J., joined, and in which BREYER, J., joined except as to Part II–E, *post*, p. 355.

Joseph T. Maziarz, Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were *Terry Goddard*, Attorney General, *Mary R. O'Grady*,

Solicitor General, *Kent E. Cattani*, Chief Counsel, *Randall M. Howe*, Former Chief Counsel, and *Nicholas D. Acedo*, Assistant Attorney General.

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

Thomas F. Jacobs argued the cause for respondent. With him on the brief was *Jeffrey T. Green*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Bill McCollum*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Craig D. Feiser* and *Courtney Brewer*, Deputy Solicitors General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Talis J. Colberg* of Alaska, *Edmund G. Brown, Jr.*, of California, *John W. Suthers* of Colorado, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Steven N. Six* of Kansas, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Kelly A. Ayotte* of New Hampshire, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for Americans for Effective Law Enforcement, Inc., et al. by *Wayne W. Schmidt*, *James P. Manak*, *Richard Weintraub*, *Michael E. McNeff*, *Eric B. Edwards*, and *Bernard J. Farber;* for the National Association of Police Organizations, Inc., by *William J. Johnson* and *Devallis Rutledge;* and for Los Angeles County District Attorney Steve Cooley et al. by *Mr. Cooley*, *pro se*, *Lael R. Rubin*, *Brentford J. Ferreira*, and *Phyllis C. Asayama*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *James J. Tomkovicz*, *Steven R. Shapiro*, and *Graham A. Boyd;* for the National Association of Criminal Defense Lawyers by *Jeffrey L. Fisher*, *Pamela S. Karlan*, *Amy Howe*, *Kevin K. Russell*, and *Thomas C. Goldstein;* and for the National Association of Federal Defenders by *Beth S. Brinkmann*, *Seth M. Galanter*, *Ketanji Brown Jackson*, *Lila M. Bateman*, *Frances H. Pratt*, *Philip J. Lynch*, *Judith H. Mizner*, and *Stephen C. Moss*.

JUSTICE STEVENS delivered the opinion of the Court.

After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel* v. *California*, 395 U. S. 752 (1969), and applied to vehicle searches in *New York* v. *Belton*, 453 U. S. 454 (1981), did not justify the search in this case. We agree with that conclusion.

Under *Chimel*, police may search incident to arrest only the space within an arrestee's "'immediate control,'" meaning "the area from within which he might gain possession of a weapon or destructible evidence." 395 U. S., at 763. The safety and evidentiary justifications underlying *Chimel*'s reaching-distance rule determine *Belton*'s scope. Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in *Thornton* v. *United States*, 541 U. S. 615 (2004), and following the suggestion in JUSTICE SCALIA's opinion concurring in the judgment in that case, *id.*, at 632, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

I

On August 25, 1999, acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Gant answered the door and, after identifying himself, stated that

he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the house that evening, they found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10-to-12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

Gant was charged with two offenses—possession of a narcotic drug for sale and possession of drug paraphernalia (*i. e.*, the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued that *Belton* did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. When asked at the

suppression hearing why the search was conducted, Officer Griffith responded: "Because the law says we can do it." App. 75.

The trial court rejected the State's contention that the officers had probable cause to search Gant's car for contraband when the search began, *id.*, at 18, 30, but it denied the motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and apprehended him only shortly after he exited his car, the court held that the search was permissible as a search incident to arrest. *Id.*, at 37. A jury found Gant guilty on both drug counts, and he was sentenced to a 3-year term of imprisonment.

After protracted state-court proceedings, the Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The court's opinion discussed at length our decision in *Belton*, which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of an arrest of the vehicle's recent occupant. 216 Ariz. 1, 3–4, 162 P. 3d 640, 642–643 (2007) (citing 453 U. S., at 460). The court distinguished *Belton* as a case concerning the permissible scope of a vehicle search incident to arrest and concluded that it did not answer "the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure." 216 Ariz., at 4, 162 P. 3d, at 643. Relying on our earlier decision in *Chimel*, the court observed that the search-incident-to-arrest exception to the warrant requirement is justified by interests in officer safety and evidence preservation. 216 Ariz., at 4, 162 P. 3d, at 643. When "the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer," the court concluded, a "warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or

prevent the destruction of evidence." *Id.*, at 5, 162 P. 3d, at 644. Accordingly, the court held that the search of Gant's car was unreasonable.

The dissenting justices would have upheld the search of Gant's car based on their view that "the validity of a *Belton* search . . . clearly does not depend on the presence of the *Chimel* rationales in a particular case." *Id.*, at 8, 162 P. 3d, at 647. Although they disagreed with the majority's view of *Belton*, the dissenting justices acknowledged that "[t]he bright-line rule embraced in *Belton* has long been criticized and probably merits reconsideration." 216 Ariz., at 10, 162 P. 3d, at 649. They thus "add[ed their] voice[s] to the others that have urged the Supreme Court to revisit *Belton*." *Id.*, at 11, 162 P. 3d, at 650.

The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari. 552 U. S. 1230 (2008).

II

Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967) (footnote omitted). Among the exceptions to the warrant requirement is a search incident to a lawful arrest. See *Weeks* v. *United States*, 232 U. S. 383, 392 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. See *United States* v. *Robinson*, 414 U. S. 218, 230–234 (1973); *Chimel*, 395 U. S., at 763.

In *Chimel*, we held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Ibid.* That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See *ibid.* (noting that searches incident to arrest are reasonable "*in order to* remove any weapons [the arrestee] might seek to use" and "*in order to prevent* [the] concealment or destruction" of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. *E. g.*, *Preston* v. *United States*, 376 U. S. 364, 367–368 (1964).

In *Belton*, we considered *Chimel*'s application to the automobile context. A lone police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked "Supergold"—a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees,[1] the officer " 'split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other' " and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine. 453 U. S., at 456.

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[1] The officer was unable to handcuff the occupants because he had only one set of handcuffs. See Brief for Petitioner in *New York* v. *Belton*, O. T. 1980, No. 80–328, p. 3 (hereinafter Brief in No. 80–328).

The New York Court of Appeals found the search unconstitutional, concluding that after the occupants were arrested the vehicle and its contents were "safely within the exclusive custody and control of the police." *State* v. *Belton,* 50 N. Y. 2d 447, 452, 407 N. E. 2d 420, 423 (1980). The State asked this Court to consider whether the exception recognized in *Chimel* permits an officer to search "a jacket found inside an automobile while the automobile's four occupants, all under arrest, are standing unsecured around the vehicle." Brief in No. 80–328, p. *i.* We granted certiorari because "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile." 453 U. S., at 460.

In its brief, the State argued that the Court of Appeals erred in concluding that the jacket was under the officer's exclusive control. Focusing on the number of arrestees and their proximity to the vehicle, the State asserted that it was reasonable for the officer to believe the arrestees could have accessed the vehicle and its contents, making the search permissible under *Chimel.* Brief in No. 80–328, at 7–8. The United States, as *amicus curiae* in support of the State, argued for a more permissive standard, but it maintained that any search incident to arrest must be " 'substantially contemporaneous' " with the arrest—a requirement it deemed "satisfied if the search occurs during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed." Brief for United States as *Amicus Curiae* in *New York* v. *Belton,* O. T. 1980, No. 80–328, p. 14. There was no suggestion by the parties or *amici* that *Chimel* authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle.

After considering these arguments, we held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the

passenger compartment of the automobile" and any containers therein. *Belton,* 453 U. S., at 460 (footnote omitted). That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.'" *Ibid.*

The Arizona Supreme Court read our decision in *Belton* as merely delineating "the proper scope of a search of the interior of an automobile" incident to an arrest, *id.*, at 459. That is, *when* the passenger compartment is within an arrestee's reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached. On that view of *Belton*, the state court concluded that the search of Gant's car was unreasonable because Gant clearly could not have accessed his car at the time of the search. It also found that no other exception to the warrant requirement applied in this case.

Gant now urges us to adopt the reading of *Belton* followed by the Arizona Supreme Court.

III

Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton*, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. This reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the "fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." *Id.*, at 466. Under the majority's approach, he argued, "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car" before conducting the search. *Id.*, at 468.

Since we decided *Belton*, Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee's reach to justify a vehicle search incident to arrest,[2] but Justice Brennan's reading of the Court's opinion has predominated. As Justice O'Connor observed, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Thornton*, 541 U. S., at 624 (opinion concurring in part). JUSTICE SCALIA has similarly noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in "this precise factual scenario . . . are legion." *Id.*, at 628 (opinion concurring in judgment) (collecting cases).[3] Indeed, some courts have upheld searches

[2] Compare *United States* v. *Green*, 324 F. 3d 375, 379 (CA5 2003) (holding that *Belton* did not authorize a search of an arrestee's vehicle when he was handcuffed and lying facedown on the ground surrounded by four police officers 6-to-10 feet from the vehicle), *United States* v. *Edwards*, 242 F. 3d 928, 938 (CA10 2001) (finding unauthorized a vehicle search conducted while the arrestee was handcuffed in the back of a patrol car), and *United States* v. *Vasey*, 834 F. 2d 782, 787 (CA9 1987) (finding unauthorized a vehicle search conducted 30-to-45 minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a police car), with *United States* v. *Hrasky*, 453 F. 3d 1099, 1102 (CA8 2006) (upholding a search conducted an hour after the arrestee was apprehended and after he had been handcuffed and placed in the back of a patrol car), *United States* v. *Weaver*, 433 F. 3d 1104, 1106 (CA9 2006) (upholding a search conducted 10-to-15 minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a patrol car), and *United States* v. *White*, 871 F. 2d 41, 44 (CA6 1989) (upholding a search conducted after the arrestee had been handcuffed and secured in the back of a police cruiser).

[3] The practice of searching vehicles incident to arrest after the arrestee has been handcuffed and secured in a patrol car has not abated since we decided *Thornton*. See, *e. g.*, *United States* v. *Murphy*, 221 Fed. Appx. 715, 717 (CA10 2007); *Hrasky*, 453 F. 3d, at 1100; *Weaver*, 433 F. 3d, at 1105; *United States* v. *Williams*, 170 Fed. Appx. 399, 401 (CA6 2006); *United States* v. *Dorsey*, 418 F. 3d 1038, 1041 (CA9 2005); *United States* v.

under *Belton* "even when . . . the handcuffed arrestee has already left the scene." 541 U. S., at 628 (same).

Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U. S., at 460, n. 3. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.[4]

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton*, 541 U. S., at 632 (Scalia, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, *e. g.*, *Atwater* v. *Lago Vista*, 532 U. S. 318,

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Osife, 398 F. 3d 1143, 1144 (CA9 2005); *United States* v. *Sumrall*, 115 Fed. Appx. 22, 24 (CA10 2004).

[4] Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains. Cf. 3 W. LaFave, Search and Seizure § 7.1(c), p. 525 (4th ed. 2004) (hereinafter LaFave) (noting that the availability of protective measures "ensur[es] the nonexistence of circumstances in which the arrestee's 'control' of the car is in doubt"). But in such a case a search incident to arrest is reasonable under the Fourth Amendment.

324 (2001); *Knowles* v. *Iowa*, 525 U. S. 113, 118 (1998). But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Cf. *Knowles*, 525 U. S., at 118. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

IV

The State does not seriously disagree with the Arizona Supreme Court's conclusion that Gant could not have accessed his vehicle at the time of the search, but it nevertheless asks us to uphold the search of his vehicle under the broad reading of *Belton* discussed above. The State argues that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle.

For several reasons, we reject the State's argument. First, the State seriously undervalues the privacy interests

at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, see *New York* v. *Class*, 475 U. S. 106, 112–113 (1986), the former interest is nevertheless important and deserving of constitutional protection, see *Knowles*, 525 U. S., at 117. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.[5]

At the same time as it undervalues these privacy concerns, the State exaggerates the clarity that its reading of *Belton* provides. Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how prox-

[5] See *Maryland* v. *Garrison*, 480 U. S. 79, 84 (1987); *Chimel* v. *California*, 395 U. S. 752, 760–761 (1969); *Stanford* v. *Texas*, 379 U. S. 476, 480–484 (1965); *Weeks* v. *United States*, 232 U. S. 383, 389–392 (1914); *Boyd* v. *United States*, 116 U. S. 616, 624–625 (1886); see also 10 C. Adams, The Works of John Adams 247–248 (1856). Many have observed that a broad reading of *Belton* gives police limitless discretion to conduct exploratory searches. See 3 LaFave § 7.1(c), at 527 (observing that *Belton* creates the risk "that police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits"); see also *United States* v. *McLaughlin*, 170 F. 3d 889, 894 (CA9 1999) (Trott, J., concurring) (observing that *Belton* has been applied to condone "purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find"); *State* v. *Pallone*, 2001 WI 77, ¶¶ 87–90, 236 Wis. 2d 162, 203–204, and n. 9, 613 N. W. 2d 568, 588, and n. 9 (2000) (Abrahamson, C. J., dissenting) (same); *State* v. *Pierce*, 136 N. J. 184, 211, 642 A. 2d 947, 961 (1994) (same).

imate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview[6] and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene.[7] The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a "bright line." See 3 LaFave § 7.1(c), at 514–524.

Contrary to the State's suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan* v. *Long*, 463 U. S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehi-

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[6] Compare *United States* v. *Caseres*, 533 F. 3d 1064, 1072 (CA9 2008) (declining to apply *Belton* when the arrestee was approached by police after he had exited his vehicle and reached his residence), with *Rainey* v. *Commonwealth*, 197 S. W. 3d 89, 94–95 (Ky. 2006) (applying *Belton* when the arrestee was apprehended 50 feet from the vehicle), and *Black* v. *State*, 810 N. E. 2d 713, 716 (Ind. 2004) (applying *Belton* when the arrestee was apprehended inside an auto repair shop and the vehicle was parked outside).

[7] Compare *McLaughlin*, 170 F. 3d, at 890–891 (upholding a search that commenced five minutes after the arrestee was removed from the scene), *United States* v. *Snook*, 88 F. 3d 605, 608 (CA8 1996) (same), and *United States* v. *Doward*, 41 F. 3d 789, 793 (CA1 1994) (upholding a search that continued after the arrestee was removed from the scene), with *United States* v. *Lugo*, 978 F. 2d 631, 634 (CA10 1992) (holding invalid a search that commenced after the arrestee was removed from the scene), and *State* v. *Badgett*, 200 Conn. 412, 427–428, 512 A. 2d 160, 169 (1986) (holding invalid a search that continued after the arrestee was removed from the scene).

cle to "gain immediate control of weapons." *Id.*, at 1049 (citing *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States* v. *Ross*, 456 U. S. 798, 820–821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by JUSTICE SCALIA's opinion concurring in the judgment in *Thornton*, which we conclude today are reasonable for purposes of the Fourth Amendment, *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. Cf. *Maryland* v. *Buie*, 494 U. S. 325, 334 (1990) (holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding).

These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are unpersuaded by the State's arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals' privacy.[8]

[8] At least eight States have reached the same conclusion. Vermont, New Jersey, New Mexico, Nevada, Pennsylvania, New York, Oregon, and Wyoming have declined to follow a broad reading of *Belton* under their state constitutions. See *State* v. *Bauder*, 181 Vt. 392, 401, 924 A. 2d 38, 46–47 (2007); *State* v. *Eckel*, 185 N. J. 523, 540, 888 A. 2d 1266, 1277 (2006); *Camacho* v. *State*, 119 Nev. 395, 399–400, 75 P. 3d 370, 373–374 (2003); *Vasquez* v. *State*, 990 P. 2d 476, 488–489 (Wyo. 1999); *State* v. *Arredondo*, 1997–NMCA–081, 123 N. M. 628, 636 (Ct. App.), overruled on other grounds by *State* v. *Steinzig*, 1999–NMCA–107, 127 N. M. 752 (Ct. App.);

V

Our dissenting colleagues argue that the doctrine of *stare decisis* requires adherence to a broad reading of *Belton* even though the justifications for searching a vehicle incident to arrest are in most cases absent.[9] The doctrine of *stare decisis* is of course "essential to the respect accorded to the judgments of the Court and to the stability of the law," but it does not compel us to follow a past decision when its rationale no longer withstands "careful analysis." *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003).

We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice. And we would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it. The safety and evidentiary interests that supported the search in *Belton* simply are not present in this case. Indeed, it is hard to imagine two cases that are factually more distinct, as *Belton* involved one officer confronted by four unsecured arrestees suspected of committing a drug offense, and this case involves several officers confronted with a securely detained arrestee apprehended for driving with a suspended license. This case is also distinguishable from *Thornton*, in which the petitioner was

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Commonwealth v. *White*, 543 Pa. 45, 57, 669 A. 2d 896, 902 (1995); *People* v. *Blasich*, 73 N. Y. 2d 673, 678, 541 N. E. 2d 40, 43 (1989); *State* v. *Fesler*, 68 Ore. App. 609, 612, 685 P. 2d 1014, 1016–1017 (1984). And a Massachusetts statute provides that a search incident to arrest may be made only for the purposes of seizing weapons or evidence of the offense of arrest. See *Commonwealth* v. *Toole*, 389 Mass. 159, 161–162, 448 N. E. 2d 1264, 1266–1267 (1983) (citing Mass. Gen. Laws, ch. 276, § 1 (West 2006)).

[9] JUSTICE ALITO's dissenting opinion also accuses us of "overrul[ing]" *Belton* and *Thornton* v. *United States*, 541 U. S. 615 (2004), "even though respondent Gant has not asked us to do so." *Post*, at 355. Contrary to that claim, the narrow reading of *Belton* we adopt today is precisely the result Gant has urged. That JUSTICE ALITO has chosen to describe this decision as overruling our earlier cases does not change the fact that the resulting rule of law is the one advocated by respondent.

arrested for a drug offense. It is thus unsurprising that Members of this Court who concurred in the judgments in *Belton* and *Thornton* also concur in the decision in this case.[10]

We do not agree with the contention in JUSTICE ALITO's dissent (hereinafter dissent) that consideration of police reliance interests requires a different result. Although it appears that the State's reading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years,[11] many of these searches were not justified by the reasons underlying the *Chimel* exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence. Cf. *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment"). The dissent's reference in this regard to the reliance interests cited in *Dickerson* v. *United States*, 530 U. S. 428 (2000), is misplaced. See *post*, at 358–359. In ob-

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[10] JUSTICE STEVENS concurred in the judgment in *Belton*, 453 U. S., at 463, for the reasons stated in his dissenting opinion in *Robbins* v. *California*, 453 U. S. 420, 444 (1981), JUSTICE THOMAS joined the Court's opinion in *Thornton*, 541 U. S. 615, and JUSTICE SCALIA and JUSTICE GINSBURG concurred in the judgment in that case, *id.*, at 625.

[11] Because a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding.

serving that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," 530 U. S., at 443, the Court was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right.

The dissent also ignores the checkered history of the search-incident-to-arrest exception. Police authority to search the place in which a lawful arrest is made was broadly asserted in *Marron* v. *United States*, 275 U. S. 192 (1927), and limited a few years later in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931), and *United States* v. *Lefkowitz*, 285 U. S. 452 (1932). The limiting views expressed in *Go-Bart* and *Lefkowitz* were in turn abandoned in *Harris* v. *United States*, 331 U. S. 145 (1947), which upheld a search of a four-room apartment incident to the occupant's arrest. Only a year later the Court in *Trupiano* v. *United States*, 334 U. S. 699, 708 (1948), retreated from that holding, noting that the search-incident-to-arrest exception is "a strictly limited" one that must be justified by "something more in the way of necessity than merely a lawful arrest." And just two years after that, in *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), the Court again reversed course and upheld the search of an entire apartment. Finally, our opinion in *Chimel* overruled *Rabinowitz* and what remained of *Harris* and established the present boundaries of the search-incident-to-arrest exception. Notably, none of the dissenters in *Chimel* or the cases that preceded it argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.

The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely "within 'the area into which an arrestee might reach,'" 453 U. S., at

460, and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations.

VI

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

To determine what is an "unreasonable" search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness. See *Virginia* v. *Moore*, 553 U. S. 164, 168–171 (2008). Since the historical scope of officers' authority to search vehicles incident to arrest is uncertain, see *Thornton* v. *United States*, 541 U. S. 615, 629–631 (2004) (SCALIA, J., concurring in judgment), traditional standards of reasonableness govern. It is abundantly clear that those standards do not justify what I take to be the rule set forth in *New York* v. *Belton*, 453 U. S. 454 (1981), and *Thornton:* that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons. When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is vir-

tually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.

Law enforcement officers face a risk of being shot whenever they pull a car over. But that risk is at its height at the time of the initial confrontation; and it is *not at all* reduced by allowing a search of the stopped vehicle after the driver has been arrested and placed in the squad car. I observed in *Thornton* that the Government had failed to provide a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle, 541 U. S., at 626; Arizona and its *amici* have not remedied that significant deficiency in the present case.

It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe "the suspect is dangerous and . . . may gain immediate control of weapons." *Michigan* v. *Long*, 463 U. S. 1032, 1049 (1983). In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan* v. *Long* is not at issue here.

JUSTICE STEVENS acknowledges that an officer-safety rationale cannot justify all vehicle searches incident to arrest, but asserts that that is not the rule *Belton* and *Thornton* adopted. (As described above, I read those cases differently.) JUSTICE STEVENS would therefore retain the application of *Chimel* v. *California*, 395 U. S. 752 (1969), in the car-search context but would apply in the future what he believes our cases held in the past: that officers making a roadside stop may search the vehicle so long as the "arrestee is within reaching distance of the passenger compartment at the time of the search." *Ante*, at 351. I believe that this

standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search. In my view we should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is *ipso facto* "reasonable" only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred. Because respondent was arrested for driving without a license (a crime for which no evidence could be expected to be found in the vehicle), I would hold in the present case that the search was unlawful.

JUSTICE ALITO insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results. See *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). We should recognize *Belton*'s fanciful reliance upon officer safety for what it was: "a return to the broader sort of [evidence-gathering] search incident to arrest that we allowed before *Chimel*." *Thornton*, *supra*, at 631 (SCALIA, J., concurring in judgment).

JUSTICE ALITO argues that there is no reason to adopt a rule limiting automobile-arrest searches to those cases where the search's object is evidence of the crime of arrest. *Post*, at 364 (dissenting opinion). I disagree. This formulation of officers' authority both preserves the outcomes of our prior cases and tethers the scope and rationale of the doctrine to the triggering event. *Belton*, by contrast, allowed searches precisely when its exigency-based rationale was least applicable: The fact of the arrest in the automobile context makes searches on exigency grounds *less* reasonable, not more. I also disagree with JUSTICE ALITO's conclusory

assertion that this standard will be difficult to administer in practice, *post,* at 360–361; the ease of its application in this case would suggest otherwise.

No other Justice, however, shares my view that application of *Chimel* in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by JUSTICE STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

JUSTICE BREYER, dissenting.

I agree with JUSTICE ALITO that *New York* v. *Belton*, 453 U. S. 454 (1981), is best read as setting forth a bright-line rule that permits a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant—regardless of the danger the arrested individual in fact poses. I also agree with JUSTICE STEVENS, however, that the rule can produce results divorced from its underlying Fourth Amendment rationale. Compare *Belton, supra,* with *Chimel* v. *California,* 395 U. S. 752, 764 (1969) (explaining that the rule allowing contemporaneous searches is justified by the need to prevent harm to a police officer or destruction of evidence of the crime). For that reason I would look for a better rule—were the question before us one of first impression.

The matter, however, is not one of first impression, and that fact makes a substantial difference. The *Belton* rule has been followed not only by this Court in *Thornton* v. *United States,* 541 U. S. 615 (2004), but also by numerous other courts. Principles of *stare decisis* must apply, and

those who wish this Court to change a well-established legal precedent—where, as here, there has been considerable reliance on the legal rule in question—bear a heavy burden. Cf. *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 918–926 (2007) (BREYER, J., dissenting). I have not found that burden met. Nor do I believe that the other considerations ordinarily relevant when determining whether to overrule a case are satisfied. I consequently join JUSTICE ALITO's dissenting opinion with the exception of Part II–E.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, and with whom JUSTICE BREYER joins except as to Part II–E, dissenting.

Twenty-eight years ago, in *New York* v. *Belton*, 453 U. S. 454, 460 (1981), this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (Footnote omitted.) Five years ago, in *Thornton* v. *United States*, 541 U. S. 615 (2004)—a case involving a situation not materially distinguishable from the situation here—the Court not only reaffirmed but extended the holding of *Belton*, making it applicable to recent occupants. Today's decision effectively overrules those important decisions, even though respondent Gant has not asked us to do so.

To take the place of the overruled precedents, the Court adopts a new two-part rule under which a police officer who arrests a vehicle occupant or recent occupant may search the passenger compartment if (1) the arrestee is within reaching distance of the vehicle at the time of the search or (2) the officer has reason to believe that the vehicle contains evidence of the offense of arrest. *Ante*, at 351. The first part of this new rule may endanger arresting officers and is truly endorsed by only four Justices; JUSTICE SCALIA joins solely for the purpose of avoiding a "4-to-1-to-4 opinion." *Ante*, at

354 (concurring opinion). The second part of the new rule is taken from JUSTICE SCALIA's separate opinion in *Thornton* without any independent explanation of its origin or justification and is virtually certain to confuse law enforcement officers and judges for some time to come. The Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law, and although the Court purports to base its analysis on the landmark decision in *Chimel* v. *California*, 395 U. S. 752 (1969), the Court's reasoning undermines *Chimel*. I would follow *Belton*, and I therefore respectfully dissent.

I

Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so.

In *Belton*, an officer on the New York Thruway removed the occupants from a car and placed them under arrest but did not handcuff them. See 453 U. S., at 456; Brief for Petitioner in *New York* v. *Belton*, O. T. 1980, No. 80–328, p. 3. The officer then searched a jacket on the car's back seat and found drugs. 453 U. S., at 455. By a divided vote, the New York Court of Appeals held that the search of the jacket violated *Chimel*, in which this Court held that an arresting officer may search the area within an arrestee's immediate control. See *State* v. *Belton*, 50 N. Y. 2d 447, 407 N. E. 2d 420 (1980). The judges of the New York Court of Appeals disagreed on the factual question whether the *Belton* arrestees could have gained access to the car. The majority thought that they could not have done so, *id.*, at 452, n. 2, 407 N. E. 2d, at 423, n. 2, but the dissent thought that this was a real possibility, *id.*, at 453, 407 N. E. 2d, at 424 (opinion of Gabrielli, J.).

Viewing this disagreement about the application of the *Chimel* rule as illustrative of a persistent and important problem, the *Belton* Court concluded that "'[a] single famil-

iar standard'" was "'essential to guide police officers'" who make roadside arrests. 453 U. S., at 458 (quoting *Dunaway* v. *New York*, 442 U. S. 200, 213–214 (1979)). The Court acknowledged that articles in the passenger compartment of a car are not always within an arrestee's reach, but "[i]n order to establish the workable rule this category of cases requires," the Court adopted a rule that categorically permits the search of a car's passenger compartment incident to the lawful arrest of an occupant. 453 U. S., at 460.

The precise holding in *Belton* could not be clearer. The Court stated unequivocally: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Ibid.* (footnote omitted).

Despite this explicit statement, the opinion of the Court in the present case curiously suggests that *Belton* may reasonably be read as adopting a holding that is narrower than the one explicitly set out in the *Belton* opinion, namely, that an officer arresting a vehicle occupant may search the passenger compartment "*when* the passenger compartment is within an arrestee's reaching distance." *Ante*, at 341 (emphasis in original). According to the Court, the broader reading of *Belton* that has gained wide acceptance "may be attributable to Justice Brennan's dissent." *Ante*, at 341.

Contrary to the Court's suggestion, however, Justice Brennan's *Belton* dissent did not mischaracterize the Court's holding in that case or cause that holding to be misinterpreted. As noted, the *Belton* Court explicitly stated precisely what it held. In *Thornton*, the Court recognized the scope of *Belton*'s holding. See 541 U. S., at 620. So did JUSTICE SCALIA's separate opinion. See *id.*, at 625 (opinion concurring in judgment) ("In *[Belton]* we set forth a bright-line rule for arrests of automobile occupants, holding that . . . a search of the whole [passenger] compartment is justified in every case"). So does JUSTICE SCALIA's opinion in the pres-

ent case. See *ante*, at 351 (*Belton* and *Thornton* held that "arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons"). This "bright-line rule" has now been interred.

II

Because the Court has substantially overruled *Belton* and *Thornton*, the Court must explain why its departure from the usual rule of *stare decisis* is justified. I recognize that *stare decisis* is not an "inexorable command," *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), and applies less rigidly in constitutional cases, *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543 (1962) (plurality opinion). But the Court has said that a constitutional precedent should be followed unless there is a "'special justification'" for its abandonment. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). Relevant factors identified in prior cases include whether the precedent has engendered reliance, *id.*, at 442, whether there has been an important change in circumstances in the outside world, *Randall* v. *Sorrell*, 548 U. S. 230, 244 (2006) (plurality opinion); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting), whether the precedent has proved to be unworkable, *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (citing *Payne*, *supra*, at 827), whether the precedent has been undermined by later decisions, see, *e. g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173–174 (1989), and whether the decision was badly reasoned, *Vieth*, *supra*, at 306 (plurality opinion). These factors weigh in favor of retaining the rule established in *Belton*.

A

Reliance. While reliance is most important in "cases involving property and contract rights," *Payne*, *supra*, at 828, the Court has recognized that reliance by law enforcement officers is also entitled to weight. In *Dickerson*, the Court held that principles of *stare decisis* "weigh[ed]" heavily

against overruling *Miranda* v. *Arizona*, 384 U. S. 436 (1966), because the *Miranda* rule had become "embedded in routine police practice." 530 U. S., at 443.

If there was reliance in *Dickerson*, there certainly is substantial reliance here. The *Belton* rule has been taught to police officers for more than a quarter century. Many searches—almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on that precedent. It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule.

The opinion of the Court recognizes that "*Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years." *Ante*, at 349. But for the Court, this seemingly counts for nothing. The Court states that "[w]e have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice," *ante*, at 348, but of course the Court routinely relies on decisions sustaining the constitutionality of police practices without doing what the Court has done here—*sua sponte* considering whether those decisions should be overruled. And the Court cites no authority for the proposition that *stare decisis* may be disregarded or provides only lesser protection when the precedent that is challenged is one that sustained the constitutionality of a law enforcement practice.

The Court also errs in arguing that the reliance interest that was given heavy weight in *Dickerson* was not "police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right." *Ante*, at 350. The *Dickerson* opinion makes no reference to "societal reliance," and petitioner in that case contended that there had been reliance on *Miranda* because, among other things, "[f]or nearly thirty-five years, *Miranda*'s requirements ha[d] shaped law enforcement training [and] police

conduct." See Brief for Petitioner in *Dickerson* v. *United States,* O. T. 1999, No. 99–5525, p. 33.

B

Changed circumstances. Abandonment of the *Belton* rule cannot be justified on the ground that the dangers surrounding the arrest of a vehicle occupant are different today than they were 28 years ago. The Court claims that "[w]e now know that articles inside the passenger compartment are rarely 'within "the area into which an arrestee might reach,"' " *ante,* at 350, but surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.

C

Workability. The *Belton* rule has not proved to be unworkable. On the contrary, the rule was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply. The Court correctly notes that even the *Belton* rule is not perfectly clear in all situations. Specifically, it is sometimes debatable whether a search is or is not contemporaneous with an arrest, *ante,* at 345–346, and n. 6, but that problem is small in comparison with the problems that the Court's new two-part rule will produce.

The first part of the Court's new rule—which permits the search of a vehicle's passenger compartment if it is within an arrestee's reach at the time of the search—reintroduces the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid. As the situation in *Belton* illustrated, there are cases in which it is unclear whether an arrestee could retrieve a weapon or evidence in the passenger compartment of a car.

Even more serious problems will also result from the second part of the Court's new rule, which requires officers

making roadside arrests to determine whether there is reason to believe that the vehicle contains evidence of the crime of arrest. What this rule permits in a variety of situations is entirely unclear.

D

Consistency with later cases. The *Belton* bright-line rule has not been undermined by subsequent cases. On the contrary, that rule was reaffirmed and extended just five years ago in *Thornton.*

E

Bad reasoning. The Court is harshly critical of *Belton*'s reasoning, but the problem that the Court perceives cannot be remedied simply by overruling *Belton. Belton* represented only a modest—and quite defensible—extension of *Chimel*, as I understand that decision.

Prior to *Chimel*, the Court's precedents permitted an arresting officer to search the area within an arrestee's "possession" and "control" for the purpose of gathering evidence. See 395 U. S., at 759–760. Based on this "abstract doctrine," *id.*, at 760, n. 4, the Court had sustained searches that extended far beyond an arrestee's grabbing area. See *United States* v. *Rabinowitz*, 339 U. S. 56 (1950) (search of entire office); *Harris* v. *United States*, 331 U. S. 145 (1947) (search of entire apartment).

The *Chimel* Court, in an opinion written by Justice Stewart, overruled these cases. Concluding that there are only two justifications for a warrantless search incident to arrest—officer safety and the preservation of evidence—the Court stated that such a search must be confined to "the arrestee's person" and "the area from within which he might gain possession of a weapon or destructible evidence." 395 U. S., at 762–763.

Unfortunately, *Chimel* did not say whether "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence" is to be measured at the time of

the arrest or at the time of the search, but unless the *Chimel* rule was meant to be a specialty rule, applicable to only a few unusual cases, the Court must have intended for this area to be measured at the time of arrest.

This is so because the Court can hardly have failed to appreciate the following two facts. First, in the great majority of cases, an officer making an arrest is able to handcuff the arrestee and remove him to a secure place before conducting a search incident to the arrest. See *ante*, at 343, n. 4 (stating that it is "the rare case" in which an arresting officer cannot secure an arrestee before conducting a search). Second, because it is safer for an arresting officer to secure an arrestee before searching, it is likely that this is what arresting officers do in the great majority of cases. (And it appears, not surprisingly, that this is in fact the prevailing practice.[1]) Thus, if the area within an arrestee's reach were assessed, not at the time of arrest, but at the time of the search, the *Chimel* rule would rarely come into play.

Moreover, if the applicability of the *Chimel* rule turned on whether an arresting officer chooses to secure an arrestee prior to conducting a search, rather than searching first and securing the arrestee later, the rule would "create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer." *United States* v. *Abdul-Saboor*, 85 F. 3d 664, 669 (CADC 1996). If this is the law, the D. C. Circuit observed, "the law would truly be, as Mr. Bumble said, 'a ass.'" *Ibid.* See also *United States* v. *Tejada*, 524 F. 3d 809, 812 (CA7 2008) ("[I]f the police could lawfully have searched the defendant's grabbing radius at the moment of arrest, he has no legitimate complaint if, the better to protect themselves from him, they first put him outside that radius").

I do not think that this is what the *Chimel* Court intended. Handcuffs were in use in 1969. The ability of arresting of-

[1] See Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of *Chimel* and *Belton*, 2002 Wis. L. Rev. 657, 665.

ficers to secure arrestees before conducting a search—and their incentive to do so—are facts that can hardly have escaped the Court's attention. I therefore believe that the *Chimel* Court intended that its new rule apply in cases in which the arrestee is handcuffed before the search is conducted.

The *Belton* Court, in my view, proceeded on the basis of this interpretation of *Chimel*. Again speaking through Justice Stewart, the *Belton* Court reasoned that articles in the passenger compartment of a car are "generally, even if not inevitably," within an arrestee's reach. 453 U. S., at 460. This is undoubtedly true at the time of the arrest of a person who is seated in a car but plainly not true when the person has been removed from the car and placed in handcuffs. Accordingly, the *Belton* Court must have proceeded on the assumption that the *Chimel* rule was to be applied at the time of arrest. And that is why the *Belton* Court was able to say that its decision "in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U. S., at 460, n. 3. Viewing *Chimel* as having focused on the time of arrest, *Belton*'s only new step was to eliminate the need to decide on a case-by-case basis whether a particular person seated in a car actually could have reached the part of the passenger compartment where a weapon or evidence was hidden. For this reason, if we are going to reexamine *Belton*, we should also reexamine the reasoning in *Chimel* on which *Belton* rests.

F

The Court, however, does not reexamine *Chimel* and thus leaves the law relating to searches incident to arrest in a confused and unstable state. The first part of the Court's new two-part rule—which permits an arresting officer to search the area within an arrestee's reach at the time of the search—applies, at least for now, only to vehicle occupants

and recent occupants, but there is no logical reason why the same rule should not apply to all arrestees.

The second part of the Court's new rule, which the Court takes uncritically from JUSTICE SCALIA's separate opinion in *Thornton*, raises doctrinal and practical problems that the Court makes no effort to address. Why, for example, is the standard for this type of evidence-gathering search "reason to believe" rather than probable cause? And why is this type of search restricted to evidence of the offense of arrest? It is true that an arrestee's vehicle is probably more likely to contain evidence of the crime of arrest than of some other crime, but if reason-to-believe is the governing standard for an evidence-gathering search incident to arrest, it is not easy to see why an officer should not be able to search when the officer has reason to believe that the vehicle in question possesses evidence of a crime other than the crime of arrest.

Nor is it easy to see why an evidence-gathering search incident to arrest should be restricted to the passenger compartment. The *Belton* rule was limited in this way because the passenger compartment was considered to be the area that vehicle occupants can generally reach, 453 U. S., at 460, but since the second part of the new rule is not based on officer safety or the preservation of evidence, the ground for this limitation is obscure.[2]

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[2] I do not understand the Court's decision to reach the following situations. First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle. The Court's decision in this case does not address the question whether in such a situation a search of the passenger compartment may be justified on the ground that the occupants who are not arrested could gain access to the car and retrieve a weapon or destroy evidence. Second, there may be situations in which an arresting officer has cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while the officer is still on the scene. The decision in this case, as I understand it, does not address that situation either.

III

Respondent in this case has not asked us to overrule *Belton*, much less *Chimel*. Respondent's argument rests entirely on an interpretation of *Belton* that is plainly incorrect, an interpretation that disregards *Belton*'s explicit delineation of its holding. I would therefore leave any reexamination of our prior precedents for another day, if such a reexamination is to be undertaken at all. In this case, I would simply apply *Belton* and reverse the judgment below.

Syllabus

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN *v.* ELAHI

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

No. 07–615. Argued January 12, 2009—Decided April 21, 2009

In 1997, the International Court of Arbitration awarded petitioner Iranian Ministry of Defense (hereinafter Iran) $2.8 million to settle a dispute with Cubic Defense Systems, Inc., a California company, over a 1977 contract that would have provided Iran with an air combat training system. When Cubic refused to pay, Iran sued in the Federal District Court in San Diego, which ordered Cubic to pay the award plus interest (Cubic Judgment). In 2000, respondent Elahi sued Iran in the D. C. Federal District Court, claiming that Iranian agents had murdered his brother. He obtained a default judgment of about $312 million and sought to collect some of the money by attaching the Cubic Judgment. Iran opposed the lien under the Foreign Sovereign Immunities Act of 1976. The California District Court denied Iran's immunity claim, and the Ninth Circuit affirmed, finding an exception to sovereign immunity. This Court vacated and remanded. *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U. S. 450.

On remand, the Ninth Circuit found that a different immunity exception applied, citing the Terrorism Risk Insurance Act of 2002, which permitted holders of terrorism-related judgments against Iran to attach "blocked" Iranian assets. The United States had blocked Iranian assets following the Iranian hostage crisis in 1979, and the court held that the asset Elahi sought to attach had remained blocked notwithstanding the unblocking orders issued after the crisis was resolved by the Algiers Accords in 1981. The court reasoned that those unblocking orders had omitted military goods such as the training system underlying the Cubic Judgment. The court further rejected Iran's argument that Elahi had waived his right of attachment, and concluded that he could attach the Cubic Judgment.

Held:

1. The asset in question was not "blocked" at the time of the Ninth Circuit's decision. Contrary to that court's holding, the relevant asset is not Iran's interest in the air combat training system, but, rather, a judgment enforcing an arbitration award based upon Cubic's failure to account to Iran for its share of the proceeds of the system's eventual

sale to Canada. And neither the Cubic Judgment nor the sale proceeds it represents were blocked assets at the time of the Court of Appeals' 2007 decision. In a 1981 order, the Treasury Department unblocked transactions involving property in which Iran's interest arose after January 19, 1981. Iran's interest in the Cubic Judgment itself arose on December 7, 1998, when the District Court confirmed the arbitration award. And Iran's interest in the property underlying the judgment arose, as the arbitrators ruled, when Cubic completed its sale of the air combat system in October 1982. Thus, whether Iran's "interest in property" is considered to be its interest in the Cubic Judgment itself or its underlying interest in the sale proceeds, the interest falls within the terms of the Treasury Department's general unblocking order. Even assuming (as the Ninth Circuit held) that the relevant asset was Iran's pre-1981 interest in the training system itself, that asset still was not "blocked" at the time of the decision below. Such an interest would fall directly within the scope of Executive Order No. 12281, which required that property owned by Iran be transferred "as directed . . . by the Government of Iran." No authority supports the contrary conclusion. Pp. 375–379.

2. Elahi cannot attach the Cubic Judgment because he has waived his right to do so. Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (VPA) offers compensation to individuals holding terrorism-related judgments against Iran. It requires those receiving payment to relinquish "all rights to . . . attach property that is at issue in claims against the United States before an international tribunal." § 2002(a)(2)(D). In 2003, the U. S. Government paid Elahi $2.3 million under the VPA as partial compensation for his judgment against Iran, and he signed a waiver form that mirrors the statutory language. A review of the record in Iran-U. S. Claims Tribunal Case No. B61 demonstrates that the Cubic Judgment falls within the terms of Elahi's waiver. Iran filed that case in 1982, claiming that between 1979 and 1981 the United States had wrongly barred the transfer of the Cubic training system and other military equipment to Iran. Iran asked the Tribunal to order the United States, among other things, to pay Iran damages. The United States answered that the Tribunal should set off the $2.8 million represented by the Cubic Judgment against any award. Iran argued that the Tribunal should not set off the $2.8 million insofar as third parties have attached the judgment. In the terms of Elahi's waiver, therefore, the Cubic Judgment is "property," and Case No. B61 itself is a "clai[m] against the United States before an international tribunal." And there remains a significant dispute about whether the Cubic Judgment can be used by the Tribunal as a setoff, placing the

Judgment "at issue" in Case No. B61. Elahi's arguments to the contrary are unavailing. Pp. 379–387.

3. Given Elahi's waiver, this Court need not decide whether the Cubic Judgment was blocked by new Executive Branch actions following the Ninth Circuit's decision. P. 387.

495 F. 3d 1024, reversed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, THOMAS, and ALITO, JJ., joined, and in which KENNEDY, SOUTER, and GINSBURG, JJ., joined as to Parts I and II. KENNEDY, J., filed an opinion concurring in part and dissenting in part, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 387.

David J. Bederman argued the cause for petitioner. With him on the briefs was *Mina Almassi.*

Douglas Hallward-Driemeier argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Garre*, *Assistant Attorney General Katsas*, then-*Acting Solicitor General Kneedler*, *Douglas N. Letter*, *Lewis S. Yelin*, *John B. Bellinger III*, and *Robert F. Hoyt.*

Carter G. Phillips argued the cause for respondent. With him on the brief were *Jacqueline G. Cooper*, *Jonathan R. Mook*, and *Philip J. Hirschkop.*

JUSTICE BREYER delivered the opinion of the Court.

Dariush Elahi, the respondent, sued Iran, claiming that Iran unlawfully participated in the assassination of his brother, and he obtained a default judgment of about $312 million. Seeking to collect some of the money, he has tried to attach an asset belonging to Iran, namely, a $2.8 million judgment that Iran obtained against a California company called Cubic Defense Systems, Inc. (Cubic Judgment). Iran has asserted a defense of sovereign immunity in order to prevent the attachment. See Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1610.

Since Iran is a sovereign nation, Elahi cannot attach the Cubic Judgment unless he finds an exception to the principle

of sovereign immunity that would allow him to do so. See *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U. S. 450 (2006) *(per curiam)*. As the case reaches us, the Terrorism Risk Insurance Act of 2002 (TRIA), § 201(a), 116 Stat. 2337, note following 28 U. S. C. § 1610, provides the sole possible exception. That Act authorizes holders of terrorism-related judgments against Iran, such as Elahi, to attach Iranian assets that the United States has "*blocked*." *Ibid.* (emphasis added). And we initially decide whether Iran's Cubic Judgment is a "blocked asset" within the terms of that Act.

Even if the Cubic Judgment is a blocked asset, however, Elahi still cannot attach it if he waived his right to do so. And we next decide whether Elahi waived that right when, in return for partial compensation from the Government, he agreed not to attach "*property that is at issue in claims against the United States before an international tribunal.*" Victims of Trafficking and Violence Protection Act of 2000 (VPA), § 2002(d)(5)(B), as added by TRIA § 201(c)(4), 116 Stat. 2339, note following 28 U. S. C. § 1610 (emphasis added).

We ultimately hold that the Cubic Judgment was not a "blocked asset" at the time the Court of Appeals handed down its decision in this case. We recognize that since that time new Executive Branch action may have "blocked" that asset; but, in light of the posture of the case, we do not decide whether it has done so. Rather, we determine that Elahi cannot attach the Cubic Judgment regardless, for the Judgment is "at issue" in a claim against the United States before the Iran-U. S. Claims Tribunal. The Judgment consequently falls within the terms of Elahi's waiver.

I

We initially set forth key background elements, including in this section the events necessary to understand the "blocked asset" question, while leaving for Part III, *infra*, additional background matters related to Elahi's waiver.

A

The Cubic Judgment arose out of a 1977 contract between Cubic Defense Systems, a California company, and Iran's Ministry of Defense. (We shall refer to the Ministry, for present purposes an inseparable part of the Iranian state, as "Iran." See *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 495 F. 3d 1024, 1035–1036 (CA9 2007).) Cubic there promised to supply Iran with certain military goods, namely, an air combat training system, for which Iran promised to pay approximately $18 million dollars. In 1979, after Iran had paid some of the money but before Cubic had sent the training system, the Iranian Revolution broke out, militants in Iran seized American hostages, and President Carter "*blocked* all property and interests in property of the Government of Iran . . . subject to the jurisdiction of the United States." Exec. Order No. 12170, 3 CFR 457 (1979 Comp.) (emphasis added), promulgated pursuant to the authority of International Emergency Economic Powers Act (IEEPA), 50 U. S. C. §§ 1701–1702 (2000 ed. and Supp. V); 31 CFR § 535.201 (1980).

About a year later, on January 19, 1981, Iran and the United States settled the crisis, in part with an agreement called the "Algiers Accords." 20 I. L. M. 224. Under the Accords, the United States agreed to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," *ibid.*, and (with some exceptions) to "arrange, subject to the provisions of U. S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties," *id.*, at 227. The President then lifted the legal prohibitions against transactions involving Iranian property. See Exec. Orders Nos. 12277–12282, 3 CFR 105–113 (1981 Comp.); 31 CFR §§ 535.211–535.215 (1981). In doing so, he ordered the transfer to Iran of Iranian financial assets and most other Iranian property "as directed . . . by the Government of Iran," Exec. Order

No. 12281, 3 CFR 112 (1981 Comp.). Shortly thereafter, the Treasury Department issued a general license authorizing "[t]ransactions involving property in which Iran . . . has an interest" where "[t]he property comes within the jurisdiction of the United States . . . after January 19, 1981, or . . . [t]he interest in the property . . . arises after January 19, 1981." 31 CFR § 535.579(a).

The Algiers Accords also set up an international arbitration tribunal, the Iran-U. S. Claims Tribunal (or Tribunal), to resolve disputes between the two nations concerning each other's performance under the Algiers Accords. The Tribunal would also resolve disputes concerning contracts and agreements between the two nations that were outstanding on January 19, 1981. 20 I. L. M., at 230–231. The Tribunal's jurisdiction included claims by nationals of one state against the other state, but it did not include claims by one state against nationals of the other state. *Id.*, at 231–232.

B

In January 1982, Iran filed two Cubic-based claims in the Tribunal. In Case No. B/61, Iran claimed that between 1979 and 1981 the United States had wrongly barred the transfer of certain military equipment, including the Cubic air combat training system, to Iran. Iran asked the Tribunal to order the United States either to issue an export license for the equipment or to pay Iran damages. App. to Brief for United States as *Amicus Curiae* 22a, 24a, 31a.

In Case No. B66, Iran claimed that Cubic had breached its contract to deliver the training system partly because the United States had taken actions contrary to the Algiers Accords. Again Iran asked the Tribunal to order either the issuance of an export license for the equipment or the payment of damages. *Id.*, at 1a, 2a, 9a–10a. In April 1987 the Tribunal dismissed this second case (No. B–66) on the grounds that the Iran-Cubic contract imposed no obligations on the United States and that the Tribunal lacked jurisdic-

tion to consider a suit by a state (Iran) against a private party (Cubic). *Ministry of Nat. Defence of Islamic Republic of Iran* v. *United States,* 14 Iran-U. S. Cl. Trib. Rep. 276, 277–278.

Iran, believing that Cubic had breached its contract, then went to arbitration before the arbitration tribunal specified in the Cubic contract, namely, the International Court of Arbitration of the International Chamber of Commerce. Iran asked that arbitration tribunal to award it restitution and damages.

In May 1997 the arbitrators issued their decision. The arbitrators found that prior to the Iranian Revolution, prior to the hostage crisis, and prior to the blocking of any Iranian assets, (1) Iran and Cubic had themselves agreed that they would temporarily discontinue (but not terminate) the contract; and (2) Cubic had agreed to try to sell the training system to another buyer and to settle accounts with Iran later. The arbitrators further found that after the crisis (in September 1981) (3) Cubic successfully sold a modified version of the system to Canada. *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Int'l Sales Corp.*, No. 7365/FMS (Int'l Ct. of Arbitration of Int'l Chamber of Commerce), pp. 32–33, 36–40, 50–51, reprinted in 13 Mealey's Int'l Arbitration Report pp. G–4, G–15 to G–18, G–21 (Oct. 1998) (Arbitration Award). The arbitrators concluded that Cubic had not lived up to this modified agreement. And, after taking account of the advance payments that Iran had made to Cubic, the funds that Cubic had spent, the amount that Canada had paid Cubic, and various other items, they awarded Iran $2.8 million plus interest. *Id.*, ¶ C.18.3(a), at G–31.

Cubic refused to pay Iran this money. Iran then sued in the Federal District Court for the Southern District of California to enforce the arbitration award. The District Court confirmed the award and entered a final judgment ordering Cubic to pay $2.8 million plus interest to Iran. That judg-

ment is the Cubic Judgment. *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168, 1174 (1998) (final judgment entered Aug. 10, 1999).

C

In February 2000 Elahi brought a tort action against Iran in the Federal District Court for the District of Columbia. Elahi claimed that Iranian agents had murdered his brother. See 28 U. S. C. § 1605(a)(7) (2000 ed.) (lifting sovereign immunity of state sponsors of certain kinds of terrorism) (subsequently replaced by National Defense Authorization Act for Fiscal Year 2008, § 1083(a)(1), 122 Stat. 338, 28 U. S. C. § 1605A (2006 ed., Supp. II)); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 589, 110 Stat. 3009–172, note following 28 U. S. C. § 1605 (providing tort cause of action). Iran did not answer the complaint. The District Court found Iran in default, and it awarded Elahi nearly $12 million in compensatory damages and $300 million in punitive damages. *Elahi* v. *Islamic Republic of Iran*, 124 F. Supp. 2d 97 (DC 2000).

In 2001 Elahi filed a notice of lien against Iran's Cubic Judgment. He thereby sought to satisfy from the Cubic Judgment a portion of what Iran owed him under his own default judgment against Iran. Iran opposed the lien. It argued that the Cubic Judgment, as property of the sovereign state of Iran, was immune from attachment or execution. The District Court denied immunity. *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 236 F. Supp. 2d 1140, 1152 (SD Cal. 2002).

The Court of Appeals affirmed the denial. *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 385 F. 3d 1206 (CA9 2004). The Court of Appeals thought that the Ministry of Defense of Iran had lost its immunity from attachment be-

cause of a special statutory exception that permits a creditor to attach the property of an "agency or instrumentality of a foreign state engaged in commercial activity in the United States"—where the creditor seeks the property to satisfy a terrorism-related judgment. 28 U. S. C. § 1610(b). See 385 F. 3d, at 1219–1222. But, on review here, we pointed out (in a *per curiam* opinion) that the sovereign immunity exception upon which the Ninth Circuit had relied—the exception for the property of an entity that has "engaged in commercial activity," § 1610(b)(2)—applies only to property of an "agency or instrumentality" of a foreign state. It does not apply to property of an entity that itself is an inseparable part of the foreign state. § 1610(a). *Elahi*, 546 U. S., at 452–453.

We remanded the case, and on remand, the Ninth Circuit held that the Ministry of Defense fell into the latter category (an inseparable part of the state of Iran), not the former (an "agency or instrumentality" of Iran). 495 F. 3d 1024, 1035–1036 (2007). Hence Elahi could not take advantage of the "engaged in commercial activity" exception. The Court of Appeals also found inapplicable a slightly different exception applicable to "property . . . of a foreign state . . . used for a commercial activity in the United States," 28 U. S. C. § 1610(a). 495 F. 3d, at 1036–1037.

Nonetheless the Court of Appeals found yet another exception that it believed denied Iran its sovereign immunity defense. The court pointed out that in 2002 Congress had enacted the TRIA. That Act permitted a person with a terrorism-related judgment to attach an asset of the responsible "terrorist" state to satisfy the judgment, "[n]otwithstanding any other provision of law," provided that the asset was a "blocked asse[t]." § 201(a), 116 Stat. 2337. The Court of Appeals noted that the Cubic Judgment arose out of a pre-1981 contract with Iran involving an air combat training system for Iran, and that President Carter had blocked virtually all Iranian assets following the Iranian hostage crisis. See Exec. Order No. 12170, 3 CFR 457 (1979 Comp.) ("block-

[ing] all property and interests in property of the Government of Iran . . . subject to the jurisdiction of the United States"), promulgated pursuant to the authority of the IEEPA, 50 U. S. C. §§ 1701–1702 (2000 ed. and Supp. V); 31 CFR § 535.201. The Court of Appeals then held that the President had never unblocked the asset in question. 495 F. 3d, at 1033. In its view, the many unblocking orders that were issued after the 1981 Algiers Accords, see, *e. g.*, Exec. Orders Nos. 12277–12282, 3 CFR 105–113; 31 CFR §§ 535.211–535.215, 535.579(a), did not apply because those unblocking orders omitted "military goods such as the [training system that underlay the Cubic Judgment]." 495 F. 3d, at 1033.

The Court of Appeals also rejected Iran's argument that Elahi had waived his right to attach the Cubic Judgment regardless (a matter to which we shall turn in Part III). And the court concluded that Elahi was free to attach the Judgment. *Id.*, at 1037.

Iran, with the support of the Department of State, asked us to grant certiorari. We did so, and we shall consider both aspects of the Court of Appeals' determination.

II

A

We turn first to the question whether the Cubic Judgment was a "blocked asset." The Ninth Circuit held that the asset in question consisted of Iran's interest in military goods, namely, an air combat training system, which it believed the Executive Branch had failed to unblock after the Iranian hostage crisis ended. None of the parties here, however, support the Ninth Circuit's determination. And neither do we.

The basic reason we cannot accept the Ninth Circuit's rationale is that we do not believe Cubic's air combat training system is the asset here in question. Elahi does not seek to attach that system. Cubic sent the system itself to Canada,

where, as far as we know, it remains. Rather, Elahi seeks to attach a judgment enforcing an arbitration award based upon Cubic's failure to account to Iran for Iran's share of the proceeds of that system's sale. And neither the Cubic Judgment nor the sale proceeds that it represents were blocked assets at the time the Court of Appeals issued its decision.

In 1981, the Treasury Department issued an order that authorized "[t]ransactions involving property in which Iran . . . has an interest" where "*[t]he interest in the property . . . arises after January 19, 1981.*" 31 CFR § 535.579(a)(1) (emphasis added). As the Court of Appeals itself pointed out, Iran's interest in the Cubic Judgment arose "on December 7, 1998, when the district court confirmed the [arbitration] award." 385 F. 3d, at 1224. Since it arose more than 17 years "after January 19, 1981," the Cubic Judgment falls within the terms of Treasury's order. And that fact, in our view, is sufficient to treat the Judgment as unblocked.

Iran's interest in the property that underlies the Cubic Judgment also arose after January 19, 1981. As the International Court of Arbitration held, Cubic and Iran entered into their initial contract before 1981. But they later agreed to discontinue (but not to terminate) the contract. Arbitration Award G–15, G–21. They agreed that Cubic would try to sell the system elsewhere. *Id.*, ¶ C.9.15, at G–14. And they further agreed that they would take "final decisions" about who owed what to whom "only . . . once the result of Cubic's attempt to resell the System" was "known." *Id.*, ¶ B.10.7, at G–17.

Cubic completed its sale of the system (to Canada) in October 1982. *Id.*, ¶ B.12.14, at G–22. And the arbitrators referred to October 1982 as "the date the Parties had in mind when they agreed to await the outcome of Cubic's resale attempts." *Ibid.* Only then was Cubic "in a position to reasonably, comprehensively and precisely account for the reuse of components originally manufactured for Iran and for any

modification costs." *Ibid.* For those reasons, and in light of the arbitrators' findings, we must conclude that October 1982 is the time when Iran's claim to proceeds arose.

The upshot is that, whether we consider Iran's "interes[t] in property" as its interest in the Cubic Judgment itself or its underlying interest in the proceeds of the Canadian sale, the interest falls within the terms of the Treasury Department's general license authorizing "[t]ransactions involving property in which Iran . . . has an interest" where "[t]he interest in the property . . . arises after January 19, 1981." 31 CFR § 535.579(a). And, as we said, that fact is sufficient for present purposes to treat the asset as having been unblocked at the time the Ninth Circuit issued the decision below.

Finally, even if we were to assume (as the Ninth Circuit held) that the relevant asset were Iran's pre-1981 interest in the air combat training system itself, we should still conclude that that asset was not "blocked" at the time of the decision below. As the Government points out, such an interest falls directly within the scope of Executive Order No. 12281, an unblocking order that required property owned by Iran to be transferred "as directed . . . by the Government of Iran." See also 31 CFR § 535.215(a). None of the four authorities upon which the Ninth Circuit relied indicates the contrary conclusion. First, the Circuit cited the Arms Export Control Act, 82 Stat. 1321, 22 U. S. C. § 2751 *et seq.*, and its implementing regulations, a statute and regulations which regulate arms shipments. It is true that, notwithstanding Executive Order No. 12281, the export of certain military equipment remained subject to regulation under other statutes, including the Arms Export Control Act. See 31 CFR § 535.215(c). But that fact does not show that military equipment remained *blocked* under IEEPA. The Court of Appeals next cited the 1979 Executive Order freezing Iranian assets, Exec. Order No. 12170, 3 CFR 457—but it failed to consider the effect of the subsequent unblocking order just

discussed. The Court of Appeals also relied on a 2005 Presidential notice extending the national emergency with respect to Iran, 70 Fed. Reg. 69039, but that notice did not impose any additional restrictions on Iranian assets. Finally, the Court of Appeals pointed to a Treasury Department guidance document, which states that "[c]ertain assets"—consisting "mainly of military and dual-use property"—"related to . . . claims" by "U. S. nationals . . . against Iran or Iranian entities" still being litigated in the Tribunal "remain blocked in the United States." Office of Foreign Assets Control, Dept. of Treasury, Foreign Assets Control Regulations for Exporters and Importers 23 (2007). But the training system does not fall into the category of assets identified by the guidance document. The system neither "remain[s] . . . in the United States" (having been sent to Canada), nor was it related to claims by "*U. S. nationals . . . against Iran or Iranian entities*" before the Tribunal. In sum, no authority supports the Ninth Circuit's conclusion that an Iranian interest in the training system itself would be a "blocked asset." And none of the parties defend the Ninth Circuit's conclusion here.

B

Although the Cubic Judgment was not a blocked asset at the time the Court of Appeals reached its decision, the Government believes that it is a blocked asset now. In 2005 the President issued a new Executive Order that blocks assets held by proliferators of weapons of mass destruction. Exec. Order No. 13382, 3 CFR 170 (2005 Comp.). And in 2007, after the Court of Appeals issued its decision, the State Department designated certain component parts of Iran's Ministry of Defense as entities whose property and interests in property are blocked under Executive Order No. 13382. See 72 Fed. Reg. 71991–71992. If the Iranian entity to which the Cubic Judgment belongs falls within the terms of the State Department's designation, then presumably that asset is blocked at this time.

The problem for the Government, however, is that Iran does not agree that the relevant parts of its Ministry of Defense fall within the scope of the State Department's designation. Thus the matter is in dispute. The lower courts have not considered that dispute. The relevant arguments have not been set forth in detail here. And in such circumstances we normally would remand the case, permitting the lower courts to decide the issue in the first instance. See, *e. g.*, *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 175 (2004). Consequently, we shall not decide whether the new Executive Branch actions have blocked the Cubic Judgment. Instead, we turn to the "waiver" question. And our answer (that Elahi has waived his right to attach the Cubic Judgment) makes it unnecessary to remand the blocking question for further consideration.

III

As we have just said, the second question concerns Elahi's waiver of his right to attach the Cubic Judgment. In 2000, Congress enacted a statute that offers some compensation to certain individuals, including Elahi, who hold terrorism-related judgments against Iran. VPA § 2002, as amended by TRIA § 201(c). The Act requires those who receive that compensation to relinquish "*all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal*, [or] that is the subject of awards rendered by such tribunal." § 2002(a)(2)(D), 114 Stat. 1542; see also § 2002(d)(5)(B), as added by TRIA § 201(c)(4), 116 Stat. 2337 (cross-referencing § 2002(a)(2)(D)). In 2003 the Government paid Elahi $2.3 million under the Act as partial compensation for his judgment against Iran. Brief for Respondent 9. And at that time, Elahi signed a waiver form that mirrors the statutory language. App. to Pet. for Cert. 30 (citing 68 Fed. Reg. 8077, 8081 (2003)).

The question is whether the Cubic Judgment "is at issue in claims" against the United States before an "international

tribunal," namely, the Iran-U. S. Claims Tribunal. If so, the Cubic Judgment falls within the terms of Elahi's waiver. The Court of Appeals believed the Judgment was not "at issue." 495 F. 3d, at 1030–1031. But we find to the contrary.

A review of the record in Iran-U. S. Claims Tribunal Case No. B/61 leads us to conclude that the Cubic Judgment is "at issue" before that Tribunal. In Case No. B/61 Iran argued that, between 1979 and 1981, the United States had wrongly prevented the transfer of Cubic's air combat training system to Iran. Iran asked the Tribunal, among other things, to order the United States to pay damages. Statement of Claim, *Islamic Republic of Iran* v. *United States* (filed Jan. 19, 1982), App. to Brief for United States as *Amicus Curiae* 22a, 24a, 31a. In its briefing before the Tribunal, Iran acknowledged that any amount it recovered from Cubic would "be recuperated from the remedy sought" against the United States. App. 76, n. 2. And Iran sent a letter to the United States in which it said that any amounts it actually received from Cubic would be "recouped from the remedy sought against the United States in Case B61." App. to Brief for United States as *Amicus Curiae* 84a. *But* Iran added that the Cubic Judgment could *not* be used as a setoff *insofar as it had been attached by creditors. Id.*, at 85a.

Meanwhile, in a rebuttal brief before the Tribunal, the United States, while arguing that in fact it owed Iran nothing, added that at the very least Iran must set off the amount "already . . . awarded" by the International Court of Arbitration (namely, the $2.8 million awarded to Iran from Cubic) against any money awarded by the Tribunal. *Id.*, at 52a, 80a–81a, and n. 32. And the United States' demand for a setoff applies even if third parties have attached the Cubic Judgment. See Tr. of Tribunal Hearing, in No. B/61 (Iran-U. S. Cl. Trib., Dec. 7 and 12, 2006), App. to Brief for Respondent 37, 38–39, 41, 42.

The upshot is a dispute about the Cubic Judgment. The United States argues (and argued before the Tribunal) that the Tribunal should set off the $2.8 million that the Cubic Judgment represents against any award that the Tribunal may make against the United States in Case No. B/61. Iran argues (and argued before the Tribunal) that the Tribunal should not set off the $2.8 million insofar as third parties have attached the Judgment.

To put the matter in terms of the language of Elahi's waiver, one can say for certain that the Cubic Judgment is "property." And Case No. B/61 itself is a "clai[m] against the United States before an international tribunal." We can also be reasonably certain that how the Tribunal should use that property is also under dispute or in question in that claim. Moreover, since several parties other than Elahi have already attached the Cubic Judgment, see Brief for United States as *Amicus Curiae* 20, the question whether an attached claim can be used as a setoff is potentially significant, irrespective of Elahi's own efforts to attach the judgment.

Are these circumstances sufficient to place the Cubic Judgment "at issue" in Case No. B/61? Elahi argues not. He points out that the Cubic Judgment does not appear on a list of property contained in Iran's statement of claim in Case No. B/61; nor is it the subject of any other claim before the Tribunal. Indeed, Iran and the United States do not dispute the Cubic Judgment's validity; they do not dispute the Cubic Judgment's ownership; and they do not dispute the fact that the United States' asset freeze had no adverse effect on the Cubic Judgment or on Iran's entitlement to the Cubic Judgment. As the dissent correctly points out, the Judgment is not "at issue" in any of these senses. The Judgment will neither be suspended nor modified by the Tribunal in Case No. B/61, nor is the Judgment property claimed by Iran from the United States in that case, see *post*, at 388–391 (KENNEDY, J., concurring in part and dissenting in part).

But that does not end the matter. The question is whether, for purposes of the VPA, a judgment can nevertheless be "at issue" before the Tribunal *even* when it will not be suspended or modified by the Tribunal and when it is not claimed by Iran from the United States. Here, a significant dispute about the Cubic Judgment still remains, namely, a dispute about whether it can be used by the Tribunal as a setoff. And in our view, that dispute is sufficient to put the Judgment "at issue" in the case.

For one thing, we do not doubt that the setoff matter is "under dispute" or "in question" in Case No. B/61, and those words typically define the term "at issue." Black's Law Dictionary 136 (8th ed. 2004). In the event that the Tribunal finds the United States liable in Case No. B/61, the total sum awarded to Iran by the Tribunal will depend on whether the Judgment is used as a setoff. And whether the Judgment can be so used depends, in turn, on whether the United States is right that an attached judgment should be set off or whether Iran is right that it should not be—a matter in question before the Tribunal. In that sense, the Judgment is "under dispute." We recognize that the dispute is over the *use* of the Judgment, not the validity of the Judgment. But we do not see how that fact matters.

For another thing, ordinary legal disputes can easily encompass questions of setoff. Suppose Smith sues a carrier for wrongfully harming a shipment of goods. The question of liability, the question of damages, and the question of reducing damages through setoff may all be at issue in the case. Which is the more important issue in a particular case depends not upon the category (liability, damages, or setoff) but upon the circumstances of that particular case.

Further, the language of the statute suggests that Congress meant the words "at issue" to carry the ordinary meaning just described. Elahi essentially distinguishes between property that is the subject of a claim (a claim, for example, that the United States took or harmed particular property

belonging to Iran) and property that might otherwise affect a Tribunal judgment (say, through its use as a setoff). And he argues that the statutory phrase "at issue" covers only the first kind of dispute, not the second. But the statute does not limit the property that is "*at issue* in a claim" to property that is the *subject* of a claim. To the contrary, the statute says that judgment creditors such as Elahi must

> "relinquis[h] all rights to execute against or attach property [1] that is *at issue in claims* against the United States before an international tribunal *[or]* [2] that *is the subject of awards* rendered by such tribunal." VPA § 2002(a)(2)(D), 114 Stat. 1542 (emphasis added); see also § 2002(d)(5)(B), as added by TRIA § 201(c)(4), 116 Stat. 2337 (cross-referencing § 2002(a)(2)(D)).

Had Congress wanted to limit the property to which it first refers (namely, property that is "*at issue*" in a claim) to property that is *the subject* of a claim, it seems likely that Congress straightforwardly would have used the words "subject of"—words that appear later (in respect to awards rendered) in the very same sentence.

Finally, the statute's purpose leans in the direction of a broader interpretation of the words "at issue" than that proposed by Elahi. Pointing to the statute's legislative history, Elahi says that the statute seeks to enable victims of terrorism to collect on judgments they have won against terrorist parties. See Brief for Respondent 6–7, 31 (citing H. R. Conf. Rep. No. 107–779 (2002); 148 Cong. Rec. 23119, 23121–23123 (2002) (statement of Sen. Harkin)). He is such a victim, and, he says, Congress would have intended an interpretation that favors his cause. But Congress had a more complicated set of purposes in mind. The statute authorizes the attachment of blocked assets, and it provides partial compensation to victims to be paid (in part) from general Treasury funds. But it does so in exchange for a right of subrogation, VPA § 2002(c), and for the victim's promise not to pursue the bal-

ance of the judgment by attaching property "at issue" in a claim against the United States before the Tribunal. VPA §§ 2002(a)(2)(D), (d)(5)(B), as added by TRIA § 201(c)(4). The statute thereby protects property that the United States might use to satisfy its potential liability to Iran.

The Cubic Judgment falls into this category. It is property that the United States could use to satisfy its potential liability to Iran, but which may be unavailable for that purpose if successfully attached. With respect to the statute's revenue-saving purpose, it is difficult to distinguish between property that is the subject of a claim before a tribunal and property that is in dispute before the tribunal in respect to its use as an offset.

The dissent adds that the "better reading" of the words "at issue" is one that limits them to the "foster[ing] [of] compliance with the Government's international obligations." *Post*, at 392. We agree with this statement, but we do not see how it adds anything but new phraseology to the dissent's basic claim, namely, that arguments before the Tribunal about "setoffs" do not count as "issues." To repeat our own view of the matter, a dispute about whether one country must pay the other country more money because it cannot use particular property (because of an attachment) to satisfy an obligation raises an issue that the Tribunal must resolve, no less and no more than other issues that might be before the Tribunal in that case or other cases.

Contrary to the dissent's suggestion, *post*, at 394, there is no unfairness in our holding. Elahi could have chosen to forgo the Government's compensation scheme, and he then could have attached the Cubic Judgment, as have other terrorist victims with judgments against Iran. See Brief for United States as *Amicus Curiae* 20. But that course carried risks: Iran had challenged Elahi's notice of lien and it was uncertain whether Elahi would prevail. In 2003, while litigation over his notice of lien was pending, Elahi chose to participate in the Government's scheme. He thereby re-

ceived the benefit of immediate, guaranteed partial compensation from the Government—in exchange for a promise not to interfere with property that the United States might need to satisfy potential liability to Iran. Having received $2.3 million in Government funds, there is nothing unfair about holding Elahi to the terms of his bargain.

Elahi makes several other arguments. He points to language in the TRIA (the statute authorizing attachment of blocked assets) which says: "*Notwithstanding any other provision of law*" the "blocked assets" of a state "shall be subject to . . . attachment in aid of execution" of a terrorism-related judgment. § 201(a), 116 Stat. 2337 (emphasis added). He also points to VPA § 2002(d)(4), as added by TRIA § 201(c)(4), 116 Stat. 2339, which reads: "*Nothing in this subsection* [which contains the relinquishment provision] *shall bar . . . enforcement* of any" terrorism-related "judgment . . . *against assets otherwise available* under this section or *under any other provision of law*." (Emphasis added.) The first provision, Elahi argues, permits him to attach blocked assets notwithstanding the VPA's requirement that he relinquish his right to attach property "at issue" before an international tribunal; and that conclusion, he says, is reinforced by VPA § 2002(d)(4). Our interpretation, he adds, would "bar . . . enforcement" of a terrorism-related judgment "otherwise available" under TRIA § 201(a)—contrary to the statutory language just quoted.

But VPA § 2002(d)(5) requires Elahi, in exchange for having received partial compensation, to relinquish "*all rights*" to attach property "at issue" in an international tribunal. VPA § 2002(a)(2)(D), 114 Stat. 1542 (cross-referenced by § 2002(d)(5)(B); emphasis added). And, as several Courts of Appeals have apparently assumed, the relinquishment of "all rights" includes the right given by TRIA § 201(a) to attach blocked assets. See *Hegna* v. *Islamic Republic of Iran*, 376 F. 3d 226, 232 (CA4 2004); *Hegna* v. *Islamic Republic of Iran*,

380 F. 3d 1000, 1009 (CA7 2004); *Hegna* v. *Islamic Republic of Iran*, 402 F. 3d 97, 99 (CA2 2005) *(per curiam)*.

Moreover, the relinquishment provision that applies to Elahi was added to the VPA by the very same statute, the TRIA, that permitted the attachment of blocked assets, and which contains the "notwithstanding" clause upon which Elahi relies. § 201(a) (blocked assets); § 201(c) (amending VPA). Congress could not have intended the words to which Elahi refers to narrow so dramatically an important provision that it inserted in the same statute. And for those who, like Elahi, argue that the legislative history supports his reading of the statute, we point out that the history suggests that Congress placed the "notwithstanding" clause in § 201(a) for totally different reasons, namely, to eliminate the effect of any Presidential waiver issued under 28 U. S. C. § 1610(f) prior to the date of the TRIA's enactment. H. R. Conf. Rep. No. 107–779, at 27.

Elahi makes three final arguments, first that setoff is not "at issue" because the United States has argued in Case No. B/61 that it has no liability at all, second that setoff is not "at issue" because the United States has not formally asserted a setoff before the Tribunal, and third that the Government violated his due process rights by inadequately informing that his waiver would deprive him of his right to attach the Cubic Judgment. We find none of these arguments convincing and shall briefly indicate our reasons in summary form.

As to the first, the United States argued setoff in the alternative, thereby placing it, in the alternative, "at issue" before the Tribunal. As to the second, Elahi at most points to a ground for disputing the propriety, under Tribunal rules, for granting a setoff; he does not deny that the Tribunal sometimes can do so, see, *e. g.*, *Futura Trading Inc.* v. *National Iranian Oil Co.*, 13 Iran-U. S. Cl. Trib. Rep. 99, 115–116, ¶ 62 (1986) (preventing collection on a claim because the claimant had already collected the sum at issue from a different

party). Hence whether the Tribunal can provide for a setoff here is a matter for the Tribunal to decide, and until it does decide, one way or the other, the matter is "at issue." As to the third, we can find nothing that shows Elahi was unfairly surprised by the scope of his waiver—certainly not to the point of violating any due process rights. See, *e. g.*, 14 Iran-U. S. Cl. Trib. Rep., at 278, ¶ 10 (dismissal of Iran's claim against Cubic was "without prejudice to any findings it may make concerning [the Cubic contract] in Case No. B61").

IV

We conclude: The Cubic Judgment was not blocked at the time the Court of Appeals reached its decision. We do not decide whether more recent Executive Branch actions would block the Judgment at present. Regardless, Elahi has waived his right to attach the Judgment. We reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion but, with all respect, dissent from Parts III and IV. As to Parts I and II, the Court is correct, in my view, to hold that the Cubic Judgment was not a "blocked asset" when the Court of Appeals reached its decision. As to Parts III and IV, however, respondent Dariush Elahi has not relinquished his right to attach the Cubic Judgment. By holding otherwise, the Court departs from the plain meaning and the purpose of the statutes Congress enacted to compensate Elahi and other victims of terrorism.

I

A

The statutory phrase to be interpreted is "property that is at issue in claims against the United States before an in-

ternational tribunal." Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), § 2002(d)(5)(B), as added by Terrorism Risk Insurance Act of 2002 (TRIA), § 201(c)(4), 116 Stat. 2339, note following 28 U. S. C. § 1610. The context, of course, is Case No. B/61—a suit by Iran against the United States that is pending before the Iran-U. S. Claims Tribunal. The word "property," as used in the statutory phrase, surely can refer both to tangible property, such as real estate or valuables in a safe-deposit box, and to intangible property interests, such as a claim, a cause of action or, as in this case, a judgment rendered by a United States district court. Still, it must be acknowledged that the term "at issue" is neither precise nor much illuminated by its operation in cases or other statutes. The absence of any clear authority on this point makes it imperative to adopt an interpretation that accords with familiar and well-settled principles of law. In this case those principles are the rules designed to give full and proper respect to final judgments rendered by courts of competent jurisdiction.

To determine whether the Cubic Judgment is "at issue" in Case No. B/61, the primary consideration must be whether the Claims Tribunal, in the exercise of its own authority and jurisdiction, can affect the ownership, disposition, or control of the property the judgment comprises. Here the property in question is a judgment rendered by the United States District Court for the Southern District of California. As all acknowledge, that court had jurisdiction over the subject and the persons then before it. And, as is further conceded, that court's judgment is valid and has binding force on Cubic Defense Systems, Inc., the nongovernmental party before that court. See *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168, 1170 (1998). Neither party to Case No. B/61 questions the judgment or requests the Claims Tribunal to interpret it—much less to alter, enforce, or invalidate it.

Even if one of the parties were to ask the Claims Tribunal to modify the Cubic Judgment, the Tribunal would simply lack power to do so. The judgment arises out of Iran's contractual dispute with Cubic, an American company, and the Tribunal has no "jurisdiction over claims by Iran against United States nationals." *Ministry of Nat. Defence of Islamic Republic of Iran* v. *United States*, 14 Iran-U. S. Cl. Trib. Rep. 276, 278 (1987) (Case No. B-66). Iran tried to sue Cubic in the Claims Tribunal 20 years ago, but the Tribunal dismissed that suit for lack of jurisdiction. *Ibid.* In these circumstances the Cubic Judgment is simply an extrinsic fact beyond the Claims Tribunal's power to affect. True, the Tribunal, when it enters its own orders, might or might not give credit to the United States for a payment, or a right to payment, arising out of the Cubic Judgment; but that does not put the judgment itself at issue.

B

Even if the Court's broad reading of the phrase "at issue" were correct, the Court's conclusion would still be wrong because the relinquishment provision is limited to property that is at issue "in claims against the United States." And the Cubic Judgment is not part of the claims Iran makes in Case No. B/61, as both Iran and the United States have made clear in their submissions to the Claims Tribunal. To put the countries' filings in context, a brief review of both the Cubic Judgment and Case No. B/61 is necessary.

The Cubic Judgment is the result of a contract dispute between Iran and Cubic. In the late 1970's, Iran hired Cubic to build an air combat training system, and advanced some $12 million for the project. But Iran failed to make all the payments due. App. 43–44. Thus rebuffed, Cubic sold the system to Canada and refused to refund any of Iran's advance payments. Iran brought an arbitration against Cubic. The panel of arbitrators, after ascertaining Cubic's costs of building the system, and after allowing the company a rea-

sonable profit of $3.5 million, ordered Cubic to return to Iran $2.8 million of the $12 million advance. Iran brought this arbitration award to the U. S. District Court for the Southern District of California, which issued the judgment at issue here. The judgment orders Cubic to pay Iran $2.8 million. *Cubic Defense Systems*, *supra*, at 1171, 1174.

Case No. B/61 is in essence a contract dispute between Iran and the United States. Iran accuses the United States of breaking its promise, made in the Algiers Accords, to "arrange . . . for the transfer to Iran of all Iranian properties" located in the United States on January 19, 1981. 20 I. L. M. 224, 227, ¶ 9 (1981). One of the properties Iran claims is Cubic's air combat training system. See Statement of Claim in No. B/61, (Iran-U. S. Cl. Trib.), App. to Brief for United States as *Amicus Curiae* 22a, 24a, 31a. Both parties have confirmed, in their joint report describing all the "property claimed by Iran," that Cubic's system is "at issue" in Iran's claims. Cover Letter to Final Joint Report Re: Case No. B/61 (July 14, 1989), App. to Brief for Respondent 14.

But the Cubic Judgment, in contrast to Cubic's training system, is not part of Iran's claims in Case No. B/61. Both countries made this clear in their submissions to the Tribunal. Their joint report does not list the Cubic Judgment among the properties "at issue." Final Joint Report (July 14, 1989), *id.*, at 15–23. And, in a statement altogether consistent with that omission, Iran told the Tribunal that "[t]he subject-matter of [Case No. B/61], at variance with the [arbitration] action [against Cubic], is the losses suffered by Iran as a result of the United States' non-export of Iranian properties." Iran's Statement No. 16, App. 73, 76. The United States agreed, stating that the "only 'property that' . . . is properly at issue" in Case No. B/61 is property that "'has already been made the subject of a claim'" by Iran against the United States. U. S. Rebuttal (Sept. 1, 2003), 1 Lodging p. L419 (emphasis deleted) (Sealed). The United States reaffirmed this position in oral argument before the Tribunal:

"Any losses in relation to [the Iran-Cubic] contract are not recoverable against the United States and issues regarding losses under that contract do not belong before this Tribunal." Tribunal Hearing 124 (Dec. 12, 2006), App. to Brief for Respondent 41, 42.

Because the Claims Tribunal lacks jurisdiction over the Cubic Judgment, and because that judgment is not part of Iran's claims against the United States in Case No. B/61, the judgment is not "property that is at issue in claims against the United States" under the plain meaning of the TRIA's relinquishment provision. TRIA § 201(c)(4), 116 Stat. 2339 (amending VTVPA § 2002(d)).

II

Even if the text of the relinquishment provision were somehow ambiguous—and it is not—then the purpose of the VTVPA and TRIA would tip the scales in Elahi's favor. The text and the evident purpose of those statutes demonstrate that Congress' primary purpose was to compensate the victims of terrorism, not to secure from those victims a relinquishment of their claims to property owned by entities found to have sponsored terrorism.

The text of the VTVPA, and of the amendments made to it by the TRIA, shows that Congress' primary purpose was to enable the victims of terrorism to execute on the assets of a state found to have sponsored or assisted in a terrorist act. In the first subsection of the TRIA concerning the attachment of state assets by victims of terrorism, Congress provided that "[n]otwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism . . . the blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgment . . . ." § 201(a), *id.*, at 2337. The effect of this subsection is to ensure that other laws do not bar victims' efforts to enforce judgments against

terrorist states. To like effect is another paragraph of the VTVPA concerning victims of Iranian terrorism. Entitled "Statutory Construction," this paragraph reads: "Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure . . . ." § 2002(d)(4), as added by TRIA § 201(c)(4), *id.*, at 2339. Though neither provision refers in direct terms to the relinquishment provision, both provisions show Congress' intent to broaden, rather than limit, the rights of victims like Elahi to execute on property owned by state sponsors of terrorism. Yet the opinion issued by the Court today does just the opposite.

To contravene the statute's clear design, the Court surmises that Congress also had a "more complicated" purpose, namely, to "protec[t] property that the United States might use to satisfy its potential liability to Iran." *Ante*, at 383, 384. This imagined purpose, the Court says, requires us to read the relinquishment provision as broadly as possible so as to prevent victims of terrorism from attaching property. But the Court does not point to evidence of this putative purpose, aside from the text of the relinquishment provision itself—a text which, as submitted above, the Court reads the wrong way.

The better reading of the relinquishment provision—and one much more consistent with Congress' protective purpose—is not as a "revenue-saving" device, *ante*, at 384, but as a way to foster compliance with the Government's international obligations. If Iran has asked the Claims Tribunal to resolve the status of certain property, then Iran and the Tribunal may well take the position that the United States has a responsibility under the Algiers Accords to prevent U. S. nationals from executing against that property. That concern is not present in this case. The ownership of the Cubic Judgment is not disputed, and allowing Elahi to attach it will not affect Iran's right to obtain full recovery from the United States in Case No. B/61. At most, the attachment

might affect the right of the United States to use the judgment to offset its liability.

The Court purports to agree with this reading of the statute's purpose. *Ibid.* But that agreement is hard to square with the Court's insistence upon fulfilling what it sees as the statute's "revenue-saving purpose." *Ibid.* If the Court did in fact believe that the "'better reading'" of the statute's purpose, *ibid.*, is to foster compliance with the United States' international obligations, then the Court would affirm the judgment of the Court of Appeals. Elahi's attachment of the Cubic Judgment does not hinder the U. S. Government's efforts to comply with its obligations under the Algiers Accords. At Algiers, the United States agreed to "arrange . . . for the transfer to Iran of all Iranian properties" located in the United States. 20 I. L. M., at 227, ¶ 9. That is not an obligation to pay Iran money, as the Court seems to believe. See *ante,* at 384. It is instead an obligation to take specific action in regard to specific properties. These specific properties do not include the Cubic Judgment—as the Court concedes. See *ante,* at 376 (holding that the Cubic Judgment was not blocked). Therefore, Elahi's attachment of the Cubic Judgment does not impede the United States' efforts to make good on its obligations under the Algiers Accords.

To be sure, a judicial lien on one of the specific properties referenced by the Algiers Accords might make it difficult for the U. S. Government to comply with its obligations, under those Accords, to arrange for that property's transfer to Iran. By encouraging creditors such as Elahi to give up their liens on these specific properties that are subject to the Algiers Accords, the TRIA makes it easier for the Government to comply with its obligation to "arrange . . . for the transfer" of these properties to Iran. This purpose (fostering compliance with the United States' obligation under the Algiers Accords) is more in keeping with the statute's text than is the Court's "revenue-saving" purpose. And this purpose—that is, the purpose of enabling the United States to meet its

obligations under the Algiers Accords—is not in the least frustrated by permitting Elahi to attach the Cubic Judgment, a property that, as the Court concedes, is not subject to the Algiers Accords.

III

The facts of this case show the injustice of the Court's interpretation. The Court today puts an end to Elahi's decade-long quest to hold Iran to account for murdering his brother Cyrus. In 2000, Elahi won a wrongful-death lawsuit against Iran and was awarded some $6 million in compensatory damages. See *Elahi* v. *Islamic Republic of Iran*, 124 F. Supp. 2d 97 (DC). In April 2003, Elahi took what he must have considered a further step toward his goal when he accepted $2.3 million from the U. S. Government under the VTVPA.

After today's ruling, what once appeared Elahi's gain of $2.3 million now seems to be a loss of $500,000. By taking the VTVPA's $2.3 million, the Court holds, Elahi relinquished his right to the $2.8 million Cubic Judgment he had already attached. The practical effect of the Court's ruling is to turn the purpose of the VTVPA on its head. Rather than further Elahi's effort to obtain compensation for the murder of his brother, the Act has instead set him back half a million dollars. For the reasons given above, this result was not what Congress intended when it passed the VTVPA.

IV

Congress passed the Victims of Trafficking and Violence Protection Act and the Terrorism Risk Insurance Act to compensate victims of terrorism. Congress expressed this purpose both in the text of the principal provision interpreted here and in accompanying sections of the statute. By stripping Elahi of his right to attach the valid judgment against Cubic rendered by the District Court—a judgment not be-

fore the Claims Tribunal in any sense—the Court fails to give the statute its intended effect. These reasons explain my respectful dissent.

Syllabus

SHINSEKI, SECRETARY OF VETERANS AFFAIRS *v.* SANDERS

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

No. 07–1209. Argued December 8, 2008—Decided April 21, 2009*

As part of the Department of Veterans Affairs' (VA) statutory duty to help a veteran develop a benefits claim, the Secretary of Veterans Affairs (Secretary) must notify an applicant of any information or evidence that is necessary to substantiate the claim. 38 U. S. C. § 5103(a). VA regulations require the notice to specify (1) what further information is necessary, (2) what portions of that information the VA will obtain, and (3) what portions the claimant must obtain. These requirements are referred to as Type One, Type Two, and Type Three, respectively.

The Court of Appeals for Veterans Claims (Veterans Court), which hears initial appeals from VA claims decisions, has a statutory duty to "take due account of the rule of prejudicial error." § 7261(b)(2). It has developed a system for dealing with notice errors, whereby a claimant arguing that the VA failed to give proper notice must explain precisely how the notice was defective. The reviewing judge will then decide what "type" of notice error the VA committed. Under the Veterans Court's approach, a Type One error has the "natural effect" of harming the claimant, but Types Two and Three errors do not. In the latter instances, the claimant must show harm, *e. g.*, by describing what evidence he would have provided (or asked the Secretary to provide) had the notice not been defective, and explaining just how the lack of that notice and evidence affected the adjudication's essential fairness.

The Federal Circuit, which reviews Veterans Court decisions, rejected the Veterans Court's approach and set forth its own framework for determining whether a notice error is harmless. When the VA provides a claimant with a notice that is deficient in *any* respect, the framework requires the Veterans Court to presume that the error is prejudicial and requires reversal unless the VA can demonstrate (1) that the defect was cured by the claimant's actual knowledge or (2) that benefits could not have been awarded as a matter of law. The Federal Circuit applied its framework in both of the present cases.

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*Together with *Shinseki, Secretary of Veterans Affairs* v. *Simmons* (see this Court's Rule 12.4), also on certiorari to the same court.

Syllabus

In respondent Sanders' case, the VA denied disability benefits on the ground that Sanders' disability, blindness in his right eye, was not related to his military service. Sanders argued to the Veterans Court that the VA had made notice errors Type Two and Type Three when it informed him what further information was necessary, but failed to tell him which portions of that information the Secretary would provide and which portions he would have to provide. The Veterans Court held these notice errors harmless, but the Federal Circuit reversed, ruling that the VA had not made the necessary claimant-knowledge or benefits-ineligibility showing required by the Federal Circuit's framework.

The VA also denied benefits in respondent Simmons' case after finding that her left-ear hearing loss, while service connected, was not severe enough to warrant compensation. Simmons argued to the Veterans Court, *inter alia*, that the VA had made a Type One notice error by failing to notify her of the information necessary to show worsening of her hearing. The court agreed, finding the error prejudicial. Noting that a Type One notice error has the "natural effect" of producing prejudice, the Veterans Court added that its review of the record convinced it that Simmons did not have actual knowledge of what evidence was necessary to substantiate her claim and, had the VA told her more specifically what additional information was needed, she might have obtained that evidence. The Federal Circuit affirmed.

Held:

1. The Federal Circuit's harmless-error framework conflicts with § 7261(b)(2)'s requirement that the Veterans Court take "due account of the rule of prejudicial error." Pp. 406–412.

(a) That § 7261(b)(2) requires the same sort of "harmless-error" rule as is ordinarily applied in civil cases is shown by the statutory words "take due account" and "prejudicial error." Congress used the same words in the Administrative Procedure Act (APA), 5 U. S. C. § 706, which is an "'administrative law . . . harmless error rule,'" *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 659–660. Legislative history confirms that Congress intended § 7261(b)(2) to incorporate the APA's approach. Pp. 406–407.

(b) Three related features, taken together, demonstrate that the Federal Circuit's framework mandates an approach to harmless error that differs significantly from the one normally taken in civil cases. First, the framework is too complex and rigid: In every case involving any type of notice error, the Veterans Court *must* find the error harmful unless the VA demonstrates the claimant's actual knowledge curing the defect or his ineligibility for benefits as a matter of law. An error's

harmlessness should not be determined through the use of mandatory presumptions and rigid rules, but through the case-specific application of judgment, based upon examination of the record. See *Kotteakos* v. *United States*, 328 U. S. 750, 760. Second, the framework imposes an unreasonable evidentiary burden on the VA, requiring the Secretary to demonstrate, *e. g.*, a claimant's state of mind about what he knew or the nonexistence of evidence that might significantly help the claimant. Third, the framework requires the VA, not the claimant, to explain why the error is harmless. The burden of showing harmfulness is normally on the party attacking an agency's determination. See, *e. g.*, *Palmer* v. *Hoffman*, 318 U. S. 109, 116. This Court has placed the burden on the Government only when the underlying matter was criminal. See, *e. g.*, *Kotteakos*, *supra*, at 760. The good reasons for this rule do not apply in the ordinary civil case. Pp. 407–411.

(c) The foregoing analysis is subject to two important qualifications. First, the Court need not, and does not, decide the lawfulness of the Veterans Court's reliance on the "natural effects" of certain kinds of notice errors. Second, although Congress' special solicitude for veterans might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other cases, that is not at issue, and need not be decided here. Pp. 411–412.

2. In Sanders' case, a review of the record demonstrates that the Veterans Court lawfully found the notice errors harmless. The VA's Types Two and Three notice errors did not matter, given that Sanders has pursued his claim for many years and should be aware of why he has been unable to show that his disability is service connected. Sanders has not told the reviewing courts what additional evidence proper notice would have led him to obtain or seek and has not explained how the notice errors could have made any difference.

In Simmons' case, some features of the record suggest that the VA's Type One error was harmless, *e. g.*, that she has long sought benefits and has a long history of medical examinations. But other features, *e. g.*, that her left-ear hearing loss was concededly service connected and has continuously deteriorated over time, suggest the opposite. Given the uncertainties, the Veterans Court should decide whether reconsideration is necessary. Pp. 412–414.

487 F. 3d 881, reversed and remanded; 487 F. 3d 892, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. SOUTER, J., filed

a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 414.

Eric D. Miller argued the cause for petitioner. With him on the briefs were former *Solicitor General Garre*, *Assistant Attorney General Katsas*, *Deputy Solicitor General Kneedler*, *Todd M. Hughes*, and *Paul J. Hutter*.

Christopher J. Meade argued the cause for respondent Simmons. With him on the brief was *Anne K. Small*. *Mark R. Lippman* argued the cause for respondent Sanders. With him on the brief was *Michael A. Morin*.†

JUSTICE BREYER delivered the opinion of the Court.

In these two civil cases, the Department of Veterans Affairs (VA) denied veterans' claims for disability benefits. In both cases the VA erroneously failed to provide the veteran with a certain kind of statutorily required notice. See 38 U. S. C. § 5103(a). In both cases the VA argued that the error was harmless. And in both cases the Court of Appeals for the Federal Circuit, after setting forth a framework for determining whether a notice error is harmless, rejected the VA's argument.

In our view, the Federal Circuit's "harmless-error" framework is too complex and rigid, its presumptions impose unreasonable evidentiary burdens upon the VA, and it is too likely too often to require the Court of Appeals for Veterans Claims (Veterans Court) to treat as harmful errors that in fact are harmless. We conclude that the framework conflicts with established law. See § 7261(b)(2) (Veterans Court must "take due account of the rule of prejudicial error").

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†Briefs of *amici curiae* urging affirmance were filed for the American Legion et al. by *Beth S. Brinkmann*, *Brian R. Matsui*, and *Barton F. Stichman;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Blair Elizabeth Taylor filed a brief for the Federal Circuit Bar Association as *amicus curiae*.

I

A

The law entitles veterans who have served on active duty in the United States military to receive benefits for disabilities caused or aggravated by their military service. The Veterans Claims Assistance Act of 2000 requires the VA to help a veteran develop his or her benefits claim. § 5103A. In doing so, the Secretary of Veterans Affairs (Secretary), upon "receipt of" an "application" for benefits, must "notify the claimant . . . of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." As "part of" the required "notice," the Secretary must also "indicate which portion of" the required "information and evidence . . . is to be provided by the claimant and which portion . . . the Secretary . . . will attempt to obtain." § 5103(a).

Repeating these statutory requirements in its regulations, the VA has said it will provide a claimant with a letter that tells the claimant (1) what further information is necessary to substantiate his or her claim; (2) what portions of that information the VA will obtain for the claimant; and (3) what portions the claimant must obtain. 38 CFR § 3.159(b) (2008). At the time of the decisions below, the regulations also required the VA to tell the claimant (4) that he may submit any other relevant information that he has available. § 3.159(b)(1). (The VA refers to these notice requirements as Type One, Type Two, Type Three, and Type Four, respectively.)

B

The VA's regional offices decide most claims. A claimant may appeal an adverse regional office decision to the VA's Board of Veterans' Appeals, an administrative board with the power to consider certain types of new evidence. 38 U. S. C. §§ 7107(b), 7109(a); 38 CFR § 20.1304(c). The claimant may seek review of an adverse Board decision in the Veterans Court, an Article I court. And the claimant (or the

Government) may appeal an adverse decision of the Veterans Court to the Court of Appeals for the Federal Circuit—but only in respect to certain legal matters, namely, "the validity . . . of any statute or regulation . . . or any interpretation thereof . . . that was relied on" by the Veterans Court in making its decision. 38 U. S. C. § 7292.

A specific statute requires the Veterans Court to "take due account of the rule of prejudicial error." § 7261(b)(2). In applying this statutory provision, the Veterans Court has developed its own special framework for notice errors. Under this framework, a claimant who argues that the VA failed to give proper notice must explain precisely how the notice was defective. Then the reviewing judge will decide what "type" of notice error the VA committed. The Veterans Court has gone on to say that a Type One error (*i. e.*, a failure to explain what further information is needed) has the "natural effect" of harming the claimant; but errors of Types Two, Three, or Four (*i. e.*, a failure to explain just who, claimant or agency, must provide the needed material or to tell the veteran that he may submit any other evidence available) do not have the "natural effect" of harming the claimant. In these latter instances, the claimant must show how the error caused harm, for example, by stating in particular just "what evidence" he would have provided (or asked the Secretary to provide) had the notice not been defective, and explaining just "how the lack of that notice and evidence affected the essential fairness of the adjudication." *Mayfield* v. *Nicholson,* 19 Vet. App. 103, 121 (2005).

C

In the first case, Woodrow Sanders, a veteran of World War II, claimed that a bazooka exploded near his face in 1944, causing later blindness in his right eye. His wartime medical records, however, did not indicate any eye problems. Indeed, his 1945 discharge examination showed near-perfect vision. But a 1948 eye examination revealed an inflammation of the right-eye retina and surrounding tissues—a condi-

tion that eventually left him nearly blind in that eye. Soon after the examination Sanders filed a claim for disability benefits. But in 1949 the VA denied benefits on the ground that Sanders had failed to show a connection between his eye condition and his earlier military service.

Forty-two years later, Sanders asked the VA to reopen his benefits claim. He argued that the 1944 bazooka explosion had hurt his eye, and added that he had begun to experience symptoms—blurred vision, swelling, and loss of sight—in 1946. He included a report from a VA doctor, Dr. Joseph Ruda, who said that "[i]t is not inconceivable that" the condition "could have occurred secondary to trauma, as stated . . . by" Sanders. A private ophthalmologist, Dr. Gregory Strainer, confirming that Sanders' right retina was scarred, added that this "type of . . . injury . . . can certainly be concussive in character." App. to Pet. for Cert. 26a–27a.

In 1992, the VA reopened Sanders' claim. *Id.*, at 29a. After obtaining Sanders' military medical records, the VA arranged for a further medical examination, this time by VA eye specialist Dr. Sheila Anderson. After examining Sanders' medical history (including records of the examinations made at the time of Sanders' enlistment and discharge), Anderson agreed with the medical diagnosis but concluded that Sanders' condition was not service related. Since Sanders' right-eye "visual acuity" was "20/20" upon enlistment and "20/25" upon discharge, and he had "reported decreased vision only 6 months prior" to his 1948 doctor's "visit," and since "there are no other signs of ocular trauma," Anderson thought that Sanders' condition "is most likely infectious in nature, although the etiology at this point is impossible to determine." "Based on the documented records," she concluded, "the patient did not lose vision while on active duty." The VA regional office denied Sanders' claim. *Ibid.*

Sanders sought Board review, and in the meantime he obtained the opinion of another VA doctor, Dr. Duane Nii, who

said that the "etiology of the patient's" eye condition "is . . . difficult to ascertain." He thought that "it is possible that" the condition "could be related to" a bazooka explosion, though the "possibility of" an infection "as the etiology . . . could also be entertained." *Id.*, at 30a. The Board concluded that Sanders had failed to show that the eye injury was service connected. The Board said that it had relied most heavily upon Anderson's report because, unlike other reports, it took account of Sanders' military medical records documenting his eyesight at the time of his enlistment and discharge. And the Board consequently affirmed the regional office's denial of Sanders' claim.

Sanders then appealed to the Veterans Court. There he argued, among other things, that the VA had made a notice error. Sanders conceded that the VA had sent him a letter telling him (1) what further information was necessary to substantiate his claim. But, he said, the VA letter did not tell him (2) which *portions* of the information the Secretary would provide or (3) which *portions* he would have to provide. That is to say, he complained about notice errors Type Two and Type Three.

The Veterans Court held that these notice errors were harmless. It said that Sanders had not explained how he would have acted differently, say, by identifying what different evidence he would have produced or asked the Secretary to obtain for him, had he received proper notice. Finding no other error, the Veterans Court affirmed the Board's decision.

D

The Court of Appeals for the Federal Circuit reviewed the Veterans Court's decision and held that the Veterans Court was wrong to find the notice error harmless. The Federal Circuit wrote that when the VA provides a claimant with a notice letter that is deficient in *any* respect (to the point where a "reasonable person" would not have read it as pro-

viding the necessary information), the Veterans Court "should . . . presum[e]" that the notice error is "prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication." *Sanders* v. *Nicholson*, 487 F. 3d 881, 889 (2007). To make this latter showing, the court added, the VA must "demonstrate" (1) that the "defect was cured by actual knowledge on the" claimant's "part," or (2) "that a benefit could not have been awarded as a matter of law." *Ibid.* Because the VA had not made such a showing, the Federal Circuit reversed the Veterans Court's decision.

E

In the second case before us, the claimant, Patricia Simmons, served on active military duty from December 1978 to April 1980. While on duty she worked in a noisy environment close to aircraft; after three months she began to lose hearing in her left ear; and by the time she was discharged, her left-ear hearing had become worse. Soon after her discharge, Simmons applied for disability benefits. The VA regional office found her hearing loss was service connected; but it also found the loss insufficiently severe to warrant compensation. In November 1980, it denied her claim.

In 1998, Simmons asked the VA to reopen her claim. She provided medical examination records showing further loss of hearing in her left ear along with (what she considered related) loss of hearing in her right ear. The VA arranged for hearing examinations by VA doctors in 1999, 2001, and 2002. The doctors measured her left-ear hearing loss, ranking it as moderate to severe; they also measured her right-ear hearing loss, ranking it as mild to moderate. After comparing the results of the examinations with a VA hearing-loss compensation schedule, the regional office concluded that Simmons' left-ear hearing loss, while service connected, was not severe enough to warrant compensation. At the same time, the regional office concluded that her right-ear hearing loss was neither service connected nor

sufficiently severe. Simmons appealed the decision to the Board, which affirmed the regional office's determination.

In 2003, Simmons appealed to the Veterans Court. Among other things, she said that she had not received a notice about (and she consequently failed to attend) a further right-ear medical examination that the VA later told her it had arranged. She added that, in respect to her claim for benefits for loss of hearing in her left ear, the VA had made a Type One notice error (*i. e.*, it had failed to tell her what further information was needed to substantiate her claim). Simmons conceded that she had received a letter from the VA. But the letter told her only what, in general, a person had to do to show that a hearing injury was service connected. It did not tell her anything about her specific problem, namely, what further information she must provide to show a worsening of hearing in her left ear, to the point where she could receive benefits.

The Veterans Court agreed with Simmons, and it found both errors prejudicial. In respect to Simmons' left-ear hearing loss (the matter at issue here), it pointed out that it had earlier said (in *Mayfield*, 19 Vet. App., at 120–124) that a Type One notice error has the " 'natural effect' of producing prejudice." The court added that its "revie[w] [of] the record in its entirety" convinced it that Simmons did not have "actual knowledge of what evidence was necessary to substantiate her claim" and, had the VA told Simmons more specifically about what additional medical information it needed, Simmons might have "obtained" a further "private" medical "examination substantiating her claim." App. to Pet. for Cert. 81a. The Veterans Court consequently remanded the case to the Board.

The Government appealed the Veterans Court's determination to the Court of Appeals for the Federal Circuit. And that court affirmed the Veterans Court's decision on the basis of its decision in *Sanders*. *Simmons* v. *Nicholson*, 487 F. 3d 892 (2007).

F

We granted certiorari in both Sanders' and Simmons' cases in order to determine the lawfulness of the Federal Circuit's "harmless-error" holdings.

II

The Federal Circuit's holdings flow directly from its use of the "harmless-error" framework that we have described. *Supra*, at 404. Thus we must decide whether that framework is consistent with a particular statutory requirement, namely, the requirement that the Veterans Court "take due account of the rule of prejudicial error," 38 U. S. C. § 7261(b)(2). See *supra*, at 401. We conclude that the framework is not consistent with the statutory demand.

A

We believe that the statute, in stating that the Veterans Court must "take due account of the rule of prejudicial error," requires the Veterans Court to apply the same kind of "harmless-error" rule that courts ordinarily apply in civil cases. The statutory words "take due account" and "prejudicial error" make clear that is so. Congress used the same words in the Administrative Procedure Act (APA). 5 U. S. C. § 706 ("[A] court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error"). The Attorney General's Manual on the Administrative Procedure Act explained that the APA's reference to "prejudicial error" is intended to "su[m] up in succinct fashion the 'harmless error' rule applied by the courts *in the review of lower court decisions as well as of administrative bodies.*" Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 110 (1947) (emphasis added). And we have previously described § 706 as an "'administrative law . . . harmless error rule.'" *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 659–660 (2007) (quoting *PDK Labs. Inc.* v. *United States Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CADC 2004)). Legis-

lative history confirms that Congress intended the Veterans Court "prejudicial error" statute to "incorporate a reference" to the APA's approach. S. Rep. No. 100–418, p. 61 (1988). We have no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative cases. Consequently, we assess the lawfulness of the Federal Circuit's approach in light of our general case law governing application of the harmless-error standard.

B

Three related features of the Federal Circuit's framework, taken together, convince us that it mandates an approach to harmless error that differs significantly from the approach courts normally take in ordinary civil cases. First, the framework is complex, rigid, and mandatory. In every case involving a notice error (of no matter which kind) the Veterans Court *must* find the error harmful unless the VA "demonstrate[s]" (1) that the claimant's "actual knowledge" cured the defect or (2) that the claimant could not have received a benefit as a matter of law. Suppose the notice error, as in Sanders' case, consisted of a failure to describe what additional information, if any, the VA would provide. It might be obvious from the record in the particular case that the error made no difference. But under the Federal Circuit's rule, the Veterans Court would have to remand the case for new proceedings regardless.

We have previously warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record. See *Kotteakos* v. *United States*, 328 U. S. 750, 760 (1946). The federal "harmless-error" statute, now codified at 28 U. S. C. § 2111, tells courts to review cases for errors of law "without regard to errors" that do not affect the parties' "substantial rights." That language seeks to prevent appellate courts from becoming " 'impregnable citadels of techni-

cality,'" *Kotteakos,* 328 U. S., at 759. And we have read it as expressing a congressional preference for determining "harmless error" without the use of presumptions insofar as those presumptions may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not. See *id.,* at 760; *O'Neal* v. *McAninch,* 513 U. S. 432, 436–437 (1995); see also R. Traynor, The Riddle of Harmless Error 26 (1970) (hereinafter Traynor) (reviewing court normally should "determine whether the error affected the judgment . . . without benefit of such aids as presumptions . . . that expedite fact-finding at the trial").

The Federal Circuit's presumptions exhibit the very characteristics that Congress sought to discourage. In the cases before us, they would prevent the reviewing court from directly asking the harmless-error question. They would prevent that court from resting its conclusion on the facts and circumstances of the particular case. And they would require the reviewing court to find the notice error prejudicial even if that court, having read the entire record, conscientiously concludes the contrary.

Second, the Federal Circuit's framework imposes an unreasonable evidentiary burden upon the VA. How is the Secretary to demonstrate, in Sanders' case for example, that Sanders *knew* that he, not the VA, would have to produce more convincing evidence that the bazooka accident caused his eye injury? How could the Secretary demonstrate that there is *no* evidence anywhere that would entitle Sanders to benefits? To show a claimant's state of mind about such a matter will often prove difficult, perhaps impossible. And even if the VA (as in Sanders' case) searches the military records and comes up emptyhanded, it may still prove difficult, or impossible, to prove the nonexistence of evidence lying somewhere about that might significantly help the claimant.

We have previously pointed out that setting an evidentiary "barrier so high that it could never be surmounted would

justify the very criticism that spawned the harmless-error doctrine," namely, reversing for error "'regardless of its effect on the judgment.'" *Neder* v. *United States*, 527 U. S. 1, 18 (1999) (quoting Traynor 50). The Federal Circuit's evidentiary rules increase the likelihood of reversal in cases where, in fact, the error is harmless. And, as we pointed out in *Neder*, that likelihood encourages abuse of the judicial process and diminishes the public's confidence in the fair and effective operation of the judicial system. 527 U. S., at 18.

Third, the Federal Circuit's framework requires the VA, not the claimant, to explain why the error is harmless. This Court has said that the party that "seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer* v. *Hoffman*, 318 U. S. 109, 116 (1943); see also *Tipton* v. *Socony Mobil Oil Co.*, 375 U. S. 34, 36 (1963) *(per curiam); United States* v. *Borden Co.*, 347 U. S. 514, 516–517 (1954); cf. *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U. S. 548, 553 (1984); *Market Street R. Co.* v. *Railroad Comm'n of Cal.*, 324 U. S. 548, 562 (1945) (finding error harmless "in the absence of any showing of . . . prejudice").

Lower court cases make clear that courts have correlated review of ordinary administrative proceedings to appellate review of civil cases in this respect. Consequently, the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination. See, *e. g.*, *American Airlines, Inc.* v. *Department of Transp.*, 202 F. 3d 788, 797 (CA5 2000) (declining to remand where appellant failed to show that error in administrative proceeding was harmful); *Air Canada* v. *Department of Transp.*, 148 F. 3d 1142, 1156–1157 (CADC 1998) (same); *Nelson* v. *Apfel*, 131 F. 3d 1228, 1236 (CA7 1997) (same); *Bar MK Ranches* v. *Yuetter*, 994 F. 2d 735, 740 (CA10 1993) (same); *Camden* v. *Department of Labor*, 831 F. 2d 449, 451 (CA3 1987) (same); *Panhandle Co-op Assn.* v. *EPA*, 771 F. 2d 1149, 1153 (CA8 1985)

(same); *Frankfort* v. *FERC*, 678 F. 2d 699, 708 (CA7 1982) (same); *NLRB* v. *Seine & Line Fishermen*, 374 F. 2d 974, 981 (CA9 1967) (same).

To say that the claimant has the "burden" of showing that an error was harmful is not to impose a complex system of "burden shifting" rules or a particularly onerous requirement. In ordinary civil appeals, for example, the appellant will point to rulings by the trial judge that the appellant claims are erroneous, say, a ruling excluding favorable evidence. Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said. But, if not, then the party seeking reversal normally must explain why the erroneous ruling caused harm. If, for example, the party seeking an affirmance makes a strong argument that the evidence on the point was overwhelming regardless, it normally makes sense to ask the party seeking reversal to provide an explanation, say, by marshaling the facts and evidence showing the contrary. The party seeking to reverse the result of a civil proceeding will likely be in a position at least as good as, and often better than, the opposing party to explain how he has been hurt by an error. Cf. *United States* v. *Fior D'Italia, Inc.*, 536 U. S. 238, 256, n. 4 (2002) (SOUTER, J., dissenting).

Respondents urge the creation of a special rule for this context, placing upon the agency the burden of proving that a notice error did *not* cause harm. But we have placed such a burden on the appellee only when the matter underlying review was criminal. See, *e. g.*, *Kotteakos*, *supra*, at 760. In criminal cases the Government seeks to deprive an individual of his liberty, thereby providing a good reason to require the Government to explain why an error should not upset the trial court's determination. And the fact that the Government must prove its case beyond a reasonable doubt justifies a rule that makes it more difficult for the reviewing court to find that an error did not affect the outcome of a

case. See *United States* v. *Olano*, 507 U. S. 725, 741 (1993) (stating that the Government bears the "burden of showing the absence of prejudice"). But in the ordinary civil case that is not so. See *Palmer*, *supra*, at 116.

C

Our discussion above is subject to two important qualifications. First, we need not, and we do not, decide the lawfulness of the use by the Veterans Court of what it called the "natural effects" of certain kinds of notice errors. We have previously made clear that courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful. See *Kotteakos*, 328 U. S., at 760–761 (reviewing courts may learn over time that the "'natural effect'" of certain errors is "'to prejudice a litigant's substantial rights'" (quoting H. R. Rep. No. 913, 65th Cong., 3d Sess., 1 (1919))). And by drawing upon "experience" that reveals some such "'natural effect,'" a court might properly influence, though not control, future determinations. See *Kotteakos*, *supra*, at 760–761. We consider here, however, only the Federal Circuit's harmless-error framework. That framework, as we have said, is mandatory. And its presumptions are not based upon an effort to determine "natural effects."

Indeed, the Federal Circuit is the wrong court to make such determinations. Statutes limit the Federal Circuit's review to certain kinds of Veterans Court errors, namely, those that concern "the validity of . . . any statute or regulation . . . or any interpretation thereof." 38 U. S. C. § 7292(a). But the factors that inform a reviewing court's "harmless-error" determination are various, potentially involving, among other case-specific factors, an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error's likely effects on the perceived fairness, integrity, or

public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference. See *Neder*, 527 U. S., at 18–19; *Kotteakos*, *supra*, at 761–763; Traynor 33–37.

It is the Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans' cases to enable it to make empirically based, nonbinding generalizations about "natural effects." And the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors. Cf. *United States* v. *Haggar Apparel Co.*, 526 U. S. 380, 394 (1999) (Article I court's special "expertise . . . guides it in making complex determinations in a specialized area of the law").

Second, we recognize that Congress has expressed special solicitude for the veterans' cause. See *post*, at 415–416 (SOUTER, J., dissenting). A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life. And Congress has made clear that the VA is not an ordinary agency. Rather, the VA has a statutory duty to help the veteran develop his or her benefits claim. See Veterans Claims Assistance Act of 2000, 38 U. S. C. § 5103A. Moreover, the adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings. See *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 311 (1985). These facts might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other circumstances. But that is not the question before us. And we need not here decide whether, or to what extent, that may be so.

III

We have considered the two cases before us in light of the principles discussed. In Sanders' case, the Veterans Court

found the notice error harmless. And after reviewing the record, we conclude that finding is lawful. The VA told Sanders what further evidence would be needed to substantiate his claim. It failed to specify what portion of any additional evidence the Secretary would provide (we imagine none) and what portion Sanders would have to provide (we imagine all).

How could the VA's failure to specify this (or any other) division of labor have mattered? Sanders has pursued his claim for over six decades; he has had numerous medical examinations; and he should be aware of the respect in which his benefits claim is deficient (namely, his inability to show that his disability is connected to his World War II service). See *supra*, at 403. Sanders has not told the Veterans Court, the Federal Circuit, or this Court what specific additional evidence proper notice would have led him to obtain or seek. He has not explained to the Veterans Court, to the Federal Circuit, or to us how the notice error to which he points could have made any difference. The Veterans Court did not consider the harmlessness issue a borderline question. Nor do we. We consequently reverse the Federal Circuit's judgment and remand the case so that the court can reinstate the judgment of the Veterans Court.

Simmons' case is more difficult. The Veterans Court found that the VA had committed a Type One error, *i. e.*, a failure to tell Simmons what information or evidence she must provide to substantiate her claim. The VA sent Simmons a letter that provided her only with general information about how to prove a claim while telling her nothing at all about how to proceed further in her own case, a case in which the question was whether a concededly service-connected left-ear hearing problem had deteriorated to the point where it was compensable. And the VA did so in the context of having arranged for a further right-ear medical examination, which (because of lack of notice) Simmons failed to attend. The Veterans Court took the "natural effect" of

a Type One error into account while also reviewing the record as a whole.

Some features of the record suggest the error was harmless, for example, the fact that Simmons has long sought benefits and has a long history of medical examinations. But other features—*e. g.*, the fact that her left-ear hearing loss was concededly service connected and has continuously deteriorated over time, and the fact that the VA had scheduled a further examination of her right ear that (had notice been given) might have revealed further left-ear hearing loss—suggest the opposite. Given the uncertainties, we believe it is appropriate to remand this case so that the Veterans Court can decide whether reconsideration is necessary.

* * *

We conclude that the Federal Circuit's harmless-error framework is inconsistent with the statutory requirement that the Veterans Court take "due account of the rule of prejudicial error." 38 U. S. C. § 7261(b)(2). We reverse the Federal Circuit's judgment in Sanders' case, and we vacate its judgment in Simmons' case. We remand both cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

Federal law requires the Court of Appeals for Veterans Claims to "take due account of the rule of prejudicial error." 38 U. S. C. § 7261(b)(2). Under this provision, when the Department of Veterans Affairs (VA) fails to notify a veteran of the information needed to support his benefit claim, as required by § 5103(a), must the veteran prove the error harmful, or must the VA prove its error harmless? The Federal Circuit held that the VA should bear the burden. *Sanders* v. *Nicholson*, 487 F. 3d 881 (2007). The Court re-

verses because the Federal Circuit's approach is "complex, rigid, and mandatory," *ante*, at 407, "imposes an unreasonable evidentiary burden upon the VA," *ante*, at 408, and contradicts the rule in other civil and administrative cases by "requir[ing] the VA, not the claimant, to explain why the error is harmless," *ante*, at 409. I respectfully disagree.

Taking the last point first, the Court assumes that there is a standard allocation of the burden of proving harmlessness that Congress meant to adopt in directing the Veterans Court to "take due account of the rule of prejudicial error." § 7261(b)(2). But as both the majority and the Government concede, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation," *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 209 (1973), and courts impose the burden of dealing with harmlessness differently in different circumstances. As the Court says, the burden is on the Government in criminal cases, *ante*, at 410, and even in civil and administrative appeals courts sometimes require the party getting the benefit of the error to show its harmlessness, depending on the statutory setting or specific sort of mistake made, see, *e. g.*, *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F. 2d 1317, 1324 (CADC 1988) (declaring that imposing the burden of proving harm "on the challenger is normally inappropriate where the agency has completely failed to comply with" notice and comment procedures).

Thus, the question is whether placing the burden of persuasion on the veteran is in order under the statutory scheme governing the VA. I believe it is not. The VA differs from virtually every other agency in being itself obliged to help the claimant develop his claim, see, *e. g.*, 38 U. S. C. § 5103A, and a number of other provisions and practices of the VA's administrative and judicial review process reflect a congressional policy to favor the veteran, see, *e. g.*, § 5107(b) ("[T]he Secretary shall give the benefit of the doubt to the claimant" whenever "there is an approximate balance of posi-

tive and negative evidence regarding any issue material to the determination of a matter"); § 7252(a) (allowing the veteran, but not the Secretary, to appeal an adverse decision to the Veterans Court). Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions, I would not remove a comparable benefit in the Veteran's Court based on the ambiguous directive of § 7261(b)(2). And even if there were a question in my mind, I would come out the same way under our longstanding "rule that interpretive doubt is to be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994).

The majority's other arguments are open to judgment, but I do not see that placing the burden of showing harm on the VA goes so far as to create a "complex, rigid, and mandatory" scheme, *ante*, at 407, or to impose "an unreasonable evidentiary burden upon the VA," *ante*, at 408. Under the Federal Circuit's rule, the VA simply "must persuade the reviewing court that the purpose of the notice was not frustrated, e. g., by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." *Sanders*, *supra*, at 889. This gives the VA several ways to show that an error was harmless, and the VA has been able to shoulder the burden in a number of cases. See, *e. g.*, *Holmes* v. *Peake*, No. 06–0852, 2008 WL 974728, *2 (Vet. App., Apr. 3, 2008) (Table) (finding notice error harmless because the claimant had "actual knowledge of what was required to substantiate" his claim); *Clark* v. *Peake*, No. 05–2422, 2008 WL 852588, *4 (Vet. App., Mar. 24, 2008) (Table) (same).

The Federal Circuit's rule thus strikes me as workable and in keeping with the statutory scheme governing veterans' benefits. It has the added virtue of giving the VA a strong incentive to comply with its notice obligations, obligations

"that g[o] to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system . . . by affording a claimant a meaningful opportunity to participate effectively in the processing of his or her claim." *Mayfield* v. *Nicholson*, 19 Vet. App. 103, 120–121 (2005).

I would affirm the Federal Circuit and respectfully dissent.

Syllabus

NKEN *v.* HOLDER, ATTORNEY GENERAL

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

No. 08–681. Argued January 21, 2009—Decided April 22, 2009

Petitioner Nken sought an order from the Fourth Circuit staying his removal to Cameroon while his petition for review of a Board of Immigration Appeals order denying his motion to reopen removal proceedings was pending. Nken acknowledged that Circuit precedent required an alien seeking such a stay to satisfy 8 U. S. C. § 1252(f)(2), which sharply restricts the availability of injunctions blocking the removal of an alien from this country, but argued that a court's authority to stay a removal order should instead be controlled by the traditional criteria governing stays. The Court of Appeals denied the stay motion without comment.

Held: Traditional stay factors, not the demanding § 1252(f)(2) standard, govern a court of appeals' authority to stay an alien's removal pending judicial review. Pp. 423–436.

(a) This question stems from changes made in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which "repealed the old judicial-review scheme set forth in [8 U. S. C.] § 1105a [(1994 ed.),] and instituted a new (and significantly more restrictive) one in . . . § 1252," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 475 (*AAADC*). Because courts of appeals lacked jurisdiction before IIRIRA to review the removal order of an alien who had already left the United States, see § 1105a(c), most aliens who appealed such a decision were given an automatic stay of the removal order pending judicial review, see § 1105a(a)(3). Three changes IIRIRA made are of particular importance here. First, the repeal of § 1105a allows courts to adjudicate a petition for review even if the alien is removed while the petition is pending. Second, the presumption of an automatic stay was repealed and replaced with a provision stating that "[s]ervice of the petition . . . does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." § 1252(b)(3)(B). Finally, IIRIRA provided that "no court shall enjoin the removal of any alien . . . unless [he] shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." § 1252(f)(2). Pp. 423–425.

(b) The parties dispute what standard a court should apply when determining whether to grant a stay. Petitioner argues that the "traditional" stay standard should apply, meaning a court should consider "(1)

whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether [he] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties . . . ; and (4) where the public interest lies." *Hilton* v. *Braunskill*, 481 U. S. 770, 776. The Government argues that § 1252(f) should govern, meaning an alien must show "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." Pp. 425–426.

(c) An appellate court's power to hold an order in abeyance while it assesses the order's legality has been described as inherent, and part of a court's "traditional equipment for the administration of justice." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 9–10. That power allows a court to act responsibly, by ensuring that the time the court takes to bring considered judgment to bear on the matter before it does not result in irreparable injury to the party aggrieved by the order under review. But a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian R. Co.* v. *United States*, 272 U. S. 658, 672. The parties and the public, while entitled to both careful review and a meaningful decision, are also entitled to the prompt execution of orders that the legislature has made final. Pp. 426–427.

(d) Section 1252(f) does not refer to "stays," but rather to authority to "enjoin the removal of any alien." An injunction and a stay serve different purposes. The former is the means by which a court tells someone what to do or not to do. While in a general sense many orders may be considered injunctions, the term is typically used to refer to orders that operate *in personam*. By contrast, a stay operates upon the judicial proceeding itself, either by halting or postponing some portion of it, or by temporarily divesting an order of enforceability. An alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but instead asks to temporarily set aside the removal order. That kind of stay, "relat[ing] only to the conduct or progress of litigation before th[e] court[,] ordinarily is not considered an injunction." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 279. That § 1252(f)(2) does not comfortably cover stays is evident in Congress's use of the word "stay" in subsection (b)(3)(B) but not subsection (f)(2), particularly since those subsections were enacted as part of a unified overhaul of judicial review. The statute's structure also clearly supports petitioner's reading: Because subsection (b)(3)(B) changed the basic rules covering stays of removal, the natural place to locate an amendment to the standard governing stays would have been subsection (b)(3)(B), not a

provision four subsections later that makes no mention of stays. Pp. 428–432.

(e) Subsection (f)(2)'s application would not fulfill the historic office of a stay, which is to hold the matter under review in abeyance to allow the appellate court sufficient time to decide the merits. Under subsection (f)(2), a stay would only be granted after the court in effect *decides* the merits, in an expedited manner. The court would have to do so under a "clear and convincing evidence" standard that does not so much preserve the availability of subsequent review as render it redundant. Nor would subsection (f)(2) allow courts "to prevent irreparable injury to the parties or to the public" pending review, *Scripps-Howard*, 316 U. S., at 9; the subsection on its face does not permit any consideration of harm, irreparable or otherwise. In short, applying § 1252(f)(2) in the stay context would result in something that does not remotely look like a stay. As in *Scripps-Howard*, the Court is loath to conclude that Congress would, "without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Id.*, at 11. The Court is not convinced Congress did so in § 1252(f)(2). Pp. 432–433.

(f) The parties dispute what the traditional four-factor standard entails. A stay is not a matter of right, and its issuance depends on the circumstances of a particular case. The first factor, a strong showing of a likelihood of success on the merits, requires more than a mere possibility that relief will be granted. Similarly, simply showing some possibility of irreparable injury fails to satisfy the second factor. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 22. Although removal is a serious burden for many aliens, that burden alone cannot constitute the requisite irreparable injury. An alien who has been removed may continue to pursue a petition for review, and those aliens who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party. In considering them, courts must be mindful that the Government's role as the respondent in every removal proceeding does not make its interest in each one negligible. There is always a public interest in prompt execution of removal orders, see *AADC*, *supra*, at 490, and that interest may be heightened by circumstances such as a particularly dangerous alien, or an alien who has substantially prolonged his stay by abusing the processes provided to him. A court asked to stay removal cannot simply assume that the balance of hardships will weigh heavily in the applicant's favor. Pp. 433–436.

Vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 437. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 439.

Lindsay C. Harrison argued the cause for petitioner. With her on the briefs were *Donald B. Verrilli, Jr.*, *Ian Heath Gershengorn*, and *Jared O. Freedman.*

Then-*Acting Solicitor General Kneedler* argued the cause for respondent. With him on the brief were former *Solicitor General Garre*, *Assistant Attorney General Katsas*, *Principal Deputy Assistant Attorney General Dupree*, *Nicole A. Saharsky*, *Donald Keener*, *Melissa Neiman-Kelting*, *Song E. Park*, and *Andrew C. MacLachlan.**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal, *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 9 (1942), and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it "has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Id.*, at 9–10 (footnote omitted). A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

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*A brief of *amici curiae* urging reversal was filed for Law Professor Sarah H. Cleveland et al. by *Cecillia D. Wang*, *Lucas Guttentag*, *Gerald L. Neuman*, *pro se*, *Steven R. Shapiro*, and *Lee Gelernt.*

Daniel J. Popeo and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance.

Paul R. Q. Wolfson and *Adam Raviv* filed a brief for the American Immigration Lawyers Association et al. as *amici curiae.*

This case involves a statutory provision that sharply restricts the circumstances under which a court may issue an injunction blocking the removal of an alien from this country. The Court of Appeals concluded, and the Government contends, that this provision applies to the granting of a stay by a court of appeals while it considers the legality of a removal order. Petitioner disagrees, and maintains that the authority of a court of appeals to stay an order of removal under the traditional criteria governing stays remains fully intact, and is not affected by the statutory provision governing injunctions. We agree with petitioner, and vacate and remand for application of the traditional criteria.

I

Jean Marc Nken, a citizen of Cameroon, entered the United States on a transit visa in April 2001. In December 2001, he applied for asylum under 8 U. S. C. § 1158, withholding of removal under § 1231(b)(3), and deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, p. 20, 1465 U. N. T. S. 85, see 8 CFR § 208.17 (2008). In his application, Nken claimed he had been persecuted in the past for participation in protests against the Cameroonian Government, and would be subject to further persecution if he returns to Cameroon.

An Immigration Judge denied Nken relief after concluding that he was not credible. The Board of Immigration Appeals (BIA) affirmed, and also declined to remand for consideration of Nken's application for adjustment of status based on his marriage to an American citizen. After the BIA denied a motion to reopen, Nken filed a petition for review of the BIA's removal order in the Court of Appeals for the Fourth Circuit. His petition was denied. Nken then filed a second motion to reopen, which was also denied, followed by a second petition for review, which was denied as well.

Nken filed a third motion to reopen, this time alleging that changed circumstances in Cameroon made his persecution more likely. The BIA denied the motion, finding that Nken had not presented sufficient facts or evidence of changed country conditions. Nken again sought review in the Court of Appeals, and also moved to stay his deportation pending resolution of his appeal. In his motion, Nken recognized that Fourth Circuit precedent required an alien seeking to stay a removal order to show by "clear and convincing evidence" that the order was "prohibited as a matter of law," 8 U. S. C. § 1252(f)(2). See *Teshome-Gebreegziabher* v. *Mukasey*, 528 F. 3d 330 (CA4 2008). Nken argued, however, that this standard did not govern. The Court of Appeals denied Nken's motion without comment. App. 74.

Nken then applied to this Court for a stay of removal pending adjudication of his petition for review, and asked in the alternative that we grant certiorari to resolve a split among the Courts of Appeals on what standard governs a request for such a stay. Compare *Teshome-Gebreegziabher*, *supra*, at 335, and *Weng* v. *United States Atty. Gen.*, 287 F. 3d 1335 (CA11 2002) (*per curiam*), with *Arevalo* v. *Ashcroft*, 344 F. 3d 1 (CA1 2003), *Mohammed* v. *Reno*, 309 F. 3d 95 (CA2 2002), *Douglas* v. *Ashcroft*, 374 F. 3d 230 (CA3 2004), *Tesfamichael* v. *Gonzales*, 411 F. 3d 169 (CA5 2005), *Bejjani* v. *INS*, 271 F. 3d 670 (CA6 2001), *Hor* v. *Gonzales*, 400 F. 3d 482 (CA7 2005), and *Andreiu* v. *Ashcroft*, 253 F. 3d 477 (CA9 2001) (en banc). We granted certiorari, and stayed petitioner's removal pending further order of this Court. *Nken* v. *Mukasey*, 555 U. S. 1042 (2008).

II

The question we agreed to resolve stems from changes in judicial review of immigration procedures brought on by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, which substantially amended the Immigration and Nationality Act (INA),

8 U. S. C. § 1101 *et seq.* When Congress passed IIRIRA, it "repealed the old judicial-review scheme set forth in [8 U. S. C.] § 1105a and instituted a new (and significantly more restrictive) one in 8 U. S. C. § 1252." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 475 (1999) (*AAADC*). The new review system substantially limited the availability of judicial review and streamlined all challenges to a removal order into a single proceeding: the petition for review. See, *e. g.*, 8 U. S. C. § 1252(a)(2) (barring review of certain removal orders and exercises of executive discretion); § 1252(b)(3)(C) (establishing strict filing and briefing deadlines for review proceedings); § 1252(b)(9) (consolidating challenges into petition for review). Three changes effected by IIRIRA are of particular importance to this case.

Before IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States. See § 1105a(c) (1994 ed.) ("An order of deportation or of exclusion shall not be reviewed by any court . . . if [the alien] has departed from the United States after the issuance of the order"). Accordingly, an alien who appealed a decision of the BIA was typically entitled to remain in the United States for the duration of judicial review. This was achieved through a provision providing most aliens with an automatic stay of their removal order while judicial review was pending. See § 1105a(a)(3) ("The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs").

IIRIRA inverted these provisions to allow for more prompt removal. First, Congress lifted the ban on adjudication of a petition for review once an alien has departed. See IIRIRA § 306(b), 110 Stat. 3009–612 (repealing § 1105a). Second, because courts were no longer prohibited from proceeding with review once an alien departed, see *Dada* v. *Mu-*

kasey, 554 U. S. 1, 22 (2008), Congress repealed the presumption of an automatic stay, and replaced it with the following: "Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U. S. C. § 1252(b)(3)(B) (2006 ed.).

Finally, IIRIRA restricted the availability of injunctive relief:

> "Limit on injunctive relief
>
> "(1) In general
>
> "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.
>
> "(2) Particular cases
>
> "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." § 1252(f).

This provision, particularly subsection (f)(2), is the source of the parties' disagreement.

III

The parties agree that courts of appeals considering a petition for review of a removal order may prevent that order from taking effect and therefore block removal while adjudicating the petition. They disagree over the standard a court should apply in deciding whether to do so. Nken argues that the "traditional" standard for a stay applies. Under

that standard, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton* v. *Braunskill*, 481 U. S. 770, 776 (1987).

The Government disagrees, arguing that a stay is simply a form of injunction, or alternatively that the relief petitioner seeks is more accurately characterized as injunctive, and therefore that the limits on injunctive relief set forth in subsection (f)(2) apply. Under that provision, a court may not "enjoin" the removal of an alien subject to a final removal order, "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U. S. C. § 1252(f)(2). Mindful that statutory interpretation turns on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997), we conclude that the traditional stay factors—not § 1252(f)(2)—govern a request for a stay pending judicial review.

A

An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as "inherent," preserved in the grant of authority to federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," All Writs Act, 28 U. S. C. § 1651(a). See *In re McKenzie*, 180 U. S. 536, 551 (1901). The Court highlighted the historic pedigree and importance of the power in *Scripps-Howard*, 316 U. S. 4, holding in that case that Congress's failure expressly to confer the authority in a statute allowing appellate review should not be taken as an implicit denial of that power.

The Court in *Scripps-Howard* did not decide what "criteria . . . should govern the Court in exercising th[e] power" to grant a stay. *Id.*, at 17. Nor did the Court consider under what circumstances Congress could deny that authority. See *ibid.* The power to grant a stay pending review, however, was described as part of a court's "traditional equipment for the administration of justice." *Id.*, at 9–10. That authority was "firmly imbedded in our judicial system," "consonant with the historic procedures of federal appellate courts," and "a power as old as the judicial system of the nation." *Id.*, at 13, 17.

The authority to hold an order in abeyance pending review allows an appellate court to act responsibly. A reviewing court must bring considered judgment to bear on the matter before it, but that cannot always be done quickly enough to afford relief to the party aggrieved by the order under review. The choice for a reviewing court should not be between justice on the fly or participation in what may be an "idle ceremony." *Id.*, at 10. The ability to grant interim relief is accordingly not simply "[a]n historic procedure for preserving rights during the pendency of an appeal," *id.*, at 15, but also a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process.

At the same time, a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review. A stay is an "intrusion into the ordinary processes of administration and judicial review," *Virginia Petroleum Jobbers Assn.* v. *FPC*, 259 F. 2d 921, 925 (CADC 1958) (*per curiam*), and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant," *Virginian R. Co.* v. *United States*, 272 U. S. 658, 672 (1926). The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.

B

Subsection (f)(2) does not by its terms refer to "stays" but instead to the authority to "enjoin the removal of any alien." The parties accordingly begin by disputing whether a stay is simply a type of injunction, covered by the term "enjoin," or a different form of relief. An injunction and a stay have typically been understood to serve different purposes. The former is a means by which a court tells someone what to do or not to do. When a court employs "the extraordinary remedy of injunction," *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312 (1982), it directs the conduct of a party, and does so with the backing of its full coercive powers. See Black's Law Dictionary 784 (6th ed. 1990) (defining "injunction" as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury").

It is true that "'[i]n a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam.*'" *Id.*, at 800 (8th ed. 2004) (quoting 1 H. Joyce, A Treatise on the Law Relating to Injunctions § 1, pp. 2–3 (1909)). This is so whether the injunction is preliminary or final; in both contexts, the order is directed at someone, and governs that party's conduct.

By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability. See Black's, *supra*, at 1413 (6th ed. 1990) (defining "stay" as "a suspension of the case or some designated proceedings within it").

A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily sus-

pending the source of authority to act—the order or judgment in question—not by directing an actor's conduct. A stay "simply suspend[s] judicial alteration of the status quo," while injunctive relief "grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers); see also *Brown* v. *Gilmore*, 533 U. S. 1301, 1303 (2001) (Rehnquist, C. J., in chambers) ("[A]pplicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute"); *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1302 (1993) (same) ("By seeking an injunction, applicants request that I issue an order *altering* the legal status quo").

An alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government's authority to remove. Although such a stay acts to "ba[r] Executive Branch officials from removing [the applicant] from the country," *post*, at 445 (ALITO, J., dissenting), it does so by returning to the status quo—the state of affairs before the removal order was entered.* That kind of stay, "relat[ing] only to

*The dissent maintains that "[a]n order preventing an executive officer from [enforcing a removal order] does not 'simply suspend judicial alteration of the status quo,'" but instead "blocks executive officials from carrying out what they view as proper enforcement of the immigration laws." *Post*, at 445 (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers)). But the relief sought here would simply suspend *administrative* alteration of the status quo, and we have long recognized that such temporary relief from an administrative order—just like temporary relief from a court order—is considered a stay. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 10–11 (1942).

The dissent would distinguish *Scripps-Howard* on the ground that Nken does not really seek to stay a final order of removal, but instead seeks "to enjoin the Executive Branch from enforcing his removal order pending judicial review of an entirely separate order [denying a motion to re-

the conduct or progress of litigation before th[e] court[,] ordinarily is not considered an injunction." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 279 (1988); see Fed. Rule App. Proc. 8(a)(1)(A) (referring to interim relief from "the judgment or order of a district court pending appeal" as "a stay"). Whether such a stay might technically be called an injunction is beside the point; that is not the label by which it is generally known. The sun may be a star, but "starry sky" does not refer to a bright summer day. The terminology of subsection (f)(2) does not comfortably cover stays.

This conclusion is reinforced by the fact that when Congress wanted to refer to a stay pending adjudication of a petition for review in § 1252, it used the word "stay." In subsection (b)(3)(B), under the heading "Stay of order," Congress provided that service of a petition for review "does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." By contrast, the language of subsection (f) says nothing about stays, but is instead titled "Limit on injunctive relief," and refers to the authority of courts to "enjoin the removal of any alien." § 1252(f)(2).

"[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." *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432 (1987) (internal quotation marks omitted). This is particularly true here, where subsections (b)(3)(B) and (f)(2) were

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open]." *Post*, at 442, n. But a determination that the BIA should have granted Nken's motion to reopen would necessarily extinguish the finality of the removal order. See Tr. of Oral Arg. 42 (Acting Solicitor General) ("[I]f the motion to reopen is granted, that vacates the final order of removal and, therefore, there is no longer a final order of removal pursuant to which the alien could be removed"). The relief sought here is properly termed a "stay" because it suspends the effect of the removal order.

enacted as part of a unified overhaul of judicial review procedures.

Subsection (b)(3)(B) changed the basic rules covering stays of removal, and would have been the natural place to locate an amendment to the traditional standard governing the grant of stays. Under the Government's view, however, Congress placed such a provision four subsections later, in a subsection that makes no mention of stays, next to a provision prohibiting classwide injunctions against the operation of removal provisions. See 8 U. S. C. § 1252(f)(1) (permitting injunctions only "with respect to the application of such provisions to an individual alien"); *AADC*, 525 U. S., at 481–482. Although the dissent "would not read too much into Congress' decision to locate such a provision in one subsection rather than in another," *post*, at 446, the Court frequently takes Congress's structural choices into consideration when interpreting statutory provisions. See, *e. g.*, *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 47 (2008).

The Government counters that petitioner's view "fails to give any operative effect to Section 1252(f)(2)." Brief for Respondent 32. Initially, this argument undercuts the Government's textual reading. It is one thing to propose that "enjoin" in subsection (f)(2) covers a broad spectrum of court orders and relief, including both stays and more typical injunctions. It is quite another to suggest that Congress used "enjoin" to refer *exclusively* to stays, so that a failure to include stays in subsection (f)(2) would render the provision superfluous. If nothing else, the terms are by no means synonymous.

Leaving that aside, there is something to the Government's point; the exact role of subsection (f)(2) under petitioner's view is not easy to explain. Congress may have been concerned about the possibility that courts would enjoin application of particular provisions of the INA, see 8 U. S. C. § 1252(f)(1) (prohibiting injunctions "other than with

respect to the application of [part IV of the INA] to an individual alien"), or about injunctions that might be available under the limited habeas provisions of subsection (e). Or perhaps subsection (f)(2) was simply included as a catchall provision raising the bar on any availability (even unforeseeable availability) of "the extraordinary remedy of injunction." *Weinberger*, 456 U. S., at 312. In any event, the Government's point is not enough to outweigh the strong indications that subsection (f)(2) is not reasonably understood to be directed at stays.

C

Applying the subsection (f)(2) standard to stays pending appeal would not fulfill the historic office of such a stay. The whole idea is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits. Under the subsection (f)(2) standard, however, a stay would only be granted after the court in effect *decides* the merits, in an expedited manner. The court would have to do so under a standard—"clear and convincing evidence"—that does not so much preserve the availability of subsequent review as render it redundant. Subsection (f)(2), in short, would invert the customary role of a stay, requiring a definitive merits decision earlier rather than later.

The authority to grant stays has historically been justified by the perceived need "to prevent irreparable injury to the parties or to the public" pending review. *Scripps-Howard*, 316 U. S., at 9. Subsection (f)(2) on its face, however, does not allow any consideration of harm, irreparable or otherwise, even harm that may deprive the movant of his right to petition for review of the removal order. Subsection (f)(2) does not resolve the dilemma stays historically addressed: what to do when there is insufficient time to resolve the merits and irreparable harm may result from delay. The provision instead requires deciding the merits under a higher

standard, without regard to the prospect of irreparable harm.

In short, applying the subsection (f)(2) standard in the stay context results in something that does not remotely look like a stay. Just like the Court in *Scripps-Howard*, we are loath to conclude that Congress would, "without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Id.*, at 11. Subsection (f)(2) would certainly deprive courts of their "customary" stay power. Our review does not convince us that Congress did that in subsection (f)(2). The four-factor test is the "traditional" one, *Hilton*, 481 U. S., at 777, and the Government has not overcome the "presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952). We agree with petitioner that an alien need not satisfy the demanding standard of § 1252(f)(2) when asking a court of appeals to stay removal pending judicial review.

IV

So what standard does govern? The question presented, as noted, offers the alternative of "'the traditional test for stays,'" 555 U. S., at 1042, but the parties dispute what that test is. See Brief for Respondent 46 ("[T]he four-part standard requires a more demanding showing than petitioner suggests"); Reply Brief for Petitioner 26 ("The Government argues . . . that the [stay] test should be reformulated").

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.*, 272 U. S., at 672. It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.*, at 672–673; see *Hilton*, *supra*, at 777 ("[T]he traditional stay factors contemplate individualized judgments in each case"). The party requesting a stay

bears the burden of showing that the circumstances justify an exercise of that discretion. See, *e. g.*, *Clinton* v. *Jones*, 520 U. S. 681, 708 (1997); *Landis* v. *North American Co.*, 299 U. S. 248, 255 (1936).

The fact that the issuance of a stay is left to the court's discretion "does not mean that no legal standard governs that discretion. . . . '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 139 (2005) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.)). As noted earlier, those legal principles have been distilled into consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton*, *supra*, at 776. There is substantial overlap between these and the factors governing preliminary injunctions, see *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 24 (2008); not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be "better than negligible." *Sofinet* v. *INS*, 188 F. 3d 703, 707 (CA7 1999) (internal quotation marks omitted). Even petitioner acknowledges that "[m]ore than a mere 'possibility' of relief is required." Reply Brief for Petitioner 21 (quoting Brief for Respondent 47). By the same token, simply showing some "possibility of irreparable injury," *Abbassi* v. *INS*, 143 F. 3d 513, 514 (CA9 1998), fails to satisfy the

second factor. As the Court pointed out earlier this Term, the "'possibility' standard is too lenient." *Winter*, *supra*, at 22.

Although removal is a serious burden for many aliens, it is not categorically irreparable, as some courts have said. See, *e. g.*, *Ofosu* v. *McElroy*, 98 F. 3d 694, 699 (CA2 1996) ("Ordinarily, when a party seeks [a stay] pending appeal, it is deemed that exclusion is an irreparable harm"); see also Petitioner's Emergency Motion for a Stay 12 ("[T]he equities particularly favor the alien facing deportation in immigration cases where failure to grant the stay would result in deportation before the alien has been able to obtain judicial review").

The automatic stay prior to IIRIRA reflected a recognition of the irreparable nature of harm from removal before decision on a petition for review, given that the petition abated upon removal. Congress's decision in IIRIRA to allow continued prosecution of a petition after removal eliminated the reason for categorical stays, as reflected in the repeal of the automatic stay in subsection (b)(3)(B). It is accordingly plain that the burden of removal alone cannot constitute the requisite irreparable injury. Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. See Brief for Respondent 44.

Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party. In considering them, courts must be mindful that the Government's role as the respondent in every removal proceeding does not make the public interest in each individual one negligible, as some courts have concluded. See, *e. g.*, *Mohammed*, 309

F. 3d, at 102 (Government harm is nothing more than "one alien [being] permitted to remain while an appeal is decided"); *Ofosu*, *supra*, at 699 (the Government "suffers no offsetting injury" in removal cases).

Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm. But that is no basis for the blithe assertion of an "absence of any injury to the public interest" when a stay is granted. Petitioner's Emergency Motion for a Stay 13. There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and "permit[s] and prolong[s] a continuing violation of United States law." *AADC*, 525 U. S., at 490. The interest in prompt removal may be heightened by the circumstances as well—if, for example, the alien is particularly dangerous, or has substantially prolonged his stay by abusing the processes provided to him. See *ibid.* ("Postponing justifiable deportation (in the hope that the alien's status will change—by, for example, marriage to an American citizen—or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding"). A court asked to stay removal cannot simply assume that "[o]rdinarily, the balance of hardships will weigh heavily in the applicant's favor." *Andreiu*, 253 F. 3d, at 484.

* * *

The Court of Appeals did not indicate what standard it applied in denying Nken a stay, but Circuit precedent required the application of § 1252(f)(2). Because we have concluded that § 1252(f)(2) does not govern, we vacate the judgment of the Court of Appeals and remand the case for consideration of Nken's motion for a stay under the standards set forth in this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion and agree that the traditional four-part standard governs an application to stay the removal of an alien pending judicial review. This is the less stringent of the two standards at issue. See *Kenyeres* v. *Ashcroft*, 538 U. S. 1301, 1303–1305 (2003) (KENNEDY, J., in chambers).

It seems appropriate to underscore that in most cases the debate about which standard should apply will have little practical effect provided the court considering the stay application adheres to the demanding standard set forth. A stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right. *Virginian R. Co.* v. *United States*, 272 U. S. 658, 672–673 (1926); see also *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 24 (2008).

No party has provided the Court with empirical data on the number of stays granted, the correlation between stays granted and ultimate success on the merits, or similar matters. The statistics would be helpful so that experience can demonstrate whether this decision yields a fair and effective result. Then, too, Congress can evaluate whether its policy objectives are being realized by the legislation it has enacted. Based on the Government's representations at oral argument, however, there are grounds for concern. See Tr. of Oral Arg. 35 ("[W]e do not have empirical data, . . . but [stays of removal] are—in the Ninth Circuit in our experience— . . . granted quite frequently"). This concern is of particular importance in those Circuits with States on our international borders. The Court of Appeals for the Ninth Circuit, for example, considers over half of all immigration petitions filed nationwide, and immigration cases compose nearly half of the Ninth Circuit's docket. See Catterson, Symposium, Ninth Circuit Conference: Changes in Appellate Caseload and Its Processing, 48 Ariz. L. Rev. 287, 297 (2006).

Under either standard, even the less stringent standard the Court adopts today, courts should not grant stays of removal on a routine basis. The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, reinforces this point. Before IIRIRA, aliens who left the United States no longer had the ability to seek review of their removal orders, see 8 U. S. C. § 1105a(c) (1994 ed.) (repealed 1996), so they could more easily have established irreparable harm due to their removal. It is perhaps for this reason Congress decided to "stay the deportation of [an] alien pending determination of the petition by the court, unless the court otherwise direct[ed]." § 1105a(a)(3) (same). IIRIRA, however, removed that prohibition (as well as the automatic stay provision), and courts may now review petitions after aliens have been removed. See Brief for Respondent 44; *ante*, at 424, 435; *post*, at 443, 447 (ALITO, J., dissenting).

This change should mean that obtaining a stay of removal is more difficult. Under the Court's four-part standard, the alien must show both irreparable injury and a likelihood of success on the merits, in addition to establishing that the interests of the parties and the public weigh in his or her favor. *Ante*, at 434–435. As the Court explains, because aliens may continue to seek review and obtain relief after removal, "the burden of removal alone cannot constitute the requisite irreparable injury." *Ante*, at 435. As a result of IIRIRA there must be a particularized, irreparable harm beyond mere removal to justify a stay.

That is not to say that demonstration of irreparable harm, without more, is sufficient to justify a stay of removal. The Court has held that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.*, *supra*, at 672. When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other. This is evident in the decisions of Justices

of the Court applying the traditional factors. See, *e. g.*, *Curry* v. *Baker*, 479 U. S. 1301, 1302 (1986) (Powell, J., in chambers) ("It is no doubt true that, absent [a stay], the applicant here will suffer irreparable injury. This fact alone is not sufficient to justify a stay"); *Ruckelshaus* v. *Monsanto Co.*, 463 U. S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("[L]ikelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay"). As those decisions make clear, "'the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.'" *Williams* v. *Zbaraz*, 442 U. S. 1309, 1311 (1979) (STEVENS, J., in chambers) (quoting *Whalen* v. *Roe*, 423 U. S. 1313, 1316 (1975) (Marshall, J., in chambers)).

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court's decision nullifies an important statutory provision that Congress enacted when it reformed the immigration laws in 1996. I would give effect to that provision, and I therefore respectfully dissent.

I

When an alien is charged with being removable from the United States, an immigration judge (IJ) conducts a hearing, receives and considers evidence, and determines whether the alien is removable. See 8 U. S. C. § 1229a(a); 8 CFR §§ 1240.1(a)(1)(i), (c) (2008). If the IJ enters an order of removal, that order becomes final when the alien's appeal to the Board of Immigration Appeals (Board) is unsuccessful or the alien declines to appeal to the Board. See 8 U. S. C. § 1101(a)(47)(B); 8 CFR §§ 1241.1, 1241.31. Once an order of removal has become final, it may be executed at any time. See 8 U. S. C. §§ 1231(a)(1)(B)(i), 1252(b)(8)(C); 8 CFR

§ 1241.33. Removal orders "are self-executing orders, not dependent upon judicial enforcement." *Stone* v. *INS*, 514 U. S. 386, 398 (1995).

After the removal order is final and enforceable, the alien may file a motion to reopen before the IJ, see 8 U. S. C. § 1229a(c)(7), or a petition for review before the appropriate court of appeals, see § 1252(a)(1). While either challenge is pending, the alien may ask the Executive Branch to stay its own hand. See 8 CFR §§ 241.6(a)–(b), 1241.6(a)–(b). If, however, the alien wants *a court* to restrain the Executive from executing a final and enforceable removal order, the alien must seek an injunction to do so. See 8 U. S. C. § 1252(a)(1) (making a final order of removal subject to 28 U. S. C. § 2349(b), which provides that an "interlocutory injunction" can "restrain" the "execution of" a final order). The plain text of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C, 110 Stat. 3009–546, provides the relevant legal standard for granting such relief: "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U. S. C. § 1252(f)(2).

II

In my view, petitioner's request for an order preventing his removal pending disposition of his current petition for review was governed by 8 U. S. C. § 1252(f)(2). Petitioner is "remova[ble] . . . pursuant to a final order," and he sought a court order to "enjoin" the Executive Branch's execution of that removal.

A

There is no dispute that petitioner is "remova[ble] . . . pursuant to a final order." *Ibid.* On March 4, 2005, the IJ determined that petitioner was removable under § 1227(a)(1)(B) and denied his claims for asylum, withholding of removal,

and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 85. See App. 32–43. Petitioner appealed to the Board, and on June 16, 2006, the Board affirmed. *Id.*, at 44–49. On that date, petitioner's order of removal became administratively final, and the Executive Branch became legally entitled to remove him from the United States. See 8 U. S. C. § 1231(a)(1)(B)(i); 8 CFR § 1241.33(a).

B

The only remaining question, therefore, is whether the interim equitable relief that petitioner sought was an order "enjoin[ing]" his removal as that term is used in 8 U. S. C. § 1252(f)(2). I believe that it was.

In ordinary usage, the term "enjoin" means to "require," "command," or "direct" an action, or to "require a person . . . to perform, or to abstain or desist from, some act." Black's Law Dictionary 529 (6th ed. 1990) (hereinafter Black's). See also Webster's Third New International Dictionary 754 (1993) (defining "enjoin" to mean "to direct, prescribe, or impose by order"; "to prohibit or restrain by a judicial order or decree"). When an alien subject to a final order of removal seeks to bar executive officials from acting upon that order pending judicial consideration of a petition for review, the alien is seeking to "enjoin" his or her removal. The alien is seeking an order "restrain[ing]" those officials and "requir[ing]" them to "abstain" from executing the order of removal.

The Court concludes that § 1252(f)(2) does not apply in this case because, in the Court's view, that provision applies only to requests for an injunction and not to requests for a stay. That conclusion is wrong for at least three reasons.

1

First, a stay is "a kind of injunction," Black's 1413, as even the Court grudgingly concedes, see *ante*, at 430 (an order

blocking an alien's removal pending judicial review "might technically be called an injunction"). See also *Teshome-Gebreegziabher* v. *Mukasey*, 528 F. 3d 330, 333 (CA4 2008) ([T]he term "stay" "is a subset of the broader term 'enjoin' "); *Kijowska* v. *Haines*, 463 F. 3d 583, 589 (CA7 2006) (a stay "is a form of injunction"); *Weng* v. *United States Atty. Gen.*, 287 F. 3d 1335, 1338 (CA11 2002) *(per curiam)* ("[T]he plain meaning of enjoin includes the grant of a stay").*

Both statutes and judicial decisions refer to orders that "stay" legal proceedings as injunctions. For example, the Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court." 28 U. S. C. § 2283. See also *Hill* v. *McDonough*, 547 U. S. 573, 578–580 (2006) (habeas petitioner sought injunction to stay his execution); *McMillen* v. *Anderson*, 95

*Thus, it is unremarkable that we have used the word "stay" to describe an injunction blocking an administrative order pending judicial review. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942); *ante*, at 429–430, n. Indeed, our decision in *Scripps-Howard*, *supra*, at 11—like the Court's decision today, *ante*, at 427, 433–434—relied heavily on *Virginian R. Co.* v. *United States*, 272 U. S. 658 (1926), the latter of which referred to "stays" as a subset of "injunctions." See *id.*, at 669 (noting that the power to issue a "stay" "to preserve the *status quo* pending an appeal" is "an incident" of the power "to enjoin" an administrative order); see also *id.*, at 671–672 (referring interchangeably to a three-judge district court's power to issue "injunctions" and "stays"). In any event, both *Scripps-Howard* and *Virginian* are inapposite because petitioner here did not seek to "stay" his removal order pending judicial review of that order; rather, he sought to enjoin the Executive Branch from enforcing his removal order pending judicial review of an entirely separate order. See *Stone* v. *INS*, 514 U. S. 386, 395 (1995) (holding that the IJ's removal order and the Board's denial of a motion to reopen are "two separate final orders"); *Bak* v. *INS*, 682 F. 2d 441, 442 (CA3 1982) *(per curiam)* ("The general rule is that a motion to reopen deportation proceedings is a new, independently reviewable order"); Brief for Respondent 51–52 (differentiating petitioner's challenge to the IJ's removal order, which "became final well over a year ago," from "petitioner's latest challenge[, which] is currently pending" before the Court of Appeals); *id.*, at 13–14, 36–37 (similar).

U. S. 37, 42 (1877) ("[Petitioner] can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction"); *Nivens* v. *Gilchrist*, 319 F. 3d 151, 153 (CA4 2003) (denial of "injunction" to "stay [a] trial"); *Jove Eng., Inc.* v. *IRS*, 92 F. 3d 1539, 1546 (CA11 1996) (automatic stay is "essentially a court-ordered injunction"). And it is revealing that the standard that the Court adopts for determining whether a stay should be ordered is the standard that is used in weighing an application for a preliminary injunction. *Ante*, at 434 (adopting preliminary injunction standard set out in *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 24 (2008)).

2

Second, the context surrounding IIRIRA's enactment suggests that § 1252(f)(2) was an important—not a superfluous—statutory provision. This Court should interpret it accordingly.

IIRIRA was designed to expedite removal and restrict the ability of aliens to remain in this country pending judicial review. Before IIRIRA, the filing of a petition for review automatically stayed removal unless the court of appeals directed otherwise. 8 U. S. C. § 1105a(a)(3) (1994 ed.) (repealed 1996). IIRIRA repealed this provision and, to drive home the point, specifically provided that "[s]ervice of the petition [for judicial review] . . . *does not* stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." § 1252(b)(3)(B) (2006 ed.) (emphasis added). In addition, "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 486 (1999) (emphasis deleted). Indeed, "protecting the Executive's discretion from the courts . . . can fairly be said to be the theme of the legislation." *Ibid.* Section 1252(f)(2), which provides that a court may not block removal during the judicial review process

unless a heightened standard is met, fits perfectly within this scheme.

The Court's interpretation, by contrast, produces anomalous results. If § 1252(f)(2) does not provide the standard to be used by the courts in determining whether an alien should be permitted to remain in this country pending judicial review, then IIRIRA left the formulation of that standard entirely to the discretion of the courts. A Congress that sought to expedite removal and limit judicial discretion is unlikely to have taken that approach.

More important, if § 1252(f)(2) does not set the standard for blocking removal pending judicial review, then, as the Court concedes, "the exact role of subsection (f)(2) . . . is not easy to explain." *Ante*, at 431. "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979). We should not lightly conclude that Congress enacted a provision that serves no function, and the Court's hypertechnical distinction between an injunction and a stay does not provide a sufficient justification for adopting an interpretation that renders § 1252(f)(2) meaningless. That result is particularly anomalous in the context of § 1252(f)(2), which Congress said should apply "[n]otwithstanding any other provision of law."

3

Third, if stays and injunctions really are two entirely distinct concepts, the order that petitioner sought here is best viewed as an injunction. Insofar as there is a difference between the two concepts, I agree with the Court that it boils down to this: "A stay 'simply suspend[s] judicial alteration of the status quo,'" whereas an injunction "'grants judicial intervention that has been withheld by lower courts.'" *Ante*, at 429 (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers)). See also Black's 1413 (defining a stay as an "act of arresting a judicial proceeding by the order of a court").

Here, petitioner did not seek an order "suspend[ing] judicial alteration of the status quo." Instead, he sought an order barring Executive Branch officials from removing him from the country. Such an order is best viewed as an injunction. See *McCarthy* v. *Briscoe*, 429 U. S. 1317, 1317, n. 1 (1976) (Powell, J., in chambers) (although applicants claimed to seek a "stay," the court granted an "injunction" because "the applicants actually [sought] affirmative relief" against executive officials).

Even if petitioner had sought to block his removal pending judicial review of the order of removal, any interim order blocking his removal would best be termed an injunction. When the Board affirmed petitioner's final removal order in 2006, it gave the Executive Branch all of the legal authority it needed to remove petitioner from the United States immediately. An order preventing an executive officer from exercising that authority does not "simply suspend judicial alteration of the status quo." *Ohio Citizens for Responsible Energy*, *supra*, at 1313. Instead, such an order is most properly termed an injunction because it blocks executive officials from carrying out what they view as proper enforcement of the immigration laws. And in that regard, it is significant that the Hobbs Act—which governs judicial review under IIRIRA, see 8 U. S. C. § 1252(a)(1)—refers to an "application for an *interlocutory injunction* restraining or suspending the enforcement, operation, or execution of, or setting aside" a final administrative order. 28 U. S. C. § 2349(b) (emphasis added).

In the present case, however, petitioner did not seek to block his removal pending judicial review of his final order of removal. That review concluded long ago. What petitioner asked for was an order barring the Executive Branch from removing him pending judicial review of an entirely different order, the Board's order denying his third motion to reopen the proceedings. Petitioner's current petition for review does not contest the correctness of the removal order.

Rather, he argues that the Board should have set aside that order due to alleged changes in conditions in his home country. A motion to reopen an administrative proceeding that is no longer subject to direct judicial review surely seeks "'an order *altering* the legal status quo.'" *Ante*, at 429 (majority opinion) (quoting *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1302 (1993) (Rehnquist, C. J., in chambers)). Consequently, the relief that petitioner sought here is best categorized as an injunction.

III

In addition to its highly technical distinction between an injunction and a stay, the Court advances several other justifications for its decision, but none is persuasive.

The Court argues that applying 8 U. S. C. § 1252(f)(2) would "deprive" us of our "'customary' stay power." *Ante*, at 433. As noted above, however, restricting judicial discretion was "the theme" of IIRIRA, *American-Arab Anti-Discrimination Comm.*, 525 U. S., at 486. And Congress is free to regulate or eliminate the relief that federal courts may award, within constitutional limits that the Court does not invoke here. Cf. *INS* v. *St. Cyr*, 533 U. S. 289, 299–300 (2001).

The Court opines that subsection (b)(3)(B)—not subsection (f)(2)—is "the natural place to locate an amendment to the traditional standard governing the grant of stays." *Ante*, at 431. But I would not read too much into Congress' decision to locate such a provision in one subsection rather than in another subsection of the same provision. In addition, there is also nothing "unnatural" about Congress' use of two separate subsections of § 1252 to address a common subject. For example, § 1252(a)(2)(A) lists several matters over which "no court shall have jurisdiction to review," while § 1252(g) lists another subject over which "no court shall have jurisdiction to hear any cause or claim." The fact that those provisions are separated by five subsections and framed in slightly

different terms does not justify ignoring them, just as the space and difference in terminology between § 1252(b)(3)(B) and § 1252(f)(2) cannot justify the Court's result.

Noting that the term "stay" is used in § 1252(b)(3)(B) but not in § 1252(f)(2), the Court infers that Congress did not intend that the latter provision apply to stays. *Ante*, at 430–431. But the use of the term "stay" in subsection (b)(3)(B) is easy to explain. As noted above, prior to IIRIRA, the Immigration and Nationality Act provided for an automatic "stay" of deportation upon the filing of a petition for review unless the court of appeals directed otherwise. See 8 U. S. C. § 1105a(a)(3) (1994 ed.) (repealed 1996). The statute provided:

> "The service of the petition for review upon [the Attorney General's agents] shall *stay* the deportation of the alien pending determination of the petition by the court . . . unless the court otherwise directs . . . ." *Ibid.* (emphasis added).

In IIRIRA, Congress repealed that provision and, to make sure that the pre-IIRIRA practice would not be continued, enacted a new provision that explicitly inverted the prior rule:

> "Service of the petition on the officer or employee does not *stay* the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." § 1252(b)(3)(B) (2006 ed.) (emphasis added).

It is thus apparent that § 1252(b)(3)(B) uses the term "stay" because that is the term that was used in the provision that it replaced.

Finally, the Court worries that applying § 1252(f)(2) would create inequitable results by allowing removable aliens to remain in the United States only if they can prove the merits of their claims under a "higher standard" than the one they would otherwise have to satisfy. *Ante*, at 432–433. But as the Court acknowledges, *ante*, at 424, IIRIRA specifically

contemplated that most aliens wishing to contest final orders of removal would be forced to pursue their appeals from abroad. See § 306(b), 110 Stat. 3009–612 (repealing 8 U. S. C. § 1105a (1994 ed.)). If such an alien seeks to remain in the United States pending judicial review, IIRIRA provides that the alien must make the heightened showing required under § 1252(f)(2). Congress did not think that this scheme is inequitable, and we must heed what § 1252(f)(2) prescribes.

* * *

In my view, the Fourth Circuit was correct to apply § 1252(f)(2) and to deny petitioner's application for an order barring his removal pending judicial review. Therefore, I would affirm the judgment of the Court of Appeals.

Syllabus

CONE *v.* BELL, WARDEN

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

No. 07–1114. Argued December 9, 2008—Decided April 28, 2009

After the State discredited petitioner Cone's defense that he killed two people while suffering from acute psychosis caused by drug addiction, he was convicted and sentenced to death. The Tennessee Supreme Court affirmed on direct appeal, and the state courts denied postconviction relief. Later, in a second petition for state postconviction relief, Cone raised the claim that the State had violated *Brady* v. *Maryland*, 373 U. S. 83, by suppressing witness statements and police reports that would have corroborated his insanity defense and bolstered his case in mitigation of the death penalty. The postconviction court denied him a hearing on the ground that the *Brady* claim had been previously determined, either on direct appeal or in earlier collateral proceedings. The State Court of Criminal Appeals affirmed. Cone then filed a petition for a writ of habeas corpus in Federal District Court. That court denied relief, holding the *Brady* claim procedurally barred because the state courts' disposition rested on adequate and independent state grounds: Cone had waived it by failing to present his claim in state court. Even if he had not defaulted the claim, ruled the court, it would fail on its merits because none of the withheld evidence would have cast doubt on his guilt. The Sixth Circuit agreed with the latter conclusion, but considered itself barred from reaching the claim's merits because the state courts had ruled the claim previously determined or waived under state law.

Held:

1. The state courts' rejection of Cone's *Brady* claim does not rest on a ground that bars federal review. Neither of the State's asserted justifications for such a bar—that the claim was decided by the State Supreme Court on direct review or that Cone had waived it by never properly raising it in state court—provides an independent and adequate state ground for denying review of Cone's federal claim. The state postconviction court's denial of the *Brady* claim on the ground it had been previously determined in state court rested on a false premise: Cone had not presented the claim in earlier proceedings, and, consequently, the state courts had not passed on it. The Sixth Circuit's rejection of the claim as procedurally defaulted because it had been twice presented to the Tennessee courts was thus erroneous. Also unpersua-

sive is the State's alternative argument that federal review is barred because the *Brady* claim was properly dismissed by the state postconviction courts as waived. Those courts held only that the claim had been previously determined, and this Court will not second-guess their judgment. Because the claim was properly preserved and exhausted in state court, it is not defaulted. Pp. 464–469.

2. The lower federal courts failed to adequately consider whether the withheld documents were material to Cone's sentence. Both the quantity and quality of the suppressed evidence lend support to Cone's trial position that he habitually used excessive amounts of drugs, that his addiction affected his behavior during the murders, and that the State's contrary arguments were false and misleading. Nevertheless, even when viewed in the light most favorable to Cone, the evidence does not sustain his insanity defense: His behavior before, during, and after the crimes was inconsistent with the contention that he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform it to the requirements of law. Because the likelihood that the suppressed evidence would have affected the jury's verdict on the insanity issue is remote, the Sixth Circuit did not err by denying habeas relief on the ground that such evidence was immaterial to the jury's guilt finding. The same cannot be said of that court's summary treatment of Cone's claim that the suppressed evidence would have influenced the jury's sentencing recommendation. Because the suppressed evidence might have been material to the jury's assessment of the proper punishment, a full review of that evidence and its effect on the sentencing verdict is warranted. Pp. 469–475.

492 F. 3d 743, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment, *post*, p. 476. ALITO, J., filed an opinion concurring in part and dissenting in part, *post*, p. 478. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 486.

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Patricia A. Millett*, *Amy Howe*, *Kevin K. Russell*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Paul R. Bottei*.

Jennifer L. Smith, Associate Deputy Attorney General of Tennessee, argued the cause for respondent. With her on

the brief were *Robert E. Cooper, Jr.*, Attorney General, and *Michael E. Moore*, Solicitor General.*

JUSTICE STEVENS delivered the opinion of the Court.

The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure "that 'justice shall be done'" in all criminal prosecutions. *United States* v. *Agurs*, 427 U. S. 97, 111 (1976) (quoting *Berger* v. *United States*, 295 U. S. 78, 88 (1935)). In *Brady* v. *Maryland*, 373 U. S. 83 (1963), we held that when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant's right to due process, "irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87.

In this case, Gary Cone, a Vietnam veteran sentenced to death, contends that the State of Tennessee violated his right to due process by suppressing witness statements and police reports that would have corroborated his trial defense and bolstered his case in mitigation of the death penalty. At his trial in 1982, Cone asserted an insanity defense, contending that he had killed two people while suffering from acute amphetamine psychosis, a disorder caused by drug addiction. The State of Tennessee discredited that defense, alleging that Cone's drug addiction was "'baloney.'" 492 F. 3d 743, 760 (CA6 2007) (Merritt, J., dissenting). Ten years later, Cone learned that the State had suppressed evidence supporting his claim of drug addiction.

Cone presented his new evidence to the state courts in a petition for postconviction relief, but the Tennessee courts

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*Briefs of *amici curiae* urging reversal were filed for Former Prosecutors by *Walter Dellinger* and *Sri Srinivasan;* and for Veterans for America by *Donald B. Verrilli, Jr.*

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

denied him a hearing on the ground that his *Brady* claim had been "previously determined," *id.*, at 753 (majority opinion), either on direct appeal from his conviction or in earlier collateral proceedings. On application for a writ of habeas corpus pursuant to 28 U. S. C. § 2254, the Federal District Court concluded that the state courts' disposition rested on an adequate and independent state ground that barred further review in federal court, and the Court of Appeals for the Sixth Circuit agreed. Doubt concerning the correctness of that holding, coupled with conflicting decisions from other Courts of Appeals, prompted our grant of certiorari. 554 U. S. 916 (2008).

After a complete review of the trial and postconviction proceedings, we conclude that the Tennessee courts' rejection of petitioner's *Brady* claim does not rest on a ground that bars federal review. Furthermore, although the District Court and the Court of Appeals passed briefly on the merits of Cone's claim, neither court distinguished the materiality of the suppressed evidence with respect to Cone's guilt from the materiality of the evidence with respect to his punishment. While we agree that the withheld documents were not material to the question whether Cone committed murder with the requisite mental state, the lower courts failed to adequately consider whether that same evidence was material to Cone's sentence. Therefore, we vacate the decision of the Court of Appeals and remand the case to the District Court to determine in the first instance whether there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment of the appropriate penalty for Cone's crimes.

I

On the afternoon of Saturday, August 10, 1980, Cone robbed a jewelry store in downtown Memphis, Tennessee. Fleeing the scene by car, he led police on a high-speed chase

into a residential neighborhood. Once there, he abandoned his vehicle and shot a police officer.[1] When a bystander tried to impede his escape, Cone shot him, too, before escaping on foot.

A short time later, Cone tried to hijack a nearby car. When that attempt failed (because the driver refused to surrender his keys), Cone tried to shoot the driver and a hovering police helicopter before realizing he had run out of ammunition. He then fled the scene. Although police conducted a thorough search, Cone was nowhere to be found.

Early the next morning, Cone reappeared in the same neighborhood at the door of an elderly woman. He asked to use her telephone, and when she refused, he drew a gun. Before he was able to gain entry, the woman slammed the door and called the police. By the time officers arrived, however, Cone had once again disappeared.

That afternoon, Cone gained entry to the home of 93-year-old Shipley Todd and his wife, 79-year-old Cleopatra Todd. Cone beat the couple to death with a blunt instrument and ransacked the first floor of their home. Later, he shaved his beard and escaped to the airport without being caught. Cone then traveled to Florida, where he was arrested several days later after robbing a drugstore in Pompano Beach.

A Tennessee grand jury charged Cone with two counts of first-degree murder, two counts of murder in the perpetration of a burglary, three counts of assault with intent to murder, and one count of robbery by use of deadly force. At his jury trial in 1982, Cone did not challenge the overwhelming physical and testimonial evidence supporting the charges against him. His sole defense was that he was not guilty by reason of insanity.

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[1] From the abandoned vehicle, police recovered stolen jewelry, large quantities of illegal and prescription drugs, and approximately $2,400 in cash. Much of the cash was later connected to a grocery store robbery that had occurred on the previous day.

Cone's counsel portrayed his client as suffering from severe drug addiction attributable to trauma Cone had experienced in Vietnam. Counsel argued that Cone had committed his crimes while suffering from chronic amphetamine psychosis, a disorder brought about by his drug abuse. That defense was supported by the testimony of three witnesses. First was Cone's mother, who described her son as an honorably discharged Vietnam veteran who had changed following his return from service. She recalled Cone describing "how terrible" it had been to handle the bodies of dead soldiers, and she explained that Cone slept restlessly and sometimes "holler[ed]" in his sleep. Tr. 1643–1645 (Apr. 20, 1982). She also described one occasion, following Cone's return from service, when a package was shipped to him that contained marijuana. Before the war, she asserted, Cone had not used drugs of any kind.

Two expert witnesses testified on Cone's behalf. Matthew Jaremko, a clinical psychologist, testified that Cone suffered from substance abuse and posttraumatic stress disorders related to his military service in Vietnam. Jaremko testified that Cone had expressed remorse for the murders, and he opined that Cone's mental disorder rendered him substantially incapable of conforming his conduct to the law. Jonathan Lipman, a neuropharmacologist, recounted at length Cone's history of illicit drug use, which began after Cone joined the Army and escalated to the point where Cone was consuming "rather horrific" quantities of drugs daily. App. 100. According to Lipman, Cone's drug abuse had led to chronic amphetamine psychosis, a disorder manifested through hallucinations and ongoing paranoia that prevented Cone from obeying the law and appreciating the wrongfulness of his actions.

In rebutting Cone's insanity defense the State's strategy throughout trial was to present Cone as a calculating, intelligent criminal who was fully in control of his decisions and actions at the time of the crimes. A key component of that

strategy involved discrediting Cone's claims of drug use.[2] Through cross-examination, the State established that both defense experts' opinions were based solely on Cone's representations to them about his drug use rather than on any independently corroborated sources, such as medical records or interviews with family or friends. The prosecution also adduced expert and lay testimony to establish that Cone was not addicted to drugs and had acted rationally and intentionally before, during, and after the Todd murders.

Particularly damaging to Cone's defense was the testimony of rebuttal witness Ilene Blankman, who had spent time with Cone several months before the murders and at whose home Cone had stayed in the days leading up to his arrest in Florida. Blankman admitted to being a former heroin addict but testified that she no longer used drugs and tried to stay away from people who did. She testified that she had never seen Cone use drugs, had never observed track marks on his body, and had never seen him exhibit signs of paranoia.

Emphasizing the State's position with respect to Cone's alleged addiction, the prosecutor told the jury during closing argument, "[Y]ou're not dealing with a crazy person, an insane man. A man . . . out of his mind. You're dealing, I submit to you, with a premeditated, cool, deliberate—and even cowardly, really—murderer." Tr. 2084 (Apr. 22, 1982). Pointing to the quantity of drugs found in Cone's car, the prosecutor suggested that far from being a drug addict, Cone was actually a drug dealer. The prosecutor argued, "I'm not trying to be absurd, but he says he's a drug addict. I say

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[2] The State also cast doubt on Cone's defense by eliciting testimony that Cone had enrolled in college following his return from Vietnam and had graduated with high honors. Later, after serving time in prison for an armed robbery, Cone gained admission to the University of Arkansas Law School. The State suggested that Cone's academic success provided further proof that he was not impaired following his return from war.

balony. He's a drug seller. Doesn't the proof show that?" App. 107.[3]

The jury rejected Cone's insanity defense and found him guilty on all counts. At the penalty hearing, the prosecution asked the jury to find that Cone's crime met the criteria for four different statutory aggravating factors, any one of which would render him eligible for a capital sentence.[4] Cone's counsel called no witnesses but instead rested on the evidence adduced during the guilt phase proceedings. Acknowledging that the prosecution's experts had disputed the existence of Cone's alleged mental disorder, counsel nevertheless urged the jury to consider Cone's drug addiction when weighing the aggravating and mitigating factors in the case.[5] The jury found all four aggravating factors and unanimously returned a sentence of death.[6]

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[3] In his closing rebuttal argument, the prosecutor continued to press the point, asserting: "There aren't any charges for drug sales, but that doesn't mean that you can't look and question in deciding whether or not this man was, in fact, a drug user, or why he had those drugs. Did he just have those drugs, or did he have those drugs and thousands of dollars in that car? Among those drugs are there only the drugs he used? How do we know if he used drugs? The only thing that we ever had that he used drugs, period, is the fact that those drugs were in the car and what he told people. What he told people. But according to even what he told people, there are drugs in there he didn't even use." Tr. 2068 (Apr. 22, 1982).

[4] The jury could impose a capital sentence only if it unanimously determined that one or more statutory aggravating circumstances had been proved by the State beyond a reasonable doubt, and that the mitigating circumstances of the case did not outweigh any statutory aggravating factors. Tenn. Code Ann. § 39–2–203(g) (1982).

[5] As defense counsel emphasized to the jury, one of the statutory mitigating factors it was required to consider was whether "[t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment." § 39–2–203(j)(8).

[6] Specifically, the jury found Cone had committed one or more prior felonies involving the use or threat of violence, see § 39–2–203(i)(2); the mur-

II

On direct appeal Cone raised numerous challenges to his conviction and sentence. Among those was a claim that the prosecution violated state law by failing to disclose a tape-recorded statement and police reports relating to several trial witnesses. See *id.*, at 114–117. The Tennessee Supreme Court rejected each of Cone's claims, and affirmed his conviction and sentence. *State* v. *Cone*, 665 S. W. 2d 87 (1984).[7] Cone then filed a petition for postconviction relief, primarily raising claims that his trial counsel had been ineffective; the Tennessee Court of Criminal Appeals affirmed the denial of that petition in 1987. *Cone* v. *State*, 747 S. W. 2d 353.

In 1989, Cone, acting *pro se*, filed a second petition for postconviction relief, raising myriad claims of error. Among these was a claim that the State had failed to disclose evidence in violation of his rights under the United States Con-

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ders had been committed for the purpose of avoiding, interfering with, or preventing Cone's lawful arrest or prosecution, see § 39–2–203(i)(6); the murders were especially heinous, atrocious, or cruel in that they involved torture and depravity of mind, see § 39–2–203(i)(5); and Cone had knowingly created a risk of death to two or more persons, other than the victim murdered, during his act of murder, see § 39–2–203(i)(3). The Tennessee Supreme Court later observed that by finding Cone guilty of murder in the first degree during the perpetration of a burglary, the jury implicitly found the existence of an additional statutory aggravating factor: that the murders occurred while Cone was committing a burglary, § 39–2–203(i)(7). *State* v. *Cone*, 665 S. W. 2d 87, 94 (1984).

[7] In summarizing the trial proceedings the Tennessee Supreme Court observed: "The only defense interposed on [Cone's] behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. Their testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse." *Id.*, at 90.

stitution. At the State's behest, the postconviction court summarily denied the petition, concluding that all the claims raised in it had either been "previously determined" or "waived." Order Dismissing Petition for Post-Conviction Relief in *Cone* v. *State*, No. P–06874 (Crim. Ct. Shelby Cty., Tenn., Jan. 2, 1990).[8] At that time, the court did not specify which claims fell into which category.

Cone appealed the denial of his petition to the Tennessee Court of Criminal Appeals, asserting that the postconviction court had erred by dismissing 13 claims—his *Brady* claim among them—as previously determined when, in fact, they had not been "previously addressed or determined by any court." Brief for Petitioner-Appellant in No. P–06874, pp. 23–24, and n. 11. In addition Cone urged the court to remand the case to allow him, with the assistance of counsel, to rebut the presumption that he had waived any of his claims by not raising them at an earlier stage in the litigation. *Id.*, at 24.[9] The court agreed and remanded the case for further proceedings.

On remand counsel was appointed, and an amended petition was filed. The State once again urged the postconvic-

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[8] Under Tennessee law in effect at the time, a criminal defendant was entitled to collateral relief if his conviction or sentence violated "any right guaranteed by the constitution of [Tennessee] or the Constitution of the United States." Tenn. Code Ann. § 40–30–105 (1982); see also § 40–30–102. Any hearing on a petition for postconviction relief was limited, however, to claims that had not been "waived or previously determined." See § 40–30–111. A ground for relief was "previously determined" if "a court of competent jurisdiction ha[d] ruled on the merits [of the claim] after a full and fair hearing." § 40–30–112(a). The claim was waived "if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." § 40–30–112(b)(1).

[9] See *Swanson* v. *State*, 749 S. W. 2d 731, 734 (Tenn. 1988) (courts should not dismiss postconviction petitions on technical grounds unless the petitioner has first had "reasonable opportunity, with aid of counsel, to file amendments" and rebut presumption of waiver (internal quotation marks omitted)).

tion court to dismiss Cone's petition. Apparently conflating the state-law disclosure claim Cone had raised on direct appeal with his newly filed *Brady* claim, the State represented that the Tennessee Supreme Court had already decided the *Brady* issue and that Cone was therefore barred from relitigating it. See App. 15–16.

While that petition remained pending before the postconviction court, the Tennessee Court of Appeals held for the first time that the State's Public Records Act allowed a criminal defendant to review the prosecutor's file in his case. See *Capital Case Resource Center of Tenn., Inc.* v. *Woodall*, No. 01–A–019104CH00150, 1992 WL 12217 (Jan. 29, 1992). Based on that holding, Cone obtained access to the prosecutor's files, in which he found proof that evidence had indeed been withheld from him at trial. Among the undisclosed documents Cone discovered were statements from witnesses who had seen him several days before and several days after the murders. The witnesses described Cone's appearance as "wild eyed," App. 50, and his behavior as "real weird," *id.*, at 49. One witness affirmed that Cone had appeared "to be drunk or high." *Ibid.* The file also contained a police report describing Cone's arrest in Florida following the murders. In that report, a police officer described Cone looking around "in a frenzied manner," and "walking in [an] agitated manner" prior to his apprehension. *Id.*, at 53. Multiple police bulletins describing Cone as a "drug user" and a "heavy drug user" were also among the undisclosed evidence. See *id.*, at 55–59.

With the newly discovered evidence in hand, Cone amended his postconviction petition once again in October 1993, expanding his *Brady* claim to allege more specifically that the State had withheld exculpatory evidence demonstrating that he "did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past." App. 20. Cone pointed to specific examples of evidence that had been withheld, alleging the evidence

was "exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence," and that there was "a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted [him] and would not have sentenced him to death." *Id.*, at 20–21.[10] In a lengthy affidavit submitted with his amended petition, Cone explained that he had not raised his *Brady* claim in earlier proceedings because the facts underlying it "ha[d] been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding." App. 18.

After denying Cone's request for an evidentiary hearing, the postconviction court denied relief on each claim presented in the amended petition. Many of the claims were dismissed on the ground that they had been waived by Cone's failure to raise them in earlier proceedings; however, consistent with the position urged by the State, the court dismissed many others, including the *Brady* claim, as mere "re-statements of previous grounds heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition." App. 22.

Noting that "the findings of the trial court in post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment," the Tennessee Court of Criminal Appeals affirmed. *Cone* v. *State*, 927 S. W. 2d 579, 581–582 (1995). The court concluded that Cone had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief *which had not been previously determined.*" *Id.*, at 582 (emphasis added). Cone unsuccessfully petitioned for re-

[10] As examples of evidence that had been withheld, Cone pointed to "statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins" and "statements contained in official police reports." App. 20.

view in the Tennessee Supreme Court, and we denied certiorari. *Cone* v. *Tennessee*, 519 U. S. 934 (1996).

III

In 1997, Cone filed a petition for a federal writ of habeas corpus. Without disclosing to the District Court the contrary position it had taken in the state-court proceedings, the State acknowledged that Cone's *Brady* claim had not been raised prior to the filing of his second postconviction petition. However, wrenching out of context the state appellate court's holding that Cone had "waived 'all claims . . . which had not been previously determined,'" the State now asserted the *Brady* claim had been waived. App. 39 (quoting *Cone*, 927 S. W. 2d, at 582).

In May 1998, the District Court denied Cone's request for an evidentiary hearing on his *Brady* claim. Lamenting that its consideration of Cone's claims had been "made more difficult" by the parties' failure to articulate the state procedural rules under which each of Cone's claims had allegedly been defaulted, App. to Pet. for Cert. 98a, the District Court nevertheless held that the *Brady* claim was procedurally barred. After parsing the claim into 11 separate subclaims based on 11 pieces of withheld evidence identified in the habeas petition, the District Court concluded that Cone had waived each subclaim by failing to present or adequately develop it in state court. App. to Pet. for Cert. 112a–113a. Moreover, the court concluded that even if Cone had not defaulted his *Brady* claim, it would fail on its merits because none of the withheld evidence would have cast doubt on Cone's guilt. App. to Pet. for Cert. 116a–119a. Throughout its opinion the District Court repeatedly referenced factual allegations contained in early versions of Cone's second petition for postconviction relief rather than the amended version of the petition upon which the state court's decision had rested. See, *e. g.*, *id.*, at 112a.

After the District Court dismissed the remainder of Cone's federal claims, the Court of Appeals for the Sixth Circuit granted him permission to appeal several issues, including the alleged suppression of *Brady* material. Before the Court of Appeals, the State shifted its procedural default argument once more, this time contending that Cone had "simply never raised" his *Brady* claim in the state court because he failed to make adequate factual allegations to support that claim in his second petition for postconviction relief. App. 41. Repeating the District Court's error, the State directed the Court of Appeals' attention to Cone's *pro se* petition and to the petition Cone's counsel filed *before* he gained access to the prosecution's case file. *Id.*, at 41–42, and n. 7. In other words, instead of citing the October 1993 amended petition on which the state court's decision had been based and to which its order explicitly referred, the State pointed the court to earlier, less developed versions of the same claim.

The Court of Appeals concluded that Cone had procedurally defaulted his *Brady* claim and had failed to show cause and prejudice to overcome the default. *Cone* v. *Bell*, 243 F. 3d 961, 968 (2001). The court acknowledged that Cone had raised his *Brady* claim. 243 F. 3d, at 969. Nevertheless, the court considered itself barred from reaching the merits of the claim because the Tennessee courts had concluded the claim was "previously determined or waived under Tenn. Code Ann. § 40–30–112." *Ibid.*

Briefly mentioning several isolated pieces of suppressed evidence, the court summarily concluded that even if Cone's *Brady* claim had not been defaulted, the suppressed evidence would not undermine confidence in the verdict (and hence was not *Brady* material) "because of the overwhelming evidence of Cone's guilt." 243 F. 3d, at 968, 969. The court did not discuss whether any of the undisclosed evidence was material with respect to Cone's sentencing proceedings.

Although the Court of Appeals rejected Cone's *Brady* claim, it held that he was entitled to have his death sentence vacated because of his counsel's ineffective assistance at sentencing. See 243 F. 3d, at 975. In 2002, this Court reversed that holding after concluding that the Tennessee courts' rejection of Cone's ineffective-assistance-of-counsel claim was not "objectively unreasonable" within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Bell* v. *Cone*, 535 U. S. 685, 699.

In 2004, following our remand, the Court of Appeals again entered judgment ordering a new sentencing hearing, this time based on the purported invalidity of an aggravating circumstance found by the jury. *Cone* v. *Bell*, 359 F. 3d 785. Again we granted certiorari and reversed, relying in part on the deferential standard that governs our review of state-court decisions under AEDPA. See *Bell* v. *Cone*, 543 U. S. 447, 452–458 (2005) *(per curiam)*.

Following our second remand, the Court of Appeals revisited Cone's *Brady* claim. This time, the court divided the claim into four separate subclaims: "(1) evidence regarding [Cone's] drug use; (2) evidence that might have been useful to impeach the testimony and credibility of prosecution witness Sergeant Ralph Roby; (3) FBI reports;[11] and (4) evidence showing that prosecution witness Ilene Blankman was untruthful and biased." 492 F. 3d, at 753. Noting that it had previously found all four subclaims to be procedurally defaulted, the court declined to reconsider its earlier decision. See *ibid.* (citing *Cone*, 243 F. 3d, at 968–970). At the same time, the court reiterated that the withheld evidence "would

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[11] In the course of federal habeas proceedings, Cone had obtained access to files from the Federal Bureau of Investigation where he found additional previously undisclosed evidence not contained in the state prosecutor's case file. The suppressed FBI documents make repeated reference to Cone's drug use and corroborate his expert's representation that he had used drugs during his prior incarceration for armed robbery. See App. 26–28.

not have overcome the overwhelming evidence of Cone's guilt in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs." 492 F. 3d, at 756. Summarily discounting Cone's contention that the withheld evidence was material with respect to his sentence, the court concluded that the introduction of the suppressed evidence would not have altered the jurors' finding that Cone's alleged drug use did not "vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence." *Id.*, at 757.

Judge Merritt dissented. He castigated the State not only for withholding documents relevant to Cone's sole defense and plea for mitigation, but also for its "falsification of the procedural record . . . concerning the State's procedural default defense to the *Brady* claim." *Id.*, at 760. Over the dissent of seven judges, Cone's petition for rehearing en banc was denied. 505 F. 3d 610 (2007).

We granted certiorari to answer the question whether a federal habeas claim is "'procedurally defaulted'" when it is twice presented to the state courts. Pet. for Cert. i.

IV

During the state and federal proceedings below, the State of Tennessee offered two different justifications for denying review of the merits of Cone's *Brady* claim. First, in connection with Cone's amended petition for state postconviction relief, the State argued that the *Brady* claim was barred because it had been decided on direct appeal. See App. 15–16. Then, in connection with Cone's federal habeas petition, the State argued that Cone's claim was waived because it had never been properly raised before the state courts. See *id.*, at 39. The District Court and the Court of Appeals agreed that Cone's claim was procedurally barred, but for different reasons. The District Court held that the claim

had been waived, App. to Pet. for Cert. 102a, while the Court of Appeals held that the claim had been either waived or previously determined, *Cone*, 243 F. 3d, at 969. We now conclude that neither prior determination nor waiver provides an independent and adequate state ground for denying Cone review of his federal claim.

It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that "is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991); *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). In the context of federal habeas proceedings, the independent and adequate state ground doctrine is designed to "ensur[e] that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Coleman*, 501 U. S., at 732. When a petitioner fails to properly raise his federal claims in state court, he deprives the State of "an opportunity to address those claims in the first instance" and frustrates the State's ability to honor his constitutional rights. *Id.*, at 732, 748. Therefore, consistent with the longstanding requirement that habeas petitioners must exhaust available state remedies before seeking relief in federal court, we have held that when a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review. See *id.*, at 731.

That does not mean, however, that federal habeas review is barred every time a state court invokes a procedural rule to limit its review of a state prisoner's claims. We have recognized that "'[t]he adequacy of state procedural bars to the assertion of federal questions' . . . is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" *Lee*, 534 U. S., at 375 (quoting *Douglas* v.

Alabama, 380 U. S. 415, 422 (1965)); see also *Coleman*, 501 U. S., at 736 ("[F]ederal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds"). The question before us now is whether federal review of Cone's *Brady* claim is procedurally barred either because the claim was twice presented to the state courts or because it was waived, and thus not presented at all.

First, we address the contention that the repeated presentation of a claim in state court bars later federal review. The Tennessee postconviction court denied Cone's *Brady* claim after concluding it had been previously determined following a full and fair hearing in state court. See Tenn. Code Ann. §40–30–112(a). That conclusion rested on a false premise: Contrary to the state courts' finding, Cone had not presented his *Brady* claim in earlier proceedings, and, consequently, the state courts had not passed on it. The Sixth Circuit recognized that Cone's *Brady* claim had not been decided on direct appeal, see *Cone*, 243 F. 3d, at 969, but felt constrained by the state courts' refusal to reach the merits of that claim on postconviction review. The Court of Appeals concluded that because the state postconviction courts had applied a state procedural law to avoid reaching the merits of Cone's *Brady* claim, "an 'independent and adequate' state ground" barred federal habeas review. 243 F. 3d, at 969. In this Court the State does not defend that aspect of the Court of Appeals' holding, and rightly so.

When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. In *Ylst* v. *Nunnemaker*, 501 U. S. 797, 804, n. 3 (1991), we observed in passing that when a state court declines to revisit a claim it has already adjudicated, the effect of the later decision upon the availability of federal habeas is "nil" because "a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing

procedural default."[12] When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for federal adjudication. See 28 U. S. C. § 2254(b)(1)(A) (permitting issuance of a writ of habeas corpus only after "the applicant has exhausted the remedies available in the courts of the State").

A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once. Accordingly, insofar as the Court of Appeals rejected Cone's *Brady* claim as procedurally defaulted because the claim had been twice presented to the Tennessee courts, its decision was erroneous.

As an alternative (and contradictory) ground for barring review of Cone's *Brady* claim, the State has argued that Cone's claim was properly dismissed by the state postconviction court on the ground it had been waived. We are not persuaded. The state appellate court affirmed the denial of Cone's *Brady* claim on the same mistaken ground offered by the lower court—that the claim had been previously determined.[13] Contrary to the State's assertion, the Tennessee

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[12] With the exception of the Sixth Circuit, all Courts of Appeals to have directly confronted the question both before and after *Ylst*, 501 U. S. 797, have agreed that a state court's successive rejection of a federal claim does not bar federal habeas review. See, *e. g.*, *Page* v. *Frank*, 343 F. 3d 901, 907 (CA7 2003); *Brecheen* v. *Reynolds*, 41 F. 3d 1343, 1358 (CA10 1994); *Bennett* v. *Whitley*, 41 F. 3d 1581, 1582 (CA5 1994); *Silverstein* v. *Henderson*, 706 F. 2d 361, 368 (CA2 1983). See also *Lambright* v. *Stewart*, 241 F. 3d 1201, 1206 (CA9 2001).

[13] As recounted earlier, Cone's state postconviction petition contained numerous claims of error. The state postconviction court dismissed some of those claims as waived and others, including the *Brady* claim, as having been previously determined. In affirming the denial of Cone's petition

appellate court did not hold that Cone's *Brady* claim was waived.

When a state court declines to find that a claim has been waived by a petitioner's alleged failure to comply with state procedural rules, our respect for the state-court judgment counsels us to do the same. Although we have an independent duty to scrutinize the application of state rules that bar our review of federal claims, *Lee*, 534 U. S., at 375, we have no concomitant duty to apply state procedural bars where

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the Tennessee Court of Criminal Appeals summarily stated that Cone had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." *Cone* v. *State*, 927 S. W. 2d 579, 582 (1995). Pointing to that language, the State asserts that the Tennessee Court of Criminal Appeals denied Cone's *Brady* claim not because it had been previously determined, but because it was waived in the postconviction court proceedings. Not so. Without questioning the trial court's finding that Cone's *Brady* claim had been previously determined, the Court of Criminal Appeals affirmed the denial of Cone's postconviction petition in its entirety. Nothing in that decision suggests the appellate court believed the *Brady* claim had been waived in the court below.

Similarly, while JUSTICE ALITO's parsing of the record persuades him that Cone failed to adequately raise his *Brady* claim to the Tennessee Court of Criminal Appeals, he does not argue that the court expressly held that Cone waived the claim. A review of Cone's opening brief reveals that he made a broad challenge to the postconviction court's dismissal of his petition and plainly asserted that the court erred by dismissing claims as previously determined on direct appeal or in his initial postconviction petition. See Brief for Petitioner-Appellant in No. 02–C–01–9403–CR–00052 (Tenn. Crim. App.), pp. 7, 14. The state appellate court did not state or suggest that Cone had waived his *Brady* claim. Rather, after commending the postconviction court for its "exemplary and meticulous treatment of the appellant's petition," *Cone*, 927 S. W. 2d, at 581, the appellate court simply adopted without modification the lower court's findings with respect to the application of Tenn. Code Ann. §40–30–112 to the facts of this case. The best reading of the Tennessee Court of Criminal Appeals' decision is that it was based on an approval of the postconviction court's reasoning rather than on an unmentioned failure by Cone to adequately challenge the dismissal of his *Brady* claim on appeal.

state courts have themselves declined to do so. The Tennessee courts did not hold that Cone waived his *Brady* claim, and we will not second-guess their judgment.[14]

The State's procedural objections to federal review of the merits of Cone's claim have resulted in a significant delay in bringing this unusually protracted case to a conclusion. Ultimately, however, they provide no obstacle to judicial review. Cone properly preserved and exhausted his *Brady* claim in the state court; therefore, it is not defaulted. We turn now to the merits of that claim.

V

Although the State is obliged to "prosecute with earnestness and vigor," it "is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U. S., at 88. Accordingly, we have held that when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment. See *Brady*, 373 U. S., at 87. In *United States* v. *Bagley*, 473 U. S. 667, 682 (1985) (opinion of Blackmun, J.), we explained that evidence is "material" within the meaning

[14] Setting aside the state courts' mistaken belief that Cone's *Brady* claim had been previously determined, there are many reasons the state courts might have rejected the State's waiver argument. The record establishes that the suppressed documents which form the basis for Cone's claim were not available to him until the Tennessee Court of Appeals' 1992 decision interpreting the State's Public Records Act as authorizing the disclosure of prosecutorial records. Soon after obtaining access to the prosecutor's file and discovering within it documents that had not been disclosed prior to trial, Cone amended his petition for postconviction relief, adding detailed allegations regarding the suppressed evidence recovered from the file, along with an affidavit explaining the reason why his claim had not been filed sooner. See App. 13, 18. The State did not oppose the amendment of Cone's petition on the ground that it was untimely, and it appears undisputed that there would have been no basis under state law for doing so. See Brief for Petitioner 7, n. 1.

of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, 514 U. S. 419, 435 (1995); accord, *Banks* v. *Dretke*, 540 U. S. 668, 698–699 (2004); *Strickler* v. *Greene*, 527 U. S. 263, 290 (1999).[15]

The documents suppressed by the State vary in kind, but they share a common feature: Each strengthens the inference that Cone was impaired by his use of drugs around the time his crimes were committed. The suppressed evidence includes statements by witnesses acknowledging that Cone appeared to be "drunk or high," App. 49, "acted real weird," *ibid.*, and "looked wild eyed," *id.*, at 50, in the two days preceding the murders.[16] It also includes documents that could

[15] Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. See *Kyles*, 514 U. S., at 437 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice . . . . See . . . Prosecution Function and Defense Function 3–3.11(a) (3d ed. 1993)"). See also ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. See *Kyles*, 514 U. S., at 439; *United States* v. *Bagley*, 473 U. S. 667, 711, n. 4 (1985) (STEVENS, J., dissenting); *United States* v. *Agurs*, 427 U. S. 97, 108 (1976).

[16] The State contends that the statements were made by witnesses who observed Cone during and immediately after he committed robberies; therefore, it is not surprising that Cone appeared less than "serene." See

have been used to impeach witnesses whose trial testimony cast doubt on Cone's drug addiction. For example, Memphis police officer Ralph Roby testified at trial that Cone had no needle marks on his body when he was arrested—an observation that bolstered the State's argument that Cone was not a drug user. The suppressed evidence reveals, however, that Roby authorized multiple teletypes to law enforcement agencies in the days following the murders in which he described Cone as a "drug user" and a "heavy drug user." See *id.*, at 55–58.[17] A suppressed statement made by the chief of police of Cone's hometown also describes Cone as a serious drug user. See *Cone*, 243 F. 3d, at 968. And undisclosed notes of a police interview with Ilene Blankman conducted several days after the murders reveal discrepancies between her initial statement and her trial testimony relevant to Cone's alleged drug use. App. 72–73. In sum, both the quantity and the quality of the suppressed evidence lends support to Cone's position at trial that he habitually used excessive amounts of drugs, that his addiction affected his behavior during his crime spree, and that the State's arguments to the contrary were false and misleading.

Brief for Respondent 46. Although a jury would have been free to infer that Cone's behavior was attributable to his criminal activity, the evidence is also consistent with Cone's assertion that he was suffering from chronic amphetamine psychosis at the time of the crimes.

[17] As the dissent points out, Roby did not testify directly that Cone was not a drug user, and FBI Agent Eugene Flynn testified that, at the time of Cone's arrest in Pompano Beach, Cone reported that he had used cocaine, Dilaudid, and Demerol and was suffering from "'slight withdrawal symptoms.'" See *post*, at 492–493, 496 (opinion of THOMAS, J.). See also Tr. 1916, 1920 (Apr. 22, 1982). It is important to note, however, that neither Flynn nor Roby corroborated Cone's account of alleged drug use. Taken in context, Roby's statement that he had not observed any needle marks on Cone's body invited the jury to infer that Cone's self-reported drug use was either minimal or contrived. See *id.*, at 1939. Therefore, although the suppressed evidence does not directly contradict Roby's trial testimony, it does place it in a different light.

Thus, the federal question that must be decided is whether the suppression of that probative evidence deprived Cone of his right to a fair trial. See *Agurs*, 427 U. S., at 108. Because the Tennessee courts did not reach the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to "any claim that was adjudicated on the merits in State court proceedings." 28 U. S. C. § 2254(d). Instead, the claim is reviewed *de novo*. See, *e. g.*, *Rompilla* v. *Beard*, 545 U. S. 374, 390 (2005) (*de novo* review where state courts did not reach prejudice prong under *Strickland* v. *Washington*, 466 U. S. 668 (1984)); *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003) (same).

Contending that the Federal District Court and Court of Appeals adequately and correctly resolved the merits of that claim, the State urges us to affirm the Sixth Circuit's denial of habeas relief. In assessing the materiality of the evidence suppressed by the State, the Court of Appeals suggested that two facts outweighed the potential force of the suppressed evidence. First, the evidence of Cone's guilt was overwhelming. Second, the evidence of Cone's drug use was cumulative because the jury had heard evidence of Cone's alleged addiction from witnesses and from officers who interviewed Cone and recovered drugs from his vehicle.[18] The Court of Appeals did not thoroughly review the suppressed evidence or consider what its cumulative effect on the jury would have been. Moreover, in concluding that the suppressed evidence was not material within the meaning of *Brady*, the court did not distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment—an omission we find significant.

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[18] In pointing to the trial evidence of Cone's drug use, the Court of Appeals made no mention of the fact that the State had discredited the testimony of Cone's experts on the ground that no independent evidence corroborated Cone's alleged addiction and that the State had argued that the drugs in Cone's car were intended for resale, rather than personal use.

Evidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however, as *Brady* itself demonstrates. In our seminal case on the disclosure of prosecutorial evidence, defendant John Brady was indicted for robbery and capital murder. At trial, Brady took the stand and confessed to robbing the victim and being present at the murder but testified that his accomplice had actually strangled the victim. *Brady* v. *State*, 226 Md. 422, 425, 174 A. 2d 167, 168 (1961). After Brady was convicted and sentenced to death he discovered that the State had suppressed the confession of his accomplice, which included incriminating statements consistent with Brady's version of events. *Id.*, at 426, 174 A. 2d, at 169. The Maryland Court of Appeals concluded that Brady's due process rights were violated by the suppression of the accomplice's confession but declined to order a new trial on guilt. Observing that nothing in the accomplice's confession "could have reduced . . . Brady's offense below murder in the first degree," the state court ordered a new trial on the question of punishment only. *Id.*, at 430, 174 A. 2d, at 171. We granted certiorari and affirmed, rejecting Brady's contention that the state court's limited remand violated his constitutional rights. 373 U. S., at 88.

As in *Brady*, the distinction between the materiality of the suppressed evidence with respect to guilt and punishment is significant in this case. During the guilt phase of Cone's trial, the only dispute was whether Cone was "sane under the law," Tr. 2040 (Apr. 22, 1982), as his counsel described the issue, or "criminally responsible" for his conduct, App. 110, as the prosecutor argued. Under Tennessee law, Cone could not be held criminally responsible for the murders if, "at the time of [his] conduct as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Graham* v. *State*, 547 S. W. 2d 531, 543 (Tenn. 1977). Although we take exception to the

Court of Appeals' failure to assess the effect of the suppressed evidence "collectively" rather than "item by item," see *Kyles*, 514 U. S., at 436, we nevertheless agree that even when viewed in the light most favorable to Cone, the evidence falls short of being sufficient to sustain his insanity defense.

Cone's experts testified that his drug addiction and posttraumatic stress disorder originated during his service in Vietnam, more than 13 years before the Todds were murdered. During those years, despite Cone's drug use and mental disorder, he managed to successfully complete his education, travel, and (when not incarcerated) function in civil society. The suppressed evidence may have strengthened the inference that Cone was on drugs or suffering from withdrawal at the time of the murders, but his behavior before, during, and after the crimes was inconsistent with the contention that he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. See *Graham*, 547 S. W. 2d, at 543. The likelihood that the suppressed evidence would have affected the jury's verdict on the issue of insanity is therefore remote. Accordingly, we conclude that the Sixth Circuit did not err by denying habeas relief on the ground that the suppressed evidence was immaterial to the jury's finding of guilt.

The same cannot be said of the Court of Appeals' summary treatment of Cone's claim that the suppressed evidence influenced the jury's sentencing recommendation. There is a critical difference between the high standard Cone was required to satisfy to establish insanity as a matter of Tennessee law and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case. See *Bell*, 535 U. S., at 712 (STEVENS, J., dissenting) ("[T]here is a vast difference between insanity—which the defense utterly failed to prove—and the possible mitigating effect of drug addiction incurred as a result of

honorable service in the military"). As defense counsel emphasized in his brief opening statement during penalty phase proceedings, the jury was statutorily required to consider whether Cone's "capacity . . . to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment." Tenn. Code Ann. § 39–2–203(j)(8). It is possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone's drug use played a mitigating, though not exculpating, role in the crimes he committed.[19] The evidence might also have rebutted the State's suggestion that Cone had manipulated his expert witnesses into falsely believing he was a drug addict when in fact he did not struggle with substance abuse.

Neither the Court of Appeals nor the District Court fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone's drug addiction—especially if attributable to honorable service of his country in Vietnam—was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death. Because the evidence suppressed at Cone's trial may well have been material to the jury's assessment of the proper punishment in this case, we conclude that a full review of the suppressed evidence and its effect is warranted.

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[19] We agree with the dissent that the standard to be applied by the District Court in evaluating the merits of Cone's *Brady* claim on remand is whether there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different. See *post*, at 491. Because neither the District Court nor the Court of Appeals considered the merits of Cone's claim with respect to the effect of the withheld evidence on his sentence, it is appropriate for the District Court, rather than this Court, to do so in the first instance.

VI

In the 27 years since Gary Cone was convicted of murder and sentenced to death, no Tennessee court has reached the merits of his claim that state prosecutors withheld evidence that would have bolstered his defense and rebutted the State's attempts to cast doubt on his alleged drug addiction. Today we hold that the Tennessee courts' procedural rejection of Cone's *Brady* claim does not bar federal habeas review of the merits of that claim. Although we conclude that the suppressed evidence was not material to Cone's conviction for first-degree murder, the lower courts erred in failing to assess the cumulative effect of the suppressed evidence with respect to Cone's capital sentence. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court with instructions to give full consideration to the merits of Cone's *Brady* claim.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

The Court's decision is grounded in unusual facts that necessarily limit its reach. When issues under *Brady* v. *Maryland*, 373 U. S. 83 (1963), are presented on federal habeas, they usually have been previously addressed in state proceedings. Federal review is accordingly sharply limited by established principles of deference: If the claim has been waived under state rules, that waiver typically precludes federal review. If the claim has been decided in the state system, federal review is restricted in light of the state court's legal and factual conclusions. The unique procedural posture of this case presents a *Brady* claim neither barred under state rules for failure to raise it nor decided in the state system.

When it comes to that claim, the Court specifies that the appropriate legal standard is the one we set forth in *Kyles*

v. *Whitley*, 514 U. S. 419, 435 (1995) (whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). See *ante*, at 470, 475, n. 19. I do not understand the majority to depart from that standard, and the majority certainly does not purport to do so.

That leaves only application of the accepted legal standard to the particular facts. It is highly unusual for this Court to engage in such an enterprise, see *Kyles*, *supra*, at 458 (SCALIA, J., dissenting), and the Court's asserted basis for doing so in this case is dubious, see *post*, at 486, 489–490 (THOMAS, J., dissenting).

In any event, the Court's review of the facts does not lead it to conclude that Cone is entitled to relief—only that the courts below did not adequately consider his claim with respect to sentencing. See *ante*, at 475 ("Neither the Court of Appeals nor the District Court fully considered whether the suppressed evidence" undermines confidence in Cone's sentence). The Court simply reviews the facts in the light most favorable to Cone, concludes that the evidence does *not* undermine confidence in the jury's determination that Cone is guilty, but sends the case back for "full consideration" of whether the same is true as to the jury's sentence of death. *Ante*, at 474–476.

So this is what we are left with: a fact-specific determination, under the established legal standard, viewing the unique facts in favor of the defendant, that the *Brady* claim fails with respect to guilt, but might have merit as to sentencing. In light of all this, I see no reason to quarrel with the Court's ruling on the *Brady* claim.

In considering on remand whether the facts establish a *Brady* violation, it is clear that the lower courts should analyze the issue under the *constitutional* standards we have set forth, not under whatever standards the American Bar Association may have established. The ABA standards are

wholly irrelevant to the disposition of this case, and the majority's passing citation of them should not be taken to suggest otherwise. See *ante,* at 470, n. 15.

JUSTICE ALITO, concurring in part and dissenting in part.

We granted certiorari in this case to answer two questions:

> "1. Is a federal habeas claim 'procedurally defaulted' because it has been presented twice to the state courts?
>
> "2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?" Pet. for Cert. i.

Both of these questions are based on a factually incorrect premise, namely, that the Tennessee Court of Criminal Appeals, the highest state court to entertain petitioner's appeal from the denial of his second petition for state postconviction relief,[1] rejected petitioner's *Brady*[2] claim on the ground that the claim had been previously decided by the Tennessee Supreme Court in petitioner's direct appeal. Petitioner's argument is that the State Supreme Court did not decide any *Brady* issue on direct appeal, that the Tennessee Court of Criminal Appeals erred in holding otherwise, and that the Sixth Circuit erred in concluding that the *Brady* claim had been procedurally defaulted on this ground. Petitioner is quite correct that his *Brady* claim was not decided on direct appeal, and the Court in the present case is clearly correct in holding that a second attempt to litigate a claim in state

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[1] Because the Tennessee Supreme Court denied discretionary review of the Tennessee Court of Criminal Appeals decision affirming the denial of petitioner's second amended petition for postconviction relief, we must look to the decision of the latter court to determine if the decision below was based on an adequate and independent state ground. See *Baldwin* v. *Reese,* 541 U. S. 27, 30–32 (2004); *O'Sullivan* v. *Boerckel,* 526 U. S. 838, 842–843 (1999).

[2] *Brady* v. *Maryland,* 373 U. S. 83 (1963).

court does not necessarily bar subsequent federal habeas review. See *ante*, at 466–467.

But all of this is beside the point because the Tennessee Court of Criminal Appeals did not reject petitioner's *Brady* claim on the ground that the claim had been previously determined on direct appeal. Rather, petitioner's *Brady* claim was simply never raised before the Tennessee Court of Criminal Appeals, and that court did not rule on the claim at all.

Because the Sixth Circuit's decision on the issue of procedural default rests on the same mistaken premise that the Tennessee Court of Criminal Appeals rejected petitioner's *Brady* claim on the ground that it had been previously determined, I entirely agree with the majority that the Sixth Circuit's decision on that issue cannot be sustained and that a remand is required. I cannot join the Court's opinion, however, for two chief reasons.

First, the Court states without explanation that "Cone properly preserved and exhausted his *Brady* claim in the state court" and that therefore the claim has not been defaulted. *Ante*, at 469. Because Cone never fairly raised this claim in the Tennessee Court of Criminal Appeals, the claim is either not exhausted (if Cone could now raise the claim in state court) or is procedurally defaulted (if state law now provides no avenue for further review). I would leave these questions for resolution in the first instance on remand.

Second, the Court, again without explanation, remands this case to the District Court, not the Court of Appeals. I see no justification for this step.

I

In order to understand the tangled procedural default issue presented in this case, it is necessary to review the far-from-exemplary manner in which the attorneys for petitioner and respondent litigated the *Brady* claim in the state courts.

On direct appeal, petitioner did not raise any *Brady* claim. As the Court notes, petitioner did claim that the State had violated a state discovery rule by failing to provide prior statements given by certain witnesses and that therefore the testimony of these witnesses should have been stricken. App. 114–117; *State* v. *Cone*, 665 S. W. 2d 87, 94 (Tenn. 1984). Although this claim concerned the State's failure to turn over information, it is clear that this was not a *Brady* claim.

The first appearance of anything resembling the claim now at issue occurred in 1993 when petitioner's experienced attorneys filed an amendment to his second petition for post-conviction relief in the Shelby County Criminal Court. This petition included a long litany of tangled claims. Paragraph 35 of this amended petition claimed, among other things, that the State had wrongfully withheld information demonstrating that one particular prosecution witness had testified falsely concerning "petitioner and his drug use." App. 13–14. This nondisclosure, the petition stated, violated not only the Fifth and Fourteenth Amendments to the Constitution of the United States (which protect the due process right on which *Brady* is based) but also the Fourth, Sixth, and Eighth Amendments to the United States Constitution and four provisions of the Tennessee Constitution.

Two months later, counsel for petitioner filed an amendment adding 12 more claims, including one (¶ 41) alleging that the State had abridged petitioner's rights by failing to disclose evidence that petitioner suffered from drug problems. App. 20. According to this new submission, the nondisclosure violated, in addition to the previously cited provisions of the Federal and State Constitutions, five more provisions of the State Constitution, including provisions regarding double jeopardy, see Tenn. Const., Art. I, § 10, *ex post facto* laws, § 11, indictment, § 14, and open courts, § 17.

The Shelby County Criminal Court was faced with the task of wading through the morass presented in the amended petition. Under Tenn. Code Ann. § 40–30–112 (1990) (re-

pealed 1995),[3] a claim could not be raised in a postconviction proceeding if the claim had been "previously determined" or waived. Citing the State Supreme Court's rejection on direct appeal of petitioner's claim that the prosecution had violated a state discovery rule by failing to turn over witness statements, the State incorrectly informed the court that the failure-to-disclose-exculpatory-evidence claim set out in ¶ 41 had been "previously determined" on direct appeal. App. 15–16. The Shelby County Criminal Court rejected the claim on this ground, and held that all of petitioner's claims had either been previously determined or waived. *Id.*, at 22.

Given the importance now assigned to petitioner's *Brady* claim, one might think that petitioner's attorneys would have (1) stressed that claim in the opening brief that they filed in the Tennessee Court of Criminal Appeals, (2) pointed out the lower court's clear error in concluding that this claim had been decided in the direct appeal, and (3) explained that information supporting the claim had only recently come to light due to the production of documents under the State's Public Records Act. But counsel did none of these things. In fact, the *Brady* claim was not mentioned at all.

Nor was *Brady* cited in the reply brief filed by the same attorneys. The reply brief did contain a passing reference to "the withholding of exculpatory evidence," but the brief did not elaborate on this claim and again failed to mention that this claim had never been previously decided and was supported by newly discovered evidence.[4]

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[3] Tennessee law has since changed. Currently, the Tennessee Post-Conviction Procedure Act bars any second postconviction petition, see Tenn. Code Ann. § 40–30–102 (2006), and permits the reopening of a petition only under limited circumstances, § 40–30–117. These restrictions apply to any petition filed after the enactment of the Post-Conviction Procedure Act, even if the conviction occurred long before.

[4] After referring to a long list of claims (not including any claim for the failure to disclose exculpatory evidence), the reply brief states:

"[I]t is clear that meritorious claims have been presented for adjudication. These claims have not been waived and a remand for a hearing is essential

The Tennessee Court of Criminal Appeals affirmed the decision of the lower state court, but the appellate court made no mention of the *Brady* claim, and I see no basis for concluding that the court regarded the issue as having been raised on appeal.

Appellate courts generally do not reach out to decide issues not raised by the appellant. *Snell* v. *Tunnell*, 920 F. 2d 673, 676 (CA10 1990); see *Powers* v. *Hamilton Cty. Public Defender Comm'n*, 501 F. 3d 592, 609–610 (CA6 2007); see also *Galvan* v. *Alaska Dept. of Corrections*, 397 F. 3d 1198, 1204 (CA9 2005) ("Courts generally do not decide issues not raised by the parties. If they granted relief to petitioners on grounds not urged by petitioners, respondents would be deprived of a fair opportunity to respond, and the courts would be deprived of the benefit of briefing" (footnote omitted)). Nor do they generally consider issues first mentioned in a reply brief. *Physicians Comm. for Responsible Medicine* v. *Johnson*, 436 F. 3d 326, 331, n. 6 (CA2 2006); *Doe* v. *Beaumont Independent School Dist.*, 173 F. 3d 274, 299, n. 13 (CA5 1999) (Garza, J., dissenting); *Doolin Security Sav. Bank, F. S. B.* v. *Office of Thrift Supervision*, 156 F. 3d 190, 191 (CADC 1998) *(per curiam); Boone* v. *Carlsbad Bancorporation, Inc.*, 972 F. 2d 1545, 1554, n. 6 (CA10 1992). And it is common practice for appellate courts to refuse to consider issues that are mentioned only in passing. *Reynolds* v. *Wagner*, 128 F. 3d 166, 178 (CA3 1997) (citing authorities).

The Tennessee Court of Criminal Appeals follows these standard practices. Rule 10(b) (2008) of that court states

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in order to enable Mr. Cone to present evidence and prove the factual allegations, including those relating to his claims of ineffective assistance of counsel, Petition ¶¶ 15, 16, 44, R–67, 71 and 141 and of *the withholding of exculpatory evidence.* Petition ¶ 41, R–139." Reply Brief for Petitioner-Appellant in No. 02–C–01–9403–CR–00052 (Tenn. Crim. App.), p. 5 (hereinafter Reply Brief) (emphasis added).

quite specifically: "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." The court has applied this rule in capital cases, *State* v. *Dellinger*, 79 S. W. 3d 458, 495, 497, 503 (Tenn. 2002) (appendix to majority opinion); *Brimmer* v. *State*, 29 S. W. 3d 497, 530 (Tenn. Crim. App. 1998), and in others. See, *e. g.*, *State* v. *Faulkner*, No. E2000–00309–CCA–R3–CD, 2001 WL 378540 (Tenn. Crim. App., Apr. 17, 2001) (73-year sentence for attempted first-degree murder). And in both capital and noncapital cases, the court has refused to entertain arguments raised for the first time in a reply brief. See *State* v. *Gerhardt*, No. W2006–02589–CCA–R3–CD, 2009 WL 160930 (Tenn. Crim. App., Jan. 23, 2009) (noncapital case); *Caruthers* v. *State*, 814 S. W. 2d 64, 68 (Tenn. Crim. App. 1991) (capital case); *Cammon* v. *State*, No. M2006–01823–CCA–R3–PC, 2007 WL 2409568, *6 (Tenn. Crim. App., Aug. 23, 2007) (noncapital case).[5] Thus, unless the Tennessee Court of Criminal Appeals departed substantially from its general practice, that court did not regard petitioner's *Brady* claim as having been raised on appeal.

In the decision now under review, the Sixth Circuit held that "[t]he Tennessee courts found that Cone's *Brady* claims were 'previously determined' and, therefore, not cognizable in [his] state post-conviction action." 492 F. 3d 743, 756 (2007). In my judgment, however, there is no basis for concluding that the Tennessee Court of Criminal Appeals thought that any *Brady* issue was before it. A contrary in-

[5] In a footnote in his reply brief, petitioner stated that he was not waiving any claim presented in the court below and asked the appellate court to consider all those claims. See Reply Brief 3, n. 1. But the Tennessee Court of Criminal Appeals has specifically held that claims may not be raised on appeal in this manner. See *Leonard* v. *State*, No. M2006–00654–CCA–R3–PC, 2007 WL 1946662, *21–*22 (July 5, 2007).

terpretation would mean that the Tennessee Court of Criminal Appeals, disregarding its own rules and standard practice, entertained an issue that was not mentioned at all in the appellant's main brief and was mentioned only in passing and without any development in the reply brief. It would mean that the Tennessee Court of Criminal Appeals, having chosen to delve into the *Brady* issue on its own, ruled on the issue without even mentioning it in its opinion and without bothering to check the record to determine whether in fact the *Brady* issue had been decided on direct appeal. Such an interpretation is utterly implausible, and it is telling that the majority in this case cites no support for such an interpretation in the Tennessee Court of Criminal Appeals' opinion.

The Sixth Circuit's decision on the question of procedural default rests on an erroneous premise and must therefore be vacated.

II

I also agree with the Court that we should not affirm the decision below on the ground that the *Brady* claim lacks substantive merit. After its erroneous discussion of procedural default, the Sixth Circuit went on to discuss the merits of petitioner's *Brady* claim. In its 2001 opinion, the Court of Appeals recognized that the prosecution's *Brady* obligation extends not only to evidence that is material to guilt but also to evidence that is material to punishment. See *Cone* v. *Bell*, 243 F. 3d 961, 968 (citing *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 57 (1987)). But neither in that opinion nor in its 2006 opinion did the court address the materiality of the information in question here in relation to petitioner's punishment. See 492 F. 3d, at 756 ("A review of the allegedly withheld documents shows that this evidence would not have overcome the overwhelming *evidence of Cone's guilt* in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs" (emphasis added)). Therefore, despite the strength of the arguments

in JUSTICE THOMAS' dissent, I would leave that question to be decided by the Sixth Circuit on remand.

III

The Court, however, does not simply vacate and remand to the Sixth Circuit but goes further.

First, the Court states without elaboration that petitioner "preserved and exhausted his *Brady* claim in the state court." *Ante*, at 469. As I have explained, petitioner did not fairly present his *Brady* claim in his prior appeal to the Tennessee Court of Criminal Appeals, and therefore that claim is either unexhausted or procedurally barred. If the State is not now foreclosed from relying on the failure to exhaust, see 28 U. S. C. § 2254(b)(3), or on procedural default,[6] those questions may be decided on remand.

Second, the Court remands the case to the District Court rather than the Court of Appeals. A remand to the District Court would of course be necessary if petitioner were entitled to an evidentiary hearing, but the Court does not hold that an evidentiary hearing is either required or permitted. In my view, unless there is to be an evidentiary hearing, there is no reason to remand this case to the District Court. If the only purpose of remand is to require an evaluation of petitioner's *Brady* claim in light of the present record, the District Court is not in a superior position to conduct such a

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[6] Unlike exhaustion, procedural default may be waived if it is not raised as a defense. *Banks* v. *Dretke*, 540 U. S. 668, 705 (2004) (allowing for waiver of "procedural default" "based on the State's litigation conduct" (citing *Gray* v. *Netherland*, 518 U. S. 152, 166 (1996))). Here, it appears that the State has consistently argued that petitioner's *Brady* claim was procedurally defaulted, but the State's supporting arguments have shifted. Whether the question of procedural default described in this opinion should be entertained under the particular circumstances here is an intensely fact-bound matter that should be left for the Sixth Circuit on remand.

review. And even if such a review is conducted in the first instance by the District Court, that court's decision would be subject to *de novo* review in the Court of Appeals. 492 F. 3d, at 750; *Cone* v. *Bell*, 243 F. 3d, at 966–967; see *United States* v. *Graham*, 484 F. 3d 413 (CA6 2007); *United States* v. *Miller*, 161 F. 3d 977, 987 (CA6 1998); *United States* v. *Phillip*, 948 F. 2d 241, 250 (CA6 1991). Accordingly, I see no good reason for remanding to the District Court rather than the Court of Appeals. And if the majority has such a reason, it is one that it has chosen to keep to itself.

* * *

For these reasons, I would vacate the decision of the Court of Appeals and remand to that court.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court affirms Gary Cone's conviction for beating an elderly couple to death with a blunt object. In so doing, the majority correctly rejects Cone's argument that his guilty verdict was secured in violation of his rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963). The majority declines, however, to decide whether the same evidence that was insufficient under *Brady* to overturn his conviction provides a basis for overturning his death sentence. The majority instead remands this question to the District Court for further consideration because it finds that the Court of Appeals engaged in a "summary treatment" of Cone's *Brady* sentencing claim. See *ante*, at 474–475.

I respectfully dissent. The Court of Appeals' allegedly "summary treatment" of Cone's sentencing claim does not justify a remand to the District Court. Cone has failed to establish "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the [sentencing]

proceeding would have been different,'" *Kyles* v. *Whitley*, 514 U. S. 419, 435 (1995) (quoting *United States* v. *Bagley*, 473 U. S. 667, 682 (1985) (opinion of Blackmun, J.)). As a result, I would affirm the judgment of the Court of Appeals.[1]

I

This case arises from a crime spree 29 years ago that began with Cone's robbery of a jewelry store in Memphis, Tennessee, and concluded with his robbery of a drugstore in Pompano Beach, Florida. Along the way, Cone shot a police officer and a bystander while trying to escape the first robbery, attempted to shoot another man in a failed carjacking attempt, unsuccessfully tried to force his way into a woman's apartment at gunpoint, and murdered 93-year-old Shipley Todd and his 79-year-old wife, Cleopatra. When he was tried on two counts of first-degree murder in 1982, Cone's sole defense was that he did not have the requisite intent to commit first-degree murder because he was in the grip of a chronic amphetamine psychosis. The jury rejected the defense and convicted Cone of both murders.

At sentencing, the Tennessee jury found beyond a reasonable doubt that four statutory aggravating factors applied to Cone's offense: (1) Cone had been convicted of one or more previous felonies involving the use or threat of violence; (2) he had knowingly created a great risk of death to two or more persons other than the victim during his act of murder; (3) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) the murder was committed for the purpose of avoiding a lawful arrest. Tr. 2151–2152 (Apr. 23, 1982); see also *State* v. *Cone*,

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[1] Because I would affirm on the basis of the Court of Appeals' alternative holding below, I do not reach the issues of procedural default resolved by the majority. See *United States* v. *Atlantic Research Corp.*, 551 U. S. 128, 141, n. 8 (2007); *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 332 (2006); *Ardestani* v. *INS*, 502 U. S. 129, 139 (1991).

665 S. W. 2d 87, 94–96 (Tenn. 1984). Tenn. Code Ann. § 39–2–203(i) (1982).[2] Cone argued to the jury at sentencing that his "capacity . . . to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment," § 39–2–203(j)(8). But the jury found that neither this, nor any other mitigating factor, outweighed the aggravating factors. The jury, as required by Tennessee law, unanimously sentenced Cone to death. See § 39–2–203(g).

For almost three decades, Cone's case has traveled through the Tennessee and federal courts. This Court has twice reversed decisions from the Court of Appeals that invalidated Cone's conviction and sentence. See *Bell* v. *Cone*, 535 U. S. 685 (2002); *Bell* v. *Cone*, 543 U. S. 447 (2005) *(per curiam)*. On remand from this Court's latest decision, the Court of Appeals directly considered whether a handful of police reports, law enforcement bulletins, and notes that were allegedly withheld from Cone's trial attorneys could have changed the result of Cone's trial or sentencing. And, for the second time, the Court of Appeals held that there was not a "'reasonable probability'" that the evidence would have altered the jury's conclusion "that Cone's prior drug use did not vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence." 492 F. 3d 743, 757 (CA6 2007). The Court of Appeals, therefore, held that neither Cone's conviction nor

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[2] The Tennessee Supreme Court later concluded that the record in Cone's case was doubtful as to evidence supporting the second factor given the lapse in time between the initial events of the escape and the Todd murders. *Cone*, 665 S. W. 2d, at 95. The court, however, determined that the existence of the other three factors rendered any possible error in this factor harmless beyond a reasonable doubt. *Ibid.*

his sentence was invalid. See *ibid.*; *Cone* v. *Bell*, 243 F. 3d 961, 968 (CA6 2001). We should affirm the Court of Appeals and put an end to this litigation.

II

According to the majority, the Court of Appeals' decision affirming Cone's death sentence is too "summary," *ante*, at 474, and the facts are such that, on further examination, Cone "might" be able to demonstrate that it is "possible" that the contested evidence would have persuaded the jury to spare his life, *ante*, at 475. On this reasoning, the majority remands the case directly to the District Court for "full consideration [of] the merits of Cone's [sentencing] claim." *Ante*, at 476. I disagree on all counts. Remanding the sentencing issue to the District Court is an "unusual step" for this Court to take. *House* v. *Bell*, 547 U. S. 518, 557 (2006) (ROBERTS, C. J., concurring in judgment in part and dissenting in part). Furthermore, in this case, it is a step that is legally and factually unjustified. There is not "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U. S., at 433–434 (quoting *Bagley*, 473 U. S., at 682 (opinion of Blackmun, J.)).

A

The majority's criticism of the Court of Appeals' allegedly "summary treatment" of the sentencing question is misplaced. Before the Court of Appeals, Cone dedicated eight pages of his opening brief to arguing that the implicated evidence was material to his guilt or innocence, but spent only one paragraph arguing its materiality to his death sentence. See Brief for Appellant in No. 99–5279 (CA6), pp. 40–48. The Court of Appeals' focus on the guilt phase, rather than the sentencing phase, simply followed Cone's lead. See 492 F. 3d, at 755 ("In his most recent brief, claiming that his

receiving the withheld evidence would have resulted in a different sentence, Cone has made only conclusory arguments").[3] There is nothing defective about a judicial decision that summarily rejects an abbreviated legal argument, especially where, as here, the burden of proving the materiality of the contested evidence was on Cone.[4]

B

In remanding this matter to the District Court, the majority makes two critical errors—one legal and one factual—that leave the false impression that Cone's *Brady* claim has a chance of success. First, the majority states that "[i]t is *possible* that the suppressed evidence" may have convinced the jury that Cone's substance abuse played a mitigating role in his crime and "[t]he evidence *might* also have rebutted the State's suggestion" that Cone's experts were inaccurately depicting the depth of his drug-induced impairment. *Ante*, at 475 (emphasis added); see also *ibid.* (remanding "[b]ecause the evidence suppressed at Cone's trial *may well have been* material to the jury's assessment of the proper punishment in this case" (emphasis added)). But, as the majority implic-

[3] The assertion by the majority, *ante*, at 475, n. 19, and JUSTICE ALITO, *ante*, at 484 (opinion concurring in part and dissenting in part), that the Court of Appeals did not address the merits of the sentencing issue at all is flatly wrong. See 492 F. 3d, at 757 (rejecting Cone's *Brady* claim because the proffered evidence would not have altered the jury's conclusion "that Cone's prior drug use did not vitiate his specific intent to murder his victims *and did not mitigate his culpability sufficient to avoid the death sentence*" (emphasis added)).

[4] The majority does not attempt to justify its remand by contending that it is necessary because the record is insufficient to decide the claim. Nor could it persuasively contend a remand is necessary so that the District Court can hold an evidentiary hearing. Such a hearing would shed no additional light on the trial proceedings or the relative impeachment value of the withheld documents. Cone himself agrees that "this Court should resolve the merits of [his] *Brady* claim." Reply Brief for Petitioner 24; see also Brief for Respondent 26–27.

itly acknowledges, see *ibid.*, n. 19, this is not the correct legal test for evaluating a *Brady* claim: "The mere possibility that an item of undisclosed information *might* have helped the defense, or *might* have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense," *United States* v. *Agurs*, 427 U. S. 97, 109–110 (1976) (emphasis added).

Rather, this Court has made clear that the legal standard for adjudicating such a claim is whether there is a "reasonable probability" that the jury would have been persuaded by the allegedly withheld evidence. *Kyles*, *supra*, at 435; *Bagley*, *supra*, at 682 (opinion of Blackmun, J.). It simply is not sufficient, therefore, to claim that "there is a reasonable *possibility* that . . . testimony might have produced a different result . . . . [P]etitioner's burden is to establish a reasonable *probability* of a different result." *Strickler* v. *Greene*, 527 U. S. 263, 291 (1999) (emphasis in original). To satisfy the "reasonable probability" standard, Cone must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence" in the jury's sentencing determination. *Kyles*, *supra*, at 435. The Court must view the record "as a whole," *Sawyer* v. *Whitley*, 505 U. S. 333, 374 (1992) (STEVENS, J., concurring in judgment), and determine whether the absence of the disclosure prevented Cone from receiving "'a trial resulting in a [sentence] worthy of confidence,'" *Strickler*, *supra*, at 290 (quoting *Kyles*, 514 U. S., at 434).

In the context of this case, for Cone to establish "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the [sentencing] proceeding would have been different,'" *id.*, at 435, he must not only demonstrate that the withheld evidence would have established that he was substantially impaired as a result of drug abuse or withdrawal; Cone also must establish that the addition of the allegedly withheld evidence ultimately would have led

the jury to conclude that any mitigating factors (including substantial impairment) outweighed all of the established aggravating factors, see Tenn. Code Ann. §39–2–203(g).[5]

Second, the majority incorrectly claims that to prevail on his *Brady* claim, Cone must demonstrate simply that the withheld evidence supported the inference that he "was impaired by his use of drugs around the time his crimes were committed." See *ante*, at 470. This is factually inaccurate because there was already significant evidence of Cone's drug use at trial. To establish that the allegedly withheld evidence would reasonably have had any impact on his case, Cone must instead show that the evidence would have supported his claim of *substantial* mental impairment from drug use.

There was extensive evidence at trial that supported the inference that Cone was not only a longstanding drug user, but that he was in fact using drugs at the time of his crimes. The State itself presented significant evidence on this point. For example, it presented proof that officers found marijuana cigarette butts, empty drug vials, and loose syringes in the car that Cone abandoned immediately after the jewelry store robbery. Tr. 1505–1509 (Apr. 19, 1982). The State also did not challenge testimony from Cone's mother that Cone used drugs. *Id.*, at 1647, 1648–1653 (Apr. 20, 1982). And, most tellingly, the State introduced evidence that Cone was abusing three drugs—cocaine, Dilaudid, and Demerol—at the time of his arrest and was suffering "slight withdrawal

[5] The majority asserts that the standard under Tennessee law for demonstrating mental defect or intoxication as a mitigating factor at sentencing is "far lesser" than the standard for demonstrating insanity in the guilt phase of a criminal trial. *Ante*, at 474. But the mitigating factor still requires a showing that Cone's mental capacity was "substantially impaired" as a result of mental defect. Tenn. Code Ann. §39–2–203(j)(8). In any event, the only authority cited by the majority for its assertion that the standard is "far" lesser than that for insanity is JUSTICE STEVENS' lone dissent in a prior appeal in this case. *Ante*, at 474–475.

symptoms" from them. *Id.*, at 1915–1916, 1920 (Apr. 22, 1982). As the Court of Appeals explained, "[i]t would not have been news to the jurors, that Cone was a 'drug user.'" 492 F. 3d, at 757.[6]

In contrast, what *was* contested by the State during trial was Cone's defense that his drug use was so significant that it caused him to suffer from extreme amphetamine psychosis at the time of the murders. One of Cone's expert witnesses, a neuropharmacologist, testified that by the summer of 1980, when the crimes occurred, Cone was ingesting "ferociously large doses" of drugs and that his increasing tolerance and use of amphetamines caused a chronic amphetamine psychosis. Tr. 1736–1737, 1744–1747, 1758–1759 (Apr. 21, 1982). The expert further testified that if a person with chronic amphetamine psychosis were to go into withdrawal, he could suffer extreme mood swings, "a crashing depression," and a state of weakness so severe that "he could barely lift himself." *Id.*, at 1857–1859. In this expert's view, these symptoms could cause a person to "lose his mind." *Id.*, at 1859.

The State contradicted that testimony with significant evidence that Cone did not act like someone who was "out of his mind" during the commission of his crimes. Rather, the State argued, Cone behaved rationally during his initial Ten-

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[6] Although there were two occasions during closing arguments where prosecutors intimated that Cone was not a drug user, see Tr. 2014–2015, 2068 (Apr. 22, 1982), the State's argument otherwise consistently focused on the real issue in the case: that Cone was not so significantly affected by his drug use around the time of his crimes that he was "out of his mind" or "drug crazy" during the critical days of August 1980. See *id.*, at 2023–2024, 2071–2084. The majority's focus on two brief excerpts from the State's closing argument fails to faithfully view the record "as a whole" for purposes of a *Brady* analysis. See *Sawyer* v. *Whitley*, 505 U. S. 333, 374 (1992) (STEVENS, J., concurring in judgment); see also *Strickler* v. *Greene*, 527 U. S. 263, 290–291 (1999) (finding no reasonable probability of a different result even when prosecutor's closing argument relied on testimony that could have been impeached by withheld material).

nessee robbery, his subsequent escape, his flight from Tennessee to Florida after the Todd murders, his Florida robbery, and his subsequent arrest. See, *e. g.*, *id.*, at 2074–2084 (Apr. 22, 1982). To substantiate this argument, the State called Federal Bureau of Investigation (FBI) Special Agent Eugene Flynn to the stand. Agent Flynn testified that, when captured, Cone coherently detailed his travel from Tennessee to Florida, explained his efforts to evade detection by shaving his beard and buying new clothes, and initiated negotiations for a plea bargain. *Id.*, at 1918–1921. The State also presented testimony from a friend of Cone's, Ilene Blankman, that she saw no indication that Cone was under the influence of drugs or severe withdrawal in the days immediately following the murder of the Todds. *Id.*, at 1875–1876, 1882–1883 (Apr. 21, 1982).

Viewing the record as a whole, then, it is apparent that the contested issue at trial and sentencing was not whether Cone used drugs, but rather the quantity of Cone's drug use and its effect on his mental state. Only if the evidence allegedly withheld from Cone was relevant to *this* question whether Cone suffered from extreme amphetamine psychosis or other substantial impairment would the evidence have been exculpatory for purposes of *Brady*. See Order Denying Motion for Evidentiary Hearing and Order of Partial Dismissal, *Cone* v. *Bell*, No. 97–2312–M1/A (WD Tenn., May 15, 1998), App. to Pet. for Cert. 119a, n. 9 (explaining that "the issue at trial was not whether Cone had ever abused any drugs (he clearly had), but whether he was out of his mind on amphetamines at the time of the murders"); Tr. 2115–2116 (Apr. 23, 1982).

III

With the legal and factual issues correctly framed, it becomes clear that Cone cannot establish a reasonable probability that admission of the evidence—viewed either individually or cumulatively—would have caused the jury to alter his sentence.

A

1

Cone first argues that he was improperly denied police reports that included witness statements regarding Cone's behavior around the time of his crime spree. The first statement was given by a convenience store employee, Robert McKinney, who saw Cone the day before he robbed the Tennessee jewelry store. When asked whether Cone appeared "to be drunk or high on anything," McKinney answered, "[w]ell he did, he acted real weird . . . he just wandered around the store." App. 49. But McKinney subsequently clarified that Cone "didn't sound drunk" and that the reason Cone attracted his attention was because he "wasn't acting like a regular customer"; he was "just kinda . . . wandering" around the store. Motion to Expand the Record, etc., in No. 97–2312–M1 (WD Tenn.), Exh. 2, pp. 3, 4. Contrary to the majority's assertion, this interview is not convincing evidence "that Cone appeared to be 'drunk or high' " when McKinney saw him. *Ante*, at 470. McKinney's clarification that he had characterized Cone's behavior as "weird" because Cone appeared to be killing time rather than acting like a normal shopper undermines the implication of McKinney's earlier statement that Cone looked "weird" because he might have been drunk or on drugs. Thus, there is little chance that McKinney's statement would have provided any significant additional evidence that Cone was using drugs, let alone provide sentence-changing evidence that he was substantially impaired due to amphetamine psychosis.

The second statement was given by Charles and Debbie Slaughter, who both witnessed Cone fleeing from police after the jewelry store robbery and reportedly told police that he looked "wild eyed." App. 50. Cone had just robbed a jewelry store, shot a police officer and a bystander, and was still fleeing from police when seen by the Slaughters. It is thus unlikely that their observation of a "wild eyed" man would

have been interpreted by the jury to mean that Cone "was suffering from chronic amphetamine psychosis at the time of the crimes," *ante*, at 471, n. 16, rather than to mean that Cone looked like a man on the run.

The third statement is contained in a police report authored by an officer who helped apprehend Cone after the Florida drugstore robbery. He reported that he saw a suspect "at the rear of Sambos Restaurant. Subject was observed to be looking about in a frenzied manner and also appeared to be looking for a place to run." App. 53. Nothing in this police report either connects Cone to drug use or appears otherwise capable of altering the jury's understanding of Cone's mental state at the time of the crimes. It certainly makes perfect sense that Cone was "looking about in a frenzied manner," *ibid.;* he had just robbed a drugstore and was about to engage in a gun battle with police in order to evade arrest. The police officer's description of Cone's appearance under these circumstances thus does not "undermine confidence" in Cone's sentence. *Kyles*, 514 U. S., at 435.

2

The next category of documents that Cone relies upon to establish his *Brady* claim are police bulletins. Some of the bulletins were sent by Memphis Police Sergeant Roby to neighboring jurisdictions on the day of the Todd murders and the day after. The bulletins sought Cone's apprehension and alternatively described him as a "drug user" or a "heavy drug user." App. 55–58. Cone asserts that he could have used these bulletins to impeach Sergeant Roby's trial testimony that the sergeant did not see any track marks when visiting Cone in jail a week later. Tr. 1939 (Apr. 22, 1982). Cone's reasoning is faulty for two key reasons. First, Sergeant Roby never testified that Cone was not a drug user. His only trial testimony on this point was simply that he observed no "needle marks" on Cone's arm when taking hair samples from him a few days after Cone's apprehen-

sion. *Ibid.* Second, the bulletins establish only "that the police were initially cautious regarding the characteristics of a person who had committed several heinous crimes." App. to Pet. for Cert. 119a, n. 9. The bulletins would not have tended to prove that the fugitive Cone was, in fact, a heavy drug user—let alone "out of his mind" or otherwise substantially impaired due to amphetamine psychosis—at the time of his crimes.[7]

3

Cone also argues that material was withheld that could have been used to impeach Ilene Blankman's testimony that Cone did not appear to be high or in withdrawal when she helped him obtain a Florida driver's license during his efforts to evade arrest in Florida. Tr. 1875–1882 (Apr. 21, 1982). But he again fails to meet the standard for exculpatory evidence set by *Brady*.

Cone first points to police notes of a pretrial interview with Blankman, which did not reflect the statement she gave at trial that she saw no track marks on Cone's arm. App. 72–73. But Blankman was questioned at trial about her failure to initially disclose this fact to police, Tr. 1903 (Apr. 21, 1982), so the jury was fully aware of the omission. Disclosure of the original copy of the police notes thus could not have had any material effect on the jury's deliberations. Moreover, the missing notes also recorded a damning statement by Blankman that Cone "never used drugs around" her and she "never saw Cone with drug paraphernalia." App.

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[7] Alert bulletins sent by the FBI similarly identified Cone as a "believed heavy drug user" or a "drug user." App. 62–70. Cone argues that these bulletins could have been used to impeach FBI Agent Flynn's testimony about Cone's arrest in Florida. The bulletins would not have constituted material impeachment evidence, however, for the second reason identified above. In addition, the bulletins would not have contradicted any of FBI Agent Flynn's testimony; he in fact stated at trial that Cone reported using three drugs and was undergoing mild drug withdrawal when he was captured in Florida. Tr. 1915–1916 (Apr. 22, 1982).

73. Thus, it is difficult to accept Cone's argument that he would have benefited from the introduction of notes from Blankman's pretrial interview. If anything, these police notes would have undermined his mitigation argument.

Cone next relies on a report that describes a woman's confrontation with the prosecution team and Blankman at a restaurant during trial. During the encounter, the woman accused Blankman of lying on the stand in order to frame Cone for the murders. *Id.*, at 74–75. The report indicates that the prosecutors politely declined the woman's numerous attempts to discuss the merits of the case and that Blankman said nothing. *Id.*, at 75. Nothing about this encounter raises doubts about Blankman's credibility.

Last, Cone points to "correspondence in the district attorney's files suggest[ing] that the prosecution had been unusually solicitous of [Blankman's] testimony." Brief for Petitioner 45. But the correspondence was completely innocuous. One of the notes, sent in response to Blankman's request for a copy of her prior statement, expressed to Blankman that her "cooperation in this particular matter is appreciated." App. 76. The prosecutor then sent a letter to confirm that Blankman would testify at trial. *Id.*, at 77. And finally, after trial, the prosecutor sent a note to inform Blankman of the verdict and indicate that they "certainly appreciate[d] [her] cooperation with [them] in the trial of Gary Bradford Cone." *Id.*, at 78. There is nothing about these notes that "tend[s] to prove any fact that is both favorable to Cone and material to his guilt or punishment." App. to Pet. for Cert. 116a.

B

Viewing the record as a whole, Cone has not come close to demonstrating that there is a "reasonable probability" that the withheld evidence, analyzed individually or cumulatively, would have changed the result of his sentencing. Much of the impeachment evidence identified by Cone is of no probative value whatsoever. The police bulletins do not contra-

dict any of the trial testimony; the restaurant encounter was innocuous; and the correspondence sent by prosecutors to Blankman does not undermine her testimony or call Cone's mental state into doubt. If the remaining evidence has any value to Cone, it is marginal at best. There was testimony that Blankman did not initially tell police that Cone lacked track marks. See Tr. 1903 (Apr. 21, 1982). McKinney clarified in his statement that Cone's activity in the store was consistent with a person killing time, not the use of drugs or alcohol. And the behavior described by the Slaughters and the Florida police officer is more naturally attributable to the circumstances of Cone's flight from the police than to any inference that Cone was "out of his mind" or otherwise substantially impaired due to amphetamine psychosis.

Countering the trivial value of the alleged *Brady* material is the clear and overwhelming evidence that during Cone's crime spree, he was neither sufficiently insane to avoid a conviction of murder nor substantially impaired by his drug use or withdrawal-related psychosis. There was substantial evidence that Cone carefully planned the jewelry store robbery and was calm in carrying it out, Tr. 974–976, 1014 (Apr. 16, 1982), 1350–1352 (Apr. 17, 1982), 1501 (Apr. 19, 1982), 2075 (Apr. 22, 1982); that he successfully eluded police after engaging them in a shootout, *id.*, at 1053–1064 (Apr. 16, 1982); that, after hiding overnight, he concocted a ruse to try to gain illegal entry to a residence, *id.*, at 1205–1208 (Apr. 17, 1982); that he murdered the Todds after they declined to cooperate with his efforts to further elude police, *id.*, at 1681 (Apr. 20, 1982); that he took steps to change his appearance at the Todd residence and then successfully fled to Florida, *id.*, at 1918–1919 (Apr. 22, 1982); that he arrived in Florida exhibiting no signs of drug use or severe withdrawal, *id.*, at 1875–1882 (Apr. 21, 1982); that he obtained false identification in a further effort to avoid apprehension, *id.*, at 1881–1882; and that he denied any memory lapses and described undergoing only minor drug withdrawal when police ar-

rested him, *id.*, at 1919–1920 (Apr. 22, 1982). Given this wealth of evidence, there is no "reasonable probability" that the jury would have found that Cone was entitled to the substantial impairment mitigator had the evidence he seeks been made available to him.

And even if Cone could have presented this evidence to the jury at sentencing and established an entitlement to this mitigator, he still has not demonstrated a reasonable probability that it would have outweighed all of the aggravating factors supporting the jury's death sentence. See *id.*, at 2151–2154 (Apr. 23, 1982). In its decision on direct appeal, the Tennessee Supreme Court was well aware of the evidence regarding the "degree and extent of [Cone's] drug abuse." *Cone*, 665 S. W. 2d, at 90. As part of its required independent review of whether the mitigation evidence was sufficiently substantial to outweigh the aggravating factors, see Tenn. Code Ann. § 39–2–205, the Tennessee court nevertheless concluded that the sentence was "not in any way disproportionate under all of the circumstances, including the brutal murders of two elderly defenseless persons by an escaping armed robber who had terrorized a residential neighborhood for twenty-four hours." 665 S. W. 2d, at 95–96. None of Cone's proffered evidence places that conclusion, made by both the jury and the Tennessee Supreme Court, "in such a different light as to undermine confidence" in Cone's sentence. *Kyles*, 514 U. S., at 435; see also *Strickler*, 527 U. S., at 296.

IV

This Court should not vacate and remand lower court decisions based on nothing more than the vague suspicion that error might be present, or because the court below could have been more clear. This is especially so where, as here, the record before the Court is adequate to evaluate Cone's *Brady* claims with respect to both the guilt and sentencing phases of his trial. The Court's willingness to return the sentencing issue to the District Court without any firm con-

viction that an error was committed by the Court of Appeals is inconsistent with our established practice and disrespectful to the lower courts that have considered this case. Worse still, the inevitable result will be years of additional delay in the execution of a death sentence lawfully imposed by a Tennessee jury. Because I would affirm the judgment below, I respectfully dissent.

Syllabus

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FOX TELEVISION STATIONS, INC., ET AL.

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

No. 07–582. Argued November 4, 2008—Decided April 28, 2009

Federal law bans the broadcasting of "any . . . indecent . . . language," 18 U. S. C. § 1464, which includes references to sexual or excretory activity or organs, see *FCC* v. *Pacifica Foundation*, 438 U. S. 726. Having first defined the prohibited speech in 1975, the Federal Communications Commission (FCC) took a cautious, but gradually expanding, approach to enforcing the statutory prohibition. In 2004, the FCC's *Golden Globes Order* declared for the first time that an expletive (nonliteral) use of the F-Word or the S-Word could be actionably indecent, even when the word is used only once.

This case concerns isolated utterances of the F- and S-Words during two live broadcasts aired by Fox Television Stations, Inc. In its order upholding the indecency findings, the FCC, *inter alia*, stated that the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionable; declared that under the new policy, a lack of repetition weighs against a finding of indecency, but is not a safe harbor; and held that both broadcasts met the new test because one involved a literal description of excrement and both invoked the F-Word. The order did not impose sanctions for either broadcast. The Second Circuit set aside the agency action, declining to address the constitutionality of the FCC's action but finding the FCC's reasoning inadequate under the Administrative Procedure Act (APA).

Held: The judgment is reversed, and the case is remanded.

489 F. 3d 444, reversed and remanded.

JUSTICE SCALIA delivered the opinion of the Court, except as to Part III–E, concluding:

1. The FCC's orders are neither "arbitrary" nor "capricious" within the meaning of the APA, 5 U. S. C. § 706(2)(A). Pp. 513–522.

(a) Under the APA standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. In overturning the FCC's judgment, the Second Circuit relied in part on its precedent interpreting the APA and *State Farm* to require a more substantial explanation for agency action that changes prior policy. There is, however, no basis in the Act or this

Court's opinions for a requirement that all agency change be subjected to more searching review. Although an agency must ordinarily display awareness that it *is* changing position, see *United States* v. *Nixon*, 418 U. S. 683, 696, and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy, it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change adequately indicates. Pp. 513–516.

(b) Under these standards, the FCC's new policy and its order finding the broadcasts at issue actionably indecent were neither arbitrary nor capricious. First, the FCC forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent prior FCC and staff actions, and explicitly disavowing them as no longer good law. The agency's reasons for expanding its enforcement activity, moreover, were entirely rational. Even when used as an expletive, the F-Word's power to insult and offend derives from its sexual meaning. And the decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with *Pacifica*'s context-based approach. Because the FCC's prior safe-harbor-for-single-words approach would likely lead to more widespread use, and in light of technological advances reducing the costs of bleeping offending words, it was rational for the agency to step away from its old regime. The FCC's decision not to impose sanctions precludes any argument that it is arbitrarily punishing parties without notice of their actions' potential consequences. Pp. 517–518.

(c) None of the Second Circuit's grounds for finding the FCC's action arbitrary and capricious is valid. First, the FCC did not need empirical evidence proving that fleeting expletives constitute harmful "first blows" to children; it suffices to know that children mimic behavior they observe. Second, the Court of Appeals' finding that fidelity to the FCC's "first blow" theory would require a categorical ban on *all* broadcasts of expletives is not responsive to the actual policy under review since the FCC has always evaluated the patent offensiveness of words and statements in relation to the context in which they were broadcast. The FCC's decision to retain some discretion in less egregious cases does not invalidate its regulation of the broadcasts under review. Third, the FCC's prediction that a *per se* exemption for fleeting expletives would lead to their increased use merits deference and makes entire sense. Pp. 518–521.

(d) Fox's additional arguments are not tenable grounds for affirmance. Fox misconstrues the agency's orders when it argues that the

Syllabus

new policy is a presumption of indecency for certain words. It reads more into *Pacifica* than is there by arguing that the FCC failed adequately to explain how this regulation is consistent with that case. And Fox's argument that the FCC's repeated appeal to "context" is a smokescreen for a standardless regime of unbridled discretion ignores the fact that the opinion in *Pacifica* endorsed a context-based approach. Pp. 521–522.

2. Absent a lower court opinion on the matter, this Court declines to address the FCC orders' constitutionality. P. 529.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A through III–D, and IV, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III–E, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 530. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 535. STEVENS, J., *post*, p. 539, and GINSBURG, J., *post*, p. 544, filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 546.

Former *Solicitor General Garre* argued the cause for petitioners. With him on the briefs were former *Solicitor General Clement*, *Assistant Attorney General Katsas*, *Eric D. Miller*, *Thomas M. Bondy*, *Anne Murphy*, *Matthew B. Berry*, *Joseph R. Palmore*, *Jacob M. Lewis*, and *Nandan M. Joshi*.

Carter G. Phillips argued the cause for respondents. With him on the brief for respondent Fox Television Stations, Inc., were *R. Clark Wadlow*, *Jennifer Tatel*, *David S. Petron*, and *Quin M. Sorenson*. *Miguel A. Estrada*, *Andrew S. Tulumello*, *Matthew D. McGill*, *Richard Cotton*, *Susan Weiner*, *Robert Corn-Revere*, *Jonathan H. Anschell*, *Susanna M. Lowy*, and *Seth P. Waxman* filed a brief for respondent NBC Universal, Inc., et al. *Andrew Jay Schwartzman* and *Parul Desai* filed a brief for respondent Center for Creative Voices in Media, Inc.*

*Briefs of *amici curiae* urging reversal were filed for the Alliance Defense Fund et al. by *Benjamin W. Bull* and *Glen Lavy;* for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*,

JUSTICE SCALIA delivered the opinion of the Court, except as to Part III–E.

Federal law prohibits the broadcasting of "any . . . indecent . . . language," 18 U. S. C. § 1464, which includes expletives referring to sexual or excretory activity or organs, see *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). This case concerns the adequacy of the Federal Communications Commission's explanation of its decision that this sometimes forbids the broadcasting of indecent expletives even when the offensive words are not repeated.

I. Statutory and Regulatory Background

The Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.* (2000 ed. and Supp. V), established a system of

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Colby M. May, *John Tuskey*, and *Shannon D. Woodruff;* for the Center for Constitutional Jurisprudence by *John C. Eastman*, *David L. Llewellyn, Jr.*, and *Edwin Meese III;* for the Decency Enforcement Center for Television by *Thomas B. North;* for Morality in Media, Inc., by *Robin S. Whitehead;* for National Religious Broadcasters by *Craig L. Parshall*, *Joseph C. Chautin III*, *Elise M. Stubbe*, and *Mark A. Balkin;* and for the Parents Television Council by *Robert R. Sparks, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the ABC Television Affiliates Association by *Wade H. Hargrove*, *Mark J. Prak*, and *David Kushner;* for the American Civil Liberties Union et al. by *Marjorie Heins*, *Steven R. Shapiro*, and *Christopher A. Hansen;* for the California Broadcasters Association et al. by *Kathleen M. Sullivan* and *Gregg P. Skall;* for the Center for Democracy & Technology et al. by *John B. Morris, Jr.*, and *Sophia S. Cope;* for Former FCC Commissioners and Officials by *Timothy K. Lewis*, *Carl A. Solano*, and *Nancy Winkelman*, and by *Henry Geller*, *Newton N. Minow*, and *Glen O. Robinson*, all *pro se;* for the National Association of Broadcasters et al. by *Paul M. Smith*, *Marsha J. MacBride*, *Jane E. Mago*, and *Jerianne Timmerman;* for Public Broadcasters by *Robert A. Long, Jr.*, *Jonathan D. Blake*, and *Jonathan L. Marcus;* for Time Warner Inc. by *Christopher Landau;* and for the Thomas Jefferson Center for the Protection of Free Expression et al. by *Robert M. O'Neil* and *J. Joshua Wheeler.*

Briefs of *amici curiae* were filed for the American Academy of Pediatrics et al. by *Angela J. Campbell*, *James N. Horwood*, and *Tillman L. Lay;* and for Free Press et al. by *Marvin Ammori.*

limited-term broadcast licenses subject to various "conditions" designed "to maintain the control of the United States over all the channels of radio transmission," § 301 (2000 ed.). Almost 28 years ago we said that "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *CBS, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981) (internal quotation marks omitted).

One of the burdens that licensees shoulder is the indecency ban—the statutory proscription against "utter[ing] any obscene, indecent, or profane language by means of radio communication," 18 U. S. C. § 1464—which Congress has instructed the Commission to enforce between the hours of 6 a.m. and 10 p.m. Public Telecommunications Act of 1992, § 16(a), 106 Stat. 954, note following 47 U. S. C. § 303.[1] Congress has given the Commission various means of enforcing the indecency ban, including civil fines, see § 503(b)(1), and license revocations or the denial of license renewals, see §§ 309(k), 312(a)(6).

The Commission first invoked the statutory ban on indecent broadcasts in 1975, declaring a daytime broadcast of George Carlin's "Filthy Words" monologue actionably indecent. *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F. C. C. 2d 94. At that time, the Commission announced the definition of indecent speech that it uses to this day, prohibiting "language that describes,

[1] The statutory prohibition applicable to commercial radio and television stations extends by its terms from 6 a.m. to 12 midnight. The Court of Appeals for the District of Columbia Circuit held, however, that because "Congress and the Commission [had] backed away from the consequences of their own reasoning," by allowing some public broadcasters to air indecent speech after 10 p.m., the court was forced "to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight." *Action for Children's Television* v. *FCC*, 58 F. 3d 654, 669 (1995) (en banc), cert. denied, 516 U. S. 1043 (1996).

in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.*, at 98.

In *FCC* v. *Pacifica Foundation*, *supra*, we upheld the Commission's order against statutory and constitutional challenge. We rejected the broadcasters' argument that the statutory proscription applied only to speech appealing to the prurient interest, noting that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Id.*, at 740. And we held that the First Amendment allowed Carlin's monologue to be banned in light of the "uniquely pervasive presence" of the medium and the fact that broadcast programming is "uniquely accessible to children." *Id.*, at 748–749.

In the ensuing years, the Commission took a cautious, but gradually expanding, approach to enforcing the statutory prohibition against indecent broadcasts. Shortly after *Pacifica*, 438 U. S. 726, the Commission expressed its "inten-[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" contained in Carlin's monologue. *In re Application of WGBH Educ. Foundation*, 69 F. C. C. 2d 1250, 1254, ¶ 10 (1978). When the full Commission next considered its indecency standard, however, it repudiated the view that its enforcement power was limited to "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue." *In re Pacifica Foundation, Inc.*, 2 FCC Rcd. 2698, 2699, ¶ 12 (1987). The Commission determined that such a "highly restricted enforcement standard . . . was unduly narrow as a matter of law and inconsistent with [the Commission's] enforcement responsibilities under Section 1464." *In re Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd. 930, ¶ 5 (1987). The Court of Appeals for the District of Columbia Circuit upheld this

expanded enforcement standard against constitutional and Administrative Procedure Act challenge. See *Action for Children's Television* v. *FCC*, 852 F. 2d 1332 (1988) (R. Ginsburg, J.), superseded in part by *Action for Children's Television* v. *FCC*, 58 F. 3d 654 (1995) (en banc).

Although the Commission had expanded its enforcement beyond the "repetitive use of specific words or phrases," it preserved a distinction between literal and nonliteral (or "expletive") uses of evocative language. *In re Pacifica Foundation, Inc.*, 2 FCC Rcd., at 2699, ¶ 13. The Commission explained that each literal "description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive," but that "deliberate and repetitive use . . . is a requisite to a finding of indecency" when a complaint focuses solely on the use of nonliteral expletives. *Ibid.*

Over a decade later, the Commission emphasized that the "full context" in which particular materials appear is "critically important," but that a few "principal" factors guide the inquiry, such as the "explicitness or graphic nature" of the material, the extent to which the material "dwells on or repeats" the offensive material, and the extent to which the material was presented to "pander," to "titillate," or to "shock." *In re Industry Guidance on Commission's Case Law Interpreting 18 U. S. C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8002, ¶ 9, 8003, ¶ 10 (2001) (emphasis deleted). "No single factor," the Commission said, "generally provides the basis for an indecency finding," but "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency." *Id.*, at 8003, ¶ 10, 8008, ¶ 17.

In 2004, the Commission took one step further by declaring for the first time that a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once. The first order to this effect dealt

with an NBC broadcast of the Golden Globe Awards, in which the performer Bono commented, "'[T]his is really, really, f***ing brilliant.'" *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4976, n. 4 (2004) *(Golden Globes Order)*. Although the Commission had received numerous complaints directed at the broadcast, its enforcement bureau had concluded that the material was not indecent because "Bono did not describe, in context, sexual or excretory organs or activities and . . . the utterance was fleeting and isolated." *Id.*, at 4975–4976, ¶ 3. The full Commission reviewed and reversed the staff ruling.

The Commission first declared that Bono's use of the F-Word fell within its indecency definition, even though the word was used as an intensifier rather than a literal descriptor. "[G]iven the core meaning of the 'F-Word,'" it said, "any use of that word . . . inherently has a sexual connotation." *Id.*, at 4978, ¶ 8. The Commission determined, moreover, that the broadcast was "patently offensive" because the F-Word "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," because "[i]ts use invariably invokes a coarse sexual image," and because Bono's use of the word was entirely "shocking and gratuitous." *Id.*, at 4979, ¶ 9.

The Commission observed that categorically exempting such language from enforcement actions would "likely lead to more widespread use." *Ibid.* Commission action was necessary to "safeguard the well-being of the nation's children from the most objectionable, most offensive language." *Ibid.* The order noted that technological advances have made it far easier to delete ("bleep out") a "single and gratuitous use of a vulgar expletive," without adulterating the content of a broadcast. *Id.*, at 4980, ¶ 11.

The order acknowledged that "prior Commission and staff action [has] indicated that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent or would not be acted

upon." It explicitly ruled that "any such interpretation is no longer good law." *Ibid.*, ¶ 12. It "clarif[ied] . . . that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.* Because, however, "existing precedent would have permitted this broadcast," the Commission determined that "NBC and its affiliates necessarily did not have the requisite notice to justify a penalty." *Id.*, at 4981–4982, ¶ 15.

II. The Present Case

This case concerns utterances in two live broadcasts aired by Fox Television Stations, Inc., and its affiliates prior to the Commission's *Golden Globes Order.* The first occurred during the 2002 Billboard Music Awards, when the singer Cher exclaimed, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em." Brief for Petitioners 9. The second involved a segment of the 2003 Billboard Music Awards, during the presentation of an award by Nicole Richie and Paris Hilton, principals in a Fox television series called "The Simple Life." Ms. Hilton began their interchange by reminding Ms. Richie to "watch the bad language," but Ms. Richie proceeded to ask the audience, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple." *Id.*, at 9–10. Following each of these broadcasts, the Commission received numerous complaints from parents whose children were exposed to the language.

On March 15, 2006, the Commission released "Notices of Apparent Liability" for a number of broadcasts that the Commission deemed actionably indecent, including the two described above. *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 2664 (2006). Multiple parties petitioned the Court of Appeals for the Second Circuit for judicial review of

the order, asserting a variety of constitutional and statutory challenges. Since the order had declined to impose sanctions, the Commission had not previously given the broadcasters an opportunity to respond to the indecency charges. It therefore requested and obtained from the Court of Appeals a voluntary remand so that the parties could air their objections. 489 F. 3d 444, 453 (2007). The Commission's order on remand upheld the indecency findings for the broadcasts described above. See *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002, and Mar. 8, 2005*, 21 FCC Rcd. 13299 (2006) *(Remand Order)*.

The order first explained that both broadcasts fell comfortably within the subject-matter scope of the Commission's indecency test because the 2003 broadcast involved a literal description of excrement and both broadcasts invoked the "F-Word," which inherently has a sexual connotation. *Id.*, at 13304, ¶ 16, 13323, ¶ 58. The order next determined that the broadcasts were patently offensive under community standards for the medium. Both broadcasts, it noted, involved entirely gratuitous uses of "one of the most vulgar, graphic, and explicit words for sexual activity in the English language." *Id.*, at 13305, ¶ 17, 13324, ¶ 59. It found Ms. Richie's use of the "F-Word" and her "explicit description of the handling of excrement" to be "vulgar and shocking," as well as to constitute "pandering," after Ms. Hilton had playfully warned her to "'watch the bad language.'" *Id.*, at 13305, ¶ 17. And it found Cher's statement patently offensive in part because she metaphorically suggested a sexual act as a means of expressing hostility to her critics. *Id.*, at 13324, ¶ 60. The order relied upon the "'critically important'" context of the utterances, *id.*, at 13304, ¶ 15, noting that they were aired during prime-time awards shows "designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars," *id.*, at 13305, ¶ 18, 13324, ¶ 59. Indeed,

approximately 2.5 million minors witnessed each of the broadcasts. *Id.*, at 13306, ¶ 18, 13326, ¶ 65.

The order asserted that both broadcasts under review would have been actionably indecent under the staff rulings and Commission dicta in effect prior to the *Golden Globes Order*—the 2003 broadcast because it involved a literal description of excrement, rather than a mere expletive, because it used more than one offensive word, and because it was planned, 21 FCC Rcd., at 13307, ¶ 22; and the 2002 broadcast because Cher used the F-Word not as a mere intensifier, but as a description of the sexual act to express hostility to her critics, *id.*, at 13324, ¶ 60. The order stated, however, that the pre-*Golden Globes* regime of immunity for isolated indecent expletives rested only upon staff rulings and Commission dicta, and that the Commission itself had never held "that the isolated use of an expletive . . . was not indecent or could not be indecent," 21 FCC Rcd., at 13307, ¶ 21. In any event, the order made clear, the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionably indecent, 21 FCC Rcd., at 13308, ¶ 23, 13325, ¶ 61, and the Commission disavowed the bureau-level decisions and its own dicta that had said otherwise, *id.*, at 13306–13307, ¶¶ 20, 21. Under the new policy, a lack of repetition "weigh[s] against a finding of indecency," *id.*, at 13325, ¶ 61, but is not a safe harbor.

The order explained that the Commission's prior "strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning." *Id.*, at 13308, ¶ 23. In the Commission's view, "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children)" to take "'the first blow'" and would allow broadcasters "to air expletives at all hours of a day so long as they did so one at a time." *Id.*, at 13309, ¶ 25. Although the Commission determined that Fox

encouraged the offensive language by using suggestive scripting in the 2003 broadcast, and unreasonably failed to take adequate precautions in both broadcasts, *id.*, at 13311–13314, ¶¶ 31–37, the order again declined to impose any forfeiture or other sanction for either of the broadcasts, *id.*, at 13321, ¶ 53, 13326, ¶ 66.

Fox returned to the Second Circuit for review of the *Remand Order*, and various intervenors including CBS, NBC, and ABC joined the action. The Court of Appeals reversed the agency's orders, finding the Commission's reasoning inadequate under the Administrative Procedure Act. 489 F. 3d 444. The majority was "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster," but it declined to reach the constitutional question. *Id.*, at 462. Judge Leval dissented, *id.*, at 467. We granted certiorari, 552 U. S. 1255 (2008).

III. Analysis

A. Governing Principles

The Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, which sets forth the full extent of judicial authority to review executive agency action for procedural correctness, see *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 545–549 (1978), permits (insofar as relevant here) the setting aside of agency action that is "arbitrary" or "capricious," 5 U. S. C. § 706(2)(A). Under what we have called this "narrow" standard of review, we insist that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983). We have made clear, however, that "a court is not to substitute its judgment for that of the agency," *ibid.*, and should "uphold a decision of less than ideal clarity if the agency's path may reasonably

be discerned," *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974).

In overturning the Commission's judgment, the Court of Appeals here relied in part on Circuit precedent requiring a more substantial explanation for agency action that changes prior policy. The Second Circuit has interpreted the Administrative Procedure Act and our opinion in *State Farm* as requiring agencies to make clear " 'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive' " as well as " 'why the new rule effectuates the statute as well as or better than the old rule.' " 489 F. 3d, at 456–457 (quoting *New York Council, Assn. of Civilian Technicians* v. *FLRA*, 757 F. 2d 502, 508 (CA2 1985); emphasis deleted). The Court of Appeals for the District of Columbia Circuit has similarly indicated that a court's standard of review is "heightened somewhat" when an agency reverses course. *NAACP* v. *FCC*, 682 F. 2d 993, 998 (1982).

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance. That case, which involved the rescission of a prior regulation, said only that such action requires "a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance." 463 U. S., at 42 (emphasis added).[2] Treating failures to act and

[2] JUSTICE BREYER's contention that *State Farm* did anything more, *post*, at 549–552 (dissenting opinion), rests upon his failure to observe the italicized phrase and upon a passage quoted in *State Farm* from a plurality opinion in *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U. S. 800 (1973). That passage referred to "a presumption that [congressional] policies will be carried out best if the settled rule is adhered to." *Id.*, at 807–808 (opinion of Marshall, J.). But the *Atchison* plurality made this statement in the context of requiring the agency to provide *some* explanation for a change, "so that the reviewing court may understand the basis

rescissions of prior action differently for purposes of the standard of review makes good sense, and has basis in the text of the statute, which likewise treats the two separately. It instructs a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U. S. C. § 706(1), and to "hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . arbitrary [or] capricious," § 706(2)(A). The statute makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States* v. *Nixon,* 418 U. S. 683, 696 (1974). And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). It would be arbitrary or capricious to ignore such matters. In such cases it is not

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of the agency's action and so may judge the consistency of that action with the agency's mandate," *id.*, at 808. The opinion did not assert the authority of a court to demand explanation sufficient to enable it to weigh (by its own lights) the merits of the agency's change. Nor did our opinion in *State Farm.*

that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

In this appeal from the Second Circuit's setting aside of Commission action for failure to comply with a procedural requirement of the Administrative Procedure Act, the broadcasters' arguments have repeatedly referred to the First Amendment. If they mean to invite us to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties, we reject the invitation. The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988). We know of no precedent for applying it to limit the scope of authorized executive action. In the same section authorizing courts to set aside "arbitrary [or] capricious" agency action, the Administrative Procedure Act separately provides for setting aside agency action that is "unlawful," 5 U. S. C. § 706(2)(A), which of course includes unconstitutional action. We think that is the only context in which constitutionality bears upon judicial review of authorized agency action. If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's "arbitrary [or] capricious" standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge.[3]

[3] JUSTICE BREYER claims that "[t]he Court has often applied [the doctrine of constitutional avoidance] where an agency's regulation relies on a plausible but constitutionally suspect interpretation of a statute." *Post,* at 566. The cases he cites, however, set aside an agency regulation because, applying the doctrine of constitutional avoidance to the ambiguous statute under which the agency acted, *the Court* found the agency's interpretation of the statute erroneous. See *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159, 174 (2001); *NLRB* v. *Catholic Bishop of Chicago,* 440 U. S. 490, 507 (1979). But JUSTICE

B. Application to This Case

Judged under the above described standards, the Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious. First, the Commission forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent "prior Commission and staff action" and explicitly disavowing them as "no longer good law." *Golden Globes Order*, 19 FCC Rcd., at 4980, ¶ 12. To be sure, the (superfluous) explanation in its *Remand Order* of why the Cher broadcast would even have violated its earlier policy may not be entirely convincing. But that unnecessary detour is irrelevant. There is no doubt that the Commission knew it was making a change. That is why it declined to assess penalties; and it relied on the *Golden Globes Order* as removing any lingering doubt. *Remand Order*, 21 FCC Rcd., at 13308, ¶ 23, 13325, ¶ 61.

Moreover, the agency's reasons for expanding the scope of its enforcement activity were entirely rational. It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent. As the Commission said with regard to expletive use of the F-Word, "the word's power to insult and offend derives from its sexual meaning." *Id.*, at 13323, ¶ 58. And the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*, 438

BREYER does not urge that *we* issue such a holding, evidently agreeing that we should limit our review to what the Court of Appeals decided, see Part IV, *infra*—which included only the adequacy of the Commission's rulemaking procedure, and not the statutory question. Rather, JUSTICE BREYER seeks a "remand [that] would do no more than ask the agency to reconsider its policy decision in light of" constitutional concerns. *Post*, at 566. That strange and novel disposition would be entirely unrelated to the doctrine of constitutional avoidance, and would better be termed the doctrine of judicial arm-twisting or appellate review by the wagged finger.

U. S., at 750. Even isolated utterances can be made in "pander[ing,] . . . vulgar and shocking" manners, *Remand Order*, 21 FCC Rcd., at 13305, ¶ 17, and can constitute harmful "'first blow[s]'" to children, *id.*, at 13309, ¶ 25. It is surely rational (if not inescapable) to believe that a safe harbor for single words would "likely lead to more widespread use of the offensive language," *Golden Globes Order*, *supra*, at 4979, ¶ 9.

When confronting other requests for *per se* rules governing its enforcement of the indecency prohibition, the Commission has declined to create safe harbors for particular types of broadcasts. See *In re Pacifica Foundation, Inc.*, 2 FCC Rcd., at 2699, ¶ 12 (repudiating the view that the Commission's enforcement power was limited to "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue"); *In re Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd., at 932, ¶ 17 ("reject[ing] an approach that would hold that if a work has merit, it is *per se* not indecent"). The Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was "at odds with the Commission's overall enforcement policy." *Remand Order*, *supra*, at 13308, ¶ 23.

The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy. *Golden Globes Order*, *supra*, at 4980, ¶ 11. And the agency's decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action.

C. The Court of Appeals' Reasoning

The Court of Appeals found the Commission's action arbitrary and capricious on three grounds. First, the court criticized the Commission for failing to explain why it had not previously banned fleeting expletives as "harmful 'first

blow[s].'" 489 F. 3d, at 458. In the majority's view, without "evidence that suggests a fleeting expletive is harmful [and] . . . serious enough to warrant government regulation," the agency could not regulate more broadly. *Id.*, at 461. As explained above, the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so. And it is not the Commission, but Congress that has proscribed "any . . . indecent . . . language." 18 U. S. C. § 1464.

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. See, *e. g.*, *State Farm*, 463 U. S., at 46–56 (addressing the costs and benefits of mandatory passive restraints for automobiles). It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

The Commission had adduced no quantifiable measure of the harm caused by the language in *Pacifica*, and we nonetheless held that the "government's interest in the 'well-being of its youth' . . . justified the regulation of otherwise protected expression." 438 U. S., at 749 (quoting *Ginsberg* v. *New York*, 390 U. S. 629, 640, 639 (1968)). If the Constitu-

tion itself demands of agencies no more scientifically certain criteria to comply with the First Amendment, neither does the Administrative Procedure Act to comply with the requirement of reasoned decisionmaking.

The court's second objection is that fidelity to the agency's "first blow" theory of harm would require a categorical ban on *all* broadcasts of expletives; the Commission's failure to go to this extreme thus undermined the coherence of its rationale. 489 F. 3d, at 458–459. This objection, however, is not responsive to the Commission's actual policy under review—the decision to include patently offensive fleeting expletives within the definition of indecency. The Commission's prior enforcement practice, unchallenged here, already drew distinctions between the offensiveness of particular words based upon the context in which they appeared. Any complaint about the Commission's failure to ban only some fleeting expletives is better directed at the agency's context-based system generally rather than its inclusion of isolated expletives.

More fundamentally, however, the agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious. "Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale," we have explained, "would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected." *Pacifica*, *supra*, at 750, n. 29. The same rationale could support the Commission's finding that a broadcast of the film Saving Private Ryan was not indecent—a finding to which the broadcasters point as supposed evidence of the Commission's inconsistency. The frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material. See *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of ABC Television Network's*

Presentation of Film "Saving Private Ryan," 20 FCC Rcd. 4507, 4513, ¶ 15 (2005) (noting that the broadcast was not "intended as family entertainment"). The agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children.

Finally, the Court of Appeals found unconvincing the agency's prediction (without any evidence) that a *per se* exemption for fleeting expletives would lead to increased use of expletives one at a time. 489 F. 3d, at 460. But even in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense. To predict that complete immunity for fleeting expletives, ardently desired by broadcasters, will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance. The Court of Appeals was perhaps correct that the Commission's prior policy had not yet caused broadcasters to "barrag[e] the airwaves with expletives," *ibid.* That may have been because its prior permissive policy had been confirmed (save in dicta) only at the staff level. In any event, as the *Golden Globes* order demonstrated, it did produce more expletives than the Commission (which has the first call in this matter) deemed in conformity with the statute.

D. Respondents' Arguments

Respondents press some arguments that the court did not adopt. They claim that the Commission failed to acknowledge its change in enforcement policy. That contention is not tenable in light of the *Golden Globes Order*'s specific declaration that its prior rulings were no longer good law, 19 FCC Rcd., at 4980, ¶ 12, and the *Remand Order*'s disavowal of those staff rulings and Commission dicta as "seriously flawed," 21 FCC Rcd., at 13308, ¶ 23. The broadcasters also try to recharacterize the nature of the Commission's shift,

contending that the old policy was not actually a *per se* rule against liability for isolated expletives and that the new policy is a presumption of indecency for certain words. This description of the prior agency policy conflicts with the broadcasters' own prior position in this case. See, *e. g.*, Brief in Opposition for Respondent Fox Television Stations, Inc., et al. 4 ("For almost 30 years following Pacifica, the FCC did not consider fleeting, isolated or inadvertent expletives to be indecent"). And we find no basis for the contention that the Commission has now adopted a presumption of indecency; its repeated reliance on context refutes this claim.

The broadcasters also make much of the fact that the Commission has gone beyond the scope of authority approved in *Pacifica*, which it once regarded as the farthest extent of its power. But we have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden. To the contrary, we explicitly left for another day whether "an occasional expletive" in "a telecast of an Elizabethan comedy" could be prohibited. 438 U. S., at 748–750. By using the narrowness of *Pacifica*'s holding to require empirical evidence of harm before the Commission regulates more broadly, the broadcasters attempt to turn the sword of *Pacifica*, which allowed *some* regulation of broadcast indecency, into an administrative-law shield preventing any regulation beyond what *Pacifica* sanctioned. Nothing prohibits federal agencies from moving in an incremental manner. Cf. *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 1002 (2005).

Finally, the broadcasters claim that the Commission's repeated appeal to "context" is simply a smokescreen for a standardless regime of unbridled discretion. But we have previously approved Commission regulation based "on a nuisance rationale under which context is all-important," *Pacifica*, *supra*, at 750, and we find no basis in the Administrative Procedure Act for mandating anything different.

E. The Dissents' Arguments

JUSTICE BREYER purports to "begin with applicable law," *post,* at 547, but in fact begins by stacking the deck. He claims that the FCC's status as an "independent" agency sheltered from political oversight requires courts to be "all the more" vigilant in ensuring "that major policy decisions be based upon articulable reasons." *Ibid.* Not so. The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction. See, *e. g.*, *In re Sealed Case*, 838 F. 2d 476, 507–508 (CADC) (Silberman, J.), rev'd *sub nom. Morrison* v. *Olson*, 487 U. S. 654 (1988); Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2271, n. 93 (2001); Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541, 583 (1994); Easterbrook, The State of Madison's Vision of the State: A Public Choice Perspective, 107 Harv. L. Rev. 1328, 1341 (1994). Indeed, the precise policy change at issue here was spurred by significant political pressure from Congress.[4]

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[4] A Subcommittee of the FCC's House Oversight Committee held hearings on the FCC's broadcast indecency enforcement on January 28, 2004. "Can You Say That on TV?": An Examination of the FCC's Enforcement with Respect to Broadcast Indecency, Hearing before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, 108th Cong., 2d Sess. Members of the Subcommittee specifically "called on the full Commission to reverse [the staff ruling in the *Golden Globes* case]" because they perceived a "feeling amongst many Americans that some TV broadcasters are engaged in a race to the bottom, pushing the decency envelope in order to distinguish themselves in the increasingly crowded entertainment field." *Id.*, at 2 (statement of Rep. Upton); see also, *e. g.*, *id.*, at 17 (statement of Rep. Terry), 19 (statement of Rep. Pitts). They repeatedly expressed disapproval of the FCC's enforcement policies, see, *e. g.*, *id.*, at 3 (statement of Rep. Upton) ("At some point, we have to ask the FCC: How much is enough? When will it revoke a license?"); *id.*, at 4 (statement of Rep. Markey) ("Today's hearing

JUSTICE STEVENS apparently recognizes this political control by Congress, and indeed sees it as the manifestation of a principal-agency relationship. In his judgment, the FCC is "better viewed as an agent of Congress" than as part of the Executive. *Post*, at 540 (dissenting opinion). He nonetheless argues that this is a good reason for requiring the FCC to explain "why its prior policy is no longer sound before allowing it to change course." *Post*, at 541. Leaving aside the unconstitutionality of a scheme giving the power to enforce laws to agents of Congress, see *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986), it seems to us that JUSTICE STEVENS' conclusion does not follow from his premise. If the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress

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will allow us to explore the FCC's lackluster enforcement record with respect to these violations").

About two weeks later, on February 11, 2004, the same Subcommittee held hearings on a bill increasing the fines for indecency violations. Hearings on H. R. 3717 before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, 108th Cong., 2d Sess. All five Commissioners were present and were grilled about enforcement shortcomings. See, *e. g.*, *id.*, at 124 (statement of Rep. Terry) ("Chairman Powell, . . . it seems like common sense that if we had . . . more frequent enforcement instead of only a few examples of fines . . . that would be a deterrent in itself"); *id.*, at 7 (statement of Rep. Dingell) ("I see that apparently . . . there is no enforcement of regulations at the FCC"). Certain statements, moreover, indicate that the political pressure applied by Congress had its desired effect. See *ibid.* ("I think our committee's work has gotten the attention of FCC Chairman Powell and the Bush Administration. And I'm happy to see the FCC now being brought to a state of apparent alert on these matters"); see also *id.*, at 124 (statement of Michael Copps, FCC Commissioner) (noting "positive" change in other Commissioners' willingness to step up enforcement in light of proposed congressional action). A version of the bill ultimately became law as the Broadcast Decency Enforcement Act of 2005, 120 Stat. 491.

The FCC adopted the change that is the subject of this litigation on March 3, 2004, about three weeks after this second hearing. See *Golden Globes Order*, 19 FCC Rcd. 4975.

made clear its wishes for stricter enforcement, see n. 4, *supra*.[5] The Administrative Procedure Act, after all, does not apply to Congress and its agencies.[6]

Regardless, it is assuredly not "applicable law" that rulemaking by independent regulatory agencies is subject to heightened scrutiny. The Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency, 5 U. S. C. § 701(b)(1), nor in the standards for reviewing agency action, § 706. Nor does any case of ours express or reflect the "heightened scrutiny" JUSTICE BREYER and JUSTICE STEVENS would impose. Indeed, it is hard to imagine any closer scrutiny than that we have given to the Environmental Protection Agency, which is not an independent agency. See *Massachusetts* v. *EPA*, 549 U. S. 497, 533–535 (2007); *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 481–486 (2001). There is no reason to magnify the separation-of-powers dilemma posed by the headless Fourth

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[5] JUSTICE STEVENS accuses us of equating statements made in a congressional hearing with the intent of Congress. *Post*, at 541–542, n. 3. In this opinion, we do not. The intent of the full Congress (or at least a majority of each House) is thought relevant to the interpretation of statutes, since they must be passed by the entire Congress. See U. S. Const., Art. I, § 7. It is quite irrelevant, however, to the extrastatutory influence Congress exerts over agencies of the Executive Branch, which is exerted by the congressional committees responsible for oversight and appropriations with respect to the relevant agency. That is a major reason why committee assignments are important, and committee chairmanships powerful. Surely JUSTICE STEVENS knows this.

[6] The Administrative Procedure Act defines "agency" to mean "each authority of the Government of the United States," 5 U. S. C. § 551(1), but specifically excludes "the Congress," § 551(1)(A). The Court of Appeals for the District of Columbia Circuit has "interpreted [this] exemption for 'the Congress' to mean the entire *legislative* branch," *Washington Legal Foundation* v. *United States Sentencing Comm'n*, 17 F. 3d 1446, 1449 (1994); see also *Ethnic Employees of Library of Congress* v. *Boorstin*, 751 F. 2d 1405, 1416, n. 15 (CADC 1985) (holding that the Library of Congress is not an "agency" under the Act).

Branch, see *Freytag* v. *Commissioner*, 501 U. S. 868, 921 (1991) (SCALIA, J., concurring in part and concurring in judgment), by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive.

JUSTICE BREYER and JUSTICE STEVENS rely upon two supposed omissions in the FCC's analysis that they believe preclude a finding that the agency did not act arbitrarily. Neither of these omissions could undermine the coherence of the rationale the agency gave, but the dissenters' evaluation of each is flawed in its own right.

First, both claim that the Commission failed adequately to explain its consideration of the constitutional issues inherent in its regulation, *post*, at 553–556 (opinion of BREYER, J.); *post*, at 542–546 (opinion of STEVENS, J.). We are unaware that we have ever before reversed an executive agency, not for violating our cases, but for failure to discuss them adequately. But leave that aside. According to JUSTICE BREYER, the agency said "next to nothing about the relation between the change it made in its prior 'fleeting expletive' policy and the First-Amendment-related need to avoid 'censorship,'" *post*, at 553. The *Remand Order* does, however, devote four full pages of small-type, single-spaced text (over 1,300 words not counting the footnotes) to explaining why the Commission believes that its indecency-enforcement regime (which includes its change in policy) is consistent with the First Amendment—and therefore not censorship as the term is understood. More specifically, JUSTICE BREYER faults the FCC for "not explain[ing] why the agency changed its mind about the line that *Pacifica* draws or its policy's relation to that line," *post*, at 556. But in fact (and as the Commission explained) this Court's holding in *Pacifica*, 438 U. S. 726, drew no constitutional line; to the contrary, it expressly declined to express any view on the constitutionality of prohibiting isolated indecency. JUSTICE BREYER and JUSTICE STEVENS evidently believe that when an agency has

obtained this Court's determination that a less restrictive rule is constitutional, its successors acquire some special burden to explain why a more restrictive rule is not *un*constitutional. We know of no such principle.[7]

Second, JUSTICE BREYER looks over the vast field of particular factual scenarios unaddressed by the FCC's 35-page *Remand Order* and finds one that is fatal: the plight of the small local broadcaster who cannot afford the new technology that enables the screening of live broadcasts for indecent utterances. Cf. *post*, at 556–561. The Commission has failed to address the fate of this unfortunate, who will, he believes, be subject to sanction.

We doubt, to begin with, that small-town broadcasters run a heightened risk of liability for indecent utterances. In programming that they originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood. Their main exposure with regard to self-originated programming is live coverage of news and public affairs. But the *Remand Order* went out of its way to note that the case at hand did not involve "breaking news coverage," and that "it may be inequitable to hold a licensee responsible for airing offensive

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[7] JUSTICE STEVENS criticizes us for "assuming that *Pacifica* endorsed" the enforcement at issue here. *Post*, at 542. We do nothing of the sort. We rely on the fact that certain aspects of the agency's decision mirror the context-based approach *Pacifica* approved, *supra*, at 517–518, but that goes to our holding on administrative law, and says nothing about constitutionality. JUSTICE STEVENS also argues that heightened deference should be due the FCC's prior policy because the "FCC's initial views . . . reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute." *Post*, at 541. We do not believe that the dead hand of a departed congressional oversight Committee should constrain the discretion that the text of a statute confers—but the point is in any event irrelevant in this appeal, which concerns not whether the agency has exceeded its statutory mandate but whether the reasons for its actions are adequate.

speech during live coverage of a public event," 21 FCC Rcd., at 13311, ¶ 33. As for the programming that small stations receive on a network "feed": This *will* be cleansed by the expensive technology small stations (by JUSTICE BREYER's hypothesis) cannot afford.

But never mind the detail of whether small broadcasters are uniquely subject to a great risk of punishment for fleeting expletives. The fundamental fallacy of JUSTICE BREYER's small-broadcaster gloomy scenario is its demonstrably false assumption that the *Remand Order* makes no provision for the avoidance of unfairness—that the single-utterance prohibition will be invoked uniformly, in all situations. The *Remand Order* made very clear that this is not the case. It said that in determining "what, if any, remedy is appropriate" the Commission would consider the facts of each individual case, such as the "possibility of human error in using delay equipment," *id.*, at 13313, ¶ 35. Thus, the fact that the agency believed that Fox (a large broadcaster that used suggestive scripting and a deficient delay system to air a prime-time awards show aimed at millions of children) "fail[ed] to exercise 'reasonable judgment, responsibility and sensitivity,'" *id.*, at 13311, ¶ 33, and n. 91 (quoting *Pacifica Foundation, Inc.*, 2 FCC Rcd., at 2700, ¶ 18), says little about how the Commission would treat smaller broadcasters who cannot afford screening equipment. Indeed, that they would not be punished for failing to purchase equipment they cannot afford is positively suggested by the *Remand Order*'s statement that "[h]olding Fox responsible for airing indecent material in this case does not . . . impose undue burdens on broadcasters." 21 FCC Rcd., at 13313, ¶ 36.

There was, in sum, no need for the Commission to compose a special treatise on local broadcasters.[8] And JUSTICE

[8] JUSTICE BREYER posits that the FCC would have been required to give more explanation had it used notice-and-comment rulemaking, which "should lead us to the same conclusion" in this review of the agency's change through adjudication. *Post*, at 562. Even assuming the premise,

BREYER can safely defer his concern for those yeomen of the airwaves until we have before us a case that involves one.

IV. Constitutionality

The Second Circuit did not definitively rule on the constitutionality of the Commission's orders, but respondents nonetheless ask us to decide their validity under the First Amendment. This Court, however, is one of final review, "not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case. Meanwhile, any chilled references to excretory and sexual material "surely lie at the periphery of First Amendment concern," *Pacifica*, 438 U. S., at 743 (plurality opinion of STEVENS, J.). We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion. We decline to address the constitutional questions at this time.

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The Second Circuit believed that children today "likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech," and that this cuts against more stringent regulation of broadcasts. 489 F. 3d, at 461. Assuming the premise is true (for this point the Second Circuit did not demand empirical evidence) the conclusion does not necessarily follow. The Commission could reasonably conclude that the pervasiveness of foul language, and the coars-

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there is no basis for incorporating all of the Administrative Procedure Act's notice-and-comment procedural requirements into arbitrary-and-capricious review of adjudicatory decisions. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 545–549 (1978).

ening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children. In the end, the Second Circuit and the broadcasters quibble with the Commission's policy choices and not with the explanation it has given. We decline to "substitute [our] judgment for that of the agency," *State Farm*, 463 U. S., at 43, and we find the Commission's orders neither arbitrary nor capricious.

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

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion, which, as a matter of administrative law, correctly upholds the Federal Communications Commission's (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act. I write separately, however, to note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). *Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. "The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" in these cases. *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 812 (1996) (THOMAS, J., concurring in judgment in part and dissenting in part).

In *Red Lion*, this Court upheld the so-called "fairness doctrine," a Government requirement "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." 395 U. S., at

369, 400–401. The decision relied heavily on the scarcity of available broadcast frequencies. According to the Court, because broadcast spectrum was so scarce, it "could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Id.*, at 376. To this end, the Court concluded that the Government should be "permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.*, at 390; see also *id.*, at 389 (concluding that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused"). Applying this principle, the Court held that "[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." *Id.*, at 394.

Red Lion specifically declined to answer whether the First Amendment authorized the Government's "refusal to permit the broadcaster to carry a particular program or to publish his own views[,] . . . [or] government censorship of a particular program," *id.*, at 396. But then in *Pacifica*, this Court rejected a challenge to the FCC's authority to impose sanctions on the broadcast of indecent material. See 438 U. S., at 729–730, 750–751; *id.*, at 742 (plurality opinion). Relying on *Red Lion*, the Court noted that "broadcasting . . . has received the most limited First Amendment protection." 438 U. S., at 748. The Court also emphasized the "uniquely pervasive presence" of the broadcast media in Americans' lives and the fact that broadcast programming was "uniquely accessible to children." *Id.*, at 748–749.

This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitu-

tional question, the Court relied on a set of transitory facts, *e. g.*, the "scarcity of radio frequencies," *Red Lion*, *supra*, at 390, to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia* v. *Heller*, 554 U. S. 570, 634–635 (2008). In breaching this principle, *Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution. *Denver Area*, *supra*, at 813 (THOMAS, J., concurring in judgment in part and dissenting in part) ("First Amendment distinctions between media [have been] dubious from their infancy"). Indeed, the logical weakness of *Red Lion* and *Pacifica* has been apparent for some time: "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media." *Telecommunications Research & Action Center* v. *FCC*, 801 F. 2d 501, 508 (CADC 1986) (Bork, J.).

Highlighting the doctrinal incoherence of *Red Lion* and *Pacifica*, the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to federal regulation of telephone dial-in services, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 127–128 (1989), cable television programming, see *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 637 (1994), and the Internet, see *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 867–868 (1997). "There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of *Pacifica* when it was issued[,] . . . it makes no sense now." *Action for Children's Television* v. *FCC*, 58 F. 3d 654, 673 (CADC 1995) (Edwards, C. J., dissenting). The justifications relied on by the Court in *Red Lion*

and *Pacifica*—"spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast." 58 F. 3d, at 673; see also *In re Industry Guidance on Commission's Case Law Interpreting 18 U. S. C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8021, n. 11 (2001) (statement of Commissioner Furchtgott-Roth) ("It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection, *see Reno* [v. *American Civil Liberties Union*, 521 U. S. 844 (1997)], than would the same exact content broadcast over-the-air").

Second, even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago. See Brief for Respondent NBC Universal et al. 37–38 (hereinafter NBC Brief). As NBC notes, the number of over-the-air broadcast stations grew from 7,411 in 1969, when *Red Lion* was issued, to 15,273 by the end of 2004. See NBC Brief 37–38; see also FCC Media Bureau Staff Research Paper, J. Berresford, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed 12–13 (Mar. 2005) (No. 2005–2). And the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to "stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today." *Consumer Electronics Assn.* v. *FCC*, 347 F. 3d 291, 294 (CADC 2003).

Moreover, traditional broadcast television and radio are no longer the "uniquely pervasive" media forms they once were. For most consumers, traditional broadcast media program-

ming is now bundled with cable or satellite services. See App. to Pet. for Cert. 106a–107a. Broadcast and other video programming is also widely available over the Internet. See Stelter, Serving Up Television Without the TV Set, N. Y. Times, Mar. 10, 2008, p. C1. And like radio and television broadcasts, Internet access is now often freely available over the airwaves and can be accessed by portable computer, cell phones, and other wireless devices. See May, Charting a New Constitutional Jurisprudence for the Digital Age, 3 Charleston L. Rev. 373, 375 (2009). The extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today. See *In re Industry Guidance*, *supra*, at 8020 (statement of Commissioner Furchtgott-Roth) ("If rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past. As the Commission has long recognized, the facts underlying this justification are no longer true" (footnote omitted)).*

These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis*. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 855 (1992) (asking "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"); see also *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 302 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate . . . "). "In

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*With respect to reliance by *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), on the ease with which children could be exposed to indecent television programming, technology has provided innovative solutions to assist adults in screening their children from unsuitable programming—even when that programming appears on broadcast channels. See NBC Brief 43–47 (discussing V-chip technology, which allows targeted blocking of television programs based on content).

cases involving constitutional issues" that turn on a particular set of factual assumptions, "this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting). For all these reasons, I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, III–A through III–D, and IV of the opinion of the Court and agree that the judgment must be reversed. This separate writing is to underscore certain background principles for the conclusion that an agency's decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so. In those circumstances I agree with the dissenting opinion of JUSTICE BREYER that the agency must explain why "it now reject[s] the considerations that led it to adopt that initial policy." *Post*, at 550.

The question whether a change in policy requires an agency to provide a more reasoned explanation than when the original policy was first announced is not susceptible, in my view, to an answer that applies in all cases. There may be instances when it becomes apparent to an agency that the reasons for a longstanding policy have been altered by discoveries in science, advances in technology, or by any of the other forces at work in a dynamic society. If an agency seeks to respond to new circumstances by modifying its earlier policy, the agency may have a substantial body of data and experience that can shape and inform the new rule. In other cases the altered circumstances may be so new that the agency must make predictive judgments that are as difficult now as when the agency's earlier policy was first an-

nounced. Reliance interests in the prior policy may also have weight in the analysis.

The question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority. That showing may be required if the agency is to demonstrate that its action is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A). And, of course, the agency action must not be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." § 706(2)(C).

These requirements stem from the administrative agency's unique constitutional position. The dynamics of the three branches of Government are well understood as a general matter. But the role and position of the agency, and the exact locus of its powers, present questions that are delicate, subtle, and complex. The Federal Government could not perform its duties in a responsible and effective way without administrative agencies. Yet the amorphous character of the administrative agency in the constitutional system escapes simple explanation.

If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances. To that end the Constitution requires that Congress' delegation of lawmaking power to an agency must be "specific and detailed." *Mistretta* v. *United States*, 488 U. S. 361, 374 (1989). Congress must "'clearly delineat[e] the general policy'" an agency is to achieve and must specify the "'boundaries of [the] delegated authority.'" *Id.*, at 372–373. Congress must "'lay down by legislative act an intelligible principle,'" and the agency must follow it. *Id.*, at 372 (quoting *J. W.*

Hampton, Jr., & Co. v. *United States*, 276 U. S. 394, 409 (1928)).

Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation. To achieve that end, Congress confined agencies' discretion and subjected their decisions to judicial review. See Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1248 (1982) (the APA was a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards"). If an agency takes action not based on neutral and rational principles, the APA grants federal courts power to set aside the agency's action as "arbitrary" or "capricious." 5 U. S. C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971). For these reasons, agencies under the APA are subject to a "searching and careful" review by the courts. *Ibid.*

Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.

This is the principle followed in the Court's opinion in *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). There, Congress directed the agency to issue regulations that would "'meet the need for motor vehicle safety.'" *Id.*, at 33. The agency promulgated a regulation requiring cars to have passive-restraint systems—either airbags or automatic seat-

belts. *Id.*, at 37. The agency based this regulation on its factual finding that these systems save lives. *Id.*, at 35.

Following a change in Presidential administration, however, the agency reversed course and rescinded the regulation. In doing so, the agency did not address its prior finding that airbags save lives. *Id.*, at 47–48. Indeed, "[n]ot one sentence" of the agency's "rulemaking statement" in support of rescinding the regulation discussed the benefits of airbags. *Id.*, at 48. This Court found the agency's rescission arbitrary and capricious because the agency did not address its prior factual findings. See *id.*, at 49–51.

The present case does not raise the concerns addressed in *State Farm.* Rather than base its prior policy on its knowledge of the broadcast industry and its audience, the FCC instead based its policy on what it considered to be our holding in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). See *In re Application of WGBH Educ. Foundation*, 69 F. C. C. 2d 1250, 1254, ¶ 10 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding"). The FCC did not base its prior policy on factual findings.

The FCC's Remand Order explains that the agency has changed its reading of *Pacifica.* The reasons the agency announces for this change are not so precise, detailed, or elaborate as to be a model for agency explanation. But, as the opinion for the Court well explains, the FCC's reasons for its action were the sort of reasons an agency may consider and act upon. The Court's careful and complete analysis—both with respect to the procedural history of the FCC's indecency policies, and the reasons the agency has given to support them—is quite sufficient to sustain the FCC's change of course against respondents' claim that the agency acted in an arbitrary or capricious fashion.

The holding of the Court of Appeals turned on its conclusion that the agency's explanation for its change of policy was insufficient, and that is the only question presented here. I agree with the Court that as this case comes to us from the

Court of Appeals we must reserve judgment on the question whether the agency's action is consistent with the guarantees of the Constitution.

JUSTICE STEVENS, dissenting.

While I join JUSTICE BREYER's cogent dissent, I think it important to emphasize two flaws in the Court's reasoning. Apparently assuming that the Federal Communications Commission's (FCC or Commission) rulemaking authority is a species of executive power, the Court espouses the novel proposition that the Commission need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation. See *ante*, at 514–515. Moreover, the Court incorrectly assumes that our decision in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), decided that the word "indecent," as used in 18 U. S. C. § 1464,[1] permits the FCC to punish the broadcast of *any* expletive that has a sexual or excretory origin. *Pacifica* was not so sweeping, and the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time.

I

"The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches—the Legislative, the Executive, and the Judicial—placing both substantive and procedural limitations on each." *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 272 (1991). The distinction among the branches is not always sharp, see *Bowsher* v. *Synar*, 478 U. S. 714, 749 (1986) (STEVENS, J., concurring in judgment) (citing cases), a consequence of the fact that the "great ordinances of the Constitution do not establish and divide fields of black

[1] Section 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

and white," *Springer* v. *Philippine Islands*, 277 U. S. 189, 209 (1928) (Holmes, J., dissenting). Strict lines of authority are particularly elusive when Congress and the President both exert a measure of control over an agency. As a landmark decision involving the Federal Trade Commission (FTC) made clear, however, when Congress grants rulemaking and adjudicative authority to an expert agency composed of commissioners selected through a bipartisan procedure and appointed for fixed terms, it substantially insulates the agency from executive control. See *Humphrey's Executor* v. *United States*, 295 U. S. 602, 623–628 (1935).

With the view that broadcast regulation "should be as free from political influence or arbitrary control as possible," S. Rep. No. 772, 69th Cong., 1st Sess., 2 (1926), Congress established the FCC with the same measure of independence from the Executive that it had provided the FTC. Just as the FCC's Commissioners do not serve at the will of the President, see 47 U. S. C. § 154(c) (2000 ed.), its regulations are not subject to change at the President's will. And when the Commission fashions rules that govern the airwaves, it exercises legislative power delegated to it by Congress. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 489–490 (2001) (STEVENS, J., concurring in part and concurring in judgment); *Bowsher*, 478 U. S., at 752 (opinion of STEVENS, J.). Consequently, the FCC "cannot in any proper sense be characterized as an arm or an eye of the executive" and is better viewed as an agent of Congress established "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative . . . aid." *Humphrey's Executor*, 295 U. S., at 628.[2]

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[2] JUSTICE SCALIA erroneously concludes that treating the FCC's rulemaking authority as an exercise of legislative power would somehow be unconstitutional. See *ante*, at 524 (citing *Bowsher* v. *Synar*, 478 U. S. 714,

The FCC, like all agencies, may revise its regulations from time to time, just as Congress amends its statutes as circumstances warrant. But the FCC is constrained by its congressional mandate. There should be a strong presumption that the FCC's initial views, reflecting the informed judgment of independent Commissioners with expertise in the regulated area, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute. The rules adopted after *Pacifica*, 438 U. S. 726, have been in effect for decades and have not proved unworkable in the intervening years. As JUSTICE BREYER's opinion explains, broadcasters have a substantial interest in regulatory stability; the threat of crippling financial penalties looms large over these entities. See *post*, at 556–561. The FCC's shifting and impermissibly vague indecency policy only imperils these broadcasters and muddles the regulatory landscape. It therefore makes eminent sense to require the Commission to justify why its prior policy is no longer sound before allowing it to change course.[3]

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726 (1986)). But that is the nature of rulemaking: Rules promulgated by agencies (independent or not) carry the force of law precisely because they are exercises of such legislative authority. This may offend JUSTICE SCALIA's theory of the "unitary Executive," *ante*, at 526, but it does not offend the Constitution. Indeed, "the Framers vested 'All legislative Powers' in the Congress, Art. I, § 1, just as in Article II they vested the 'executive Power' in the President, Art. II, § 1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 489 (2001) (STEVENS, J., concurring in part and concurring in judgment).

[3] It appears that JUSTICE SCALIA has come to the view that isolated statements by members of a congressional oversight subcommittee are sufficient evidence of Congress' intent. See *ante*, at 523–524, n. 4. Delving into the details of how various lawmakers "grilled" the full slate of FCC Commissioners, JUSTICE SCALIA concludes, quite remarkably, that this encounter "made clear [Congress'] wishes for stricter enforcement" and "would seem an adequate explanation of [the FCC's] change of posi-

The FCC's congressional charter, 47 U. S. C. § 151 *et seq.*, the Administrative Procedure Act, 5 U. S. C. § 706(2)(A) (2006 ed.) (instructing courts to "hold unlawful and set aside . . . arbitrary [or] capricious" agency action), and the rule of law all favor stability over administrative whim.

II

The Court commits a second critical error by assuming that *Pacifica* endorsed a construction of the term "indecent," as used in 18 U. S. C. § 1464, that would include any expletive that has a sexual or excretory origin. Neither the opinion of the Court, nor Justice Powell's concurring opinion, adopted such a far-reaching interpretation. Our holding was narrow in two critical respects. First, we concluded, over the dissent of four Justices, that the statutory term "indecent" was not limited to material that had prurient appeal and instead included material that was in "nonconformance with accepted standards of morality." *Pacifica*, 438 U. S., at 740. Second, we upheld the FCC's adjudication that a 12-minute, expletive-filled monologue by satiric humorist George Carlin was indecent "as broadcast." *Id.*, at 735. We did not decide whether an *isolated* expletive could qualify as indecent. *Id.*, at 750; *id.*, at 760–761 (Powell, J., concurring in part and concurring in judgment). And we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.

The narrow treatment of the term "indecent" in *Pacifica* defined the outer boundaries of the enforcement policies adopted by the FCC in the ensuing years. The Commission originally explained that "under the legal standards set forth in *Pacifica*, deliberate and repetitive use [of expletives] in a

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tion." *Ante*, at 524–525. Putting to the side the question whether congressional outrage is the kind of evidence sufficient to explain the Commission's decision to adopt a thinly reasoned and unconstitutional policy, JUSTICE SCALIA's treatment of these proceedings as evidencing the intent of Congress would make even the most ardent student of legislative history blush.

patently offensive manner is a requisite to a finding of indecency." *In re Pacifica Foundation*, 2 FCC Rcd. 2698, 2699, ¶ 13 (1987). While the "repetitive use" issue has received the most attention in this case, it should not be forgotten that *Pacifica* permitted the Commission to regulate only those words that describe sex or excrement. See 438 U. S., at 743 (plurality opinion) ("[T]he Commission's definition of indecency will deter only the broadcasting of patently offensive *references* to excretory and sexual organs and activities" (emphasis added)). The FCC minimizes the strength of this limitation by now claiming that any use of the words at issue in this case, in any context and in any form, *necessarily* describes sex or excrement. See *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 13299, 13308, ¶ 23 (2006) *(Remand Order)* ("[A]ny strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense in light of the fact that an expletive's power to offend derives from its sexual or excretory meaning" (internal quotation marks omitted)). The customs of speech refute this claim: There is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. One rests at the core of indecency; the other stands miles apart. As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency.[4] See *In re Complaints Against Vari-*

[4] It is ironic, to say the least, that while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement, commercials broadcast during prime-time hours frequently ask viewers whether they too are battling erectile dysfunction or are having trouble going to the bathroom.

ous Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4978–4979, ¶¶ 8–9 (2004) (declaring that even the use of an expletive to emphasize happiness "invariably invokes a coarse sexual image").

Even if the words that concern the Court in this case *sometimes* retain their sexual or excretory meaning, there are surely countless instances in which they are used in a manner unrelated to their origin. These words may not be polite, but that does not mean they are necessarily "indecent" under § 1464. By improperly equating the two, the Commission has adopted an interpretation of "indecency" that bears no resemblance to what *Pacifica* contemplated.[5] Most distressingly, the Commission appears to be entirely unaware of this fact, see *Remand Order*, 21 FCC Rcd., at 13308 (erroneously referencing *Pacifica* in support of its new policy), and today's majority seems untroubled by this significant oversight, see *ante*, at 508–510, 517–518. Because the FCC has failed to demonstrate an awareness that it has ventured far beyond *Pacifica*'s reading of § 1464, its policy choice must be declared arbitrary and set aside as unlawful. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971).

III

For these reasons and those stated in JUSTICE BREYER's dissenting opinion, I would affirm the judgment of the Court of Appeals.

JUSTICE GINSBURG, dissenting.

The mainspring of this case is a Government restriction on spoken words. This appeal, I recognize, arises under the

[5] While JUSTICE THOMAS and I disagree about the continued wisdom of *Pacifica*, see *ante*, p. 530 (concurring opinion), the changes in technology and the availability of broadcast spectrum he identifies certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen.

Administrative Procedure Act (APA or Act).* JUSTICE BREYER's dissenting opinion, which I join, cogently describes the infirmities of the Federal Communications Commission's (FCC or Commission) policy switch under that Act. The Commission's bold stride beyond the bounds of *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), I agree, exemplified "arbitrary" and "capricious" decisionmaking. I write separately only to note that there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow.

More than 30 years ago, a sharply divided Court allowed the FCC to sanction a midafternoon radio broadcast of comedian George Carlin's 12-minute "Filthy Words" monologue. *Ibid.* Carlin satirized the "original" seven dirty words and repeated them relentlessly in a variety of colloquialisms. The monologue was aired as part of a program on contemporary attitudes toward the use of language. *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F. C. C. 2d 94, 95 (1975). In rejecting the First Amendment challenge, the Court "emphasize[d] the narrowness of [its] holding." *Pacifica*, 438 U. S., at 750. See also *ante*, at 539 (STEVENS, J., dissenting). In this regard, the majority stressed that the Carlin monologue deliberately repeated the dirty words "over and over again." 438 U. S., at 729, 751–755 (appendix). Justice Powell, concurring, described Carlin's speech as "verbal shock treatment." *Id.*, at 757 (concurring in part and concurring in judgment).

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*The Second Circuit, presented with both constitutional and statutory challenges, vacated the remand order on APA grounds. The court therefore "refrain[ed] from deciding" the "constitutional questions." 489 F. 3d 444, 462 (2007) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 445 (1988)). The majority, however, stated and explained why it was "skeptical" that the Commission's policy could "pass constitutional muster." 489 F. 3d, at 462.

In contrast, the unscripted fleeting expletives at issue here are neither deliberate nor relentlessly repetitive. Nor does the Commission's policy home in on expressions used to describe sexual or excretory activities or organs. Spontaneous utterances used simply to convey an emotion or intensify a statement fall within the order's compass. Cf. *Cohen* v. *California*, 403 U. S. 15, 26 (1971) ("[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."); *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 805 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part) (a word categorized as indecent "often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power").

The *Pacifica* decision, however it might fare on reassessment, see *ante*, at 535 (THOMAS, J., concurring), was tightly cabined, and for good reason. In dissent, Justice Brennan observed that the Government should take care before enjoining the broadcast of words or expressions spoken by many "in our land of cultural pluralism." 438 U. S., at 775. That comment, fitting in the 1970's, is even more potent today. If the reserved constitutional question reaches this Court, see *ante*, at 529 (majority opinion), we should be mindful that words unpalatable to some may be "commonplace" for others, "the stuff of everyday conversations," 438 U. S., at 776 (Brennan, J., dissenting).

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

In my view, the Federal Communications Commission failed adequately to explain *why* it *changed* its indecency pol-

icy from a policy permitting a single "fleeting use" of an expletive, to a policy that made no such exception. Its explanation fails to discuss two critical factors, at least one of which directly underlay its original policy decision. Its explanation instead discussed several factors well known to it the first time around, which by themselves provide no significant justification for a *change* of policy. Consequently, the FCC decision is "arbitrary, capricious, an abuse of discretion." 5 U. S. C. § 706(2)(A); *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 41–43 (1983); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 420–421 (1971). And I would affirm the Second Circuit's similar determination.

I

I begin with applicable law. That law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences. Federal Communications Commissioners have fixed terms of office; they are not directly responsible to the voters; and they enjoy an independence expressly designed to insulate them, to a degree, from "'the exercise of political oversight.'" *Freytag* v. *Commissioner*, 501 U. S. 868, 916 (1991) (SCALIA, J., concurring in part and concurring in judgment); see also *Morrison* v. *Olson*, 487 U. S. 654, 691, n. 30 (1988). That insulation helps to secure important governmental objectives, such as the constitutionally related objective of maintaining broadcast regulation that does not bend too readily before the political winds. But that agency's comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons.

The statutory provision applicable here is the Administrative Procedure Act's (APA) prohibition of agency action that is "arbitrary, capricious, [or] an abuse of discretion," 5 U. S. C. § 706(2)(A). This legal requirement helps assure agency decisionmaking based upon more than the personal preferences of the decisionmakers. Courts have applied the provision sparingly, granting agencies broad policymaking leeway. But they have also made clear that agency discretion is not "'unbounded.'" *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 167–168 (1962). In so holding, American courts have followed a venerable legal tradition, stretching back at least to the days of Sir Edward Coke and the draining of the English fens. See *Rooke's Case*, 77 Eng. Rep. 209, 210, 5 Coke Rep. 99b, 100a (C. P. 1598) (Coke, J.) (members of sewer commission with authority to act according "to their discretio[n]" are nonetheless "limited and bound with the rule of reason and law . . . and [cannot act] according to their wills and private affections" (quoted in Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 954 (1957))).

The law has also recognized that it is not so much a particular set of substantive commands but rather it is a *process*, a process of learning through reasoned argument, that is the antithesis of the "arbitrary." This means agencies must follow a "logical and rational" decisionmaking "process." *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998). An agency's policy decisions must reflect the reasoned exercise of expert judgment. See *Burlington Truck Lines*, *supra*, at 167 (decision must reflect basis on which agency "exercised its expert discretion"); see also *Humphrey's Executor* v. *United States*, 295 U. S. 602, 624 (1935) (independent agencies "exercise . . . trained judgment . . . 'informed by experience'"). And, as this Court has specified, in determining whether an agency's policy choice was "arbitrary," a reviewing court "must consider whether the decision was based on a consideration of the

relevant factors and whether there has been a clear error of judgment." *Overton Park*, *supra*, at 416.

Moreover, an agency must act consistently. The agency must follow its own rules. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 389–390 (1932). And when an agency seeks to change those rules, it must focus on the fact of change and explain the basis for that change. See, *e. g.*, *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981 (2005) ("*Unexplained* inconsistency is" a "reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (emphasis added)).

To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, "Why did you change?" And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue. An (imaginary) administrator explaining why he chose a policy that requires driving on the right side, rather than the left side, of the road might say, "Well, one side seemed as good as the other, so I flipped a coin." But even assuming the rationality of that explanation for an *initial* choice, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right side to left side, 25 years later.

In *State Farm*, a unanimous Court applied these commonsense requirements to an agency decision that rescinded an earlier agency policy. The Court wrote that an agency must provide an explanation for the agency's "*revocation*" of a prior action that is more thorough than the explanation necessary when it does not act in the first instance. The Court defined "revocation," not simply as *rescinding* an earlier policy, cf. *ante*, at 514–515, but as "a *reversal of the agency's former views* as to the proper course," *State Farm*, 463 U. S., at 41 (emphasis added). See also *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 502, n. 20 (2002) (portion of Court's

opinion joined by SCALIA, KENNEDY, and THOMAS, JJ.) (noting *State Farm* "may be read as prescribing more searching judicial review" when "an agency [is] 'changing its course' as to the interpretation of a statute"); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 524, n. 3 (1994) (THOMAS, J., dissenting) (similar).

At the same time, the Court described the need for explanation in terms that apply, not simply to pure *rescissions* of earlier rules, but rather to changes of policy as it more broadly defined them. But see *ante*, at 514–515. It said that the law required an explanation for such a *change* because the earlier policy, representing a "'settled course of behavior[,] embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies . . . best if the settled rule is adhered to.'" *State Farm*, *supra*, at 41–42. Thus, the agency must explain *why* it has come to the conclusion that it should now change direction. Why does it now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?

Contrary to the majority's characterization of this dissent, it would not (and *State Farm* does not) require a "*heightened standard*" of review. *Ante*, at 514 (emphasis added). Rather, the law requires application of the *same standard* of review to different circumstances, namely, circumstances characterized by the fact that *change* is at issue. It requires the agency to focus upon the fact of change where change is relevant, just as it must focus upon any other relevant circumstance. It requires the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment.

I recognize that *sometimes* the ultimate explanation for a change may have to be, "We now weigh the relevant considerations differently." But at other times, an agency can and should say more. Where, for example, the agency rested its

previous policy on particular factual findings, see *ante*, at 537–538 (KENNEDY, J., concurring in part and concurring in judgment); or where an agency rested its prior policy on its view of the governing law, see *infra*, at 553–556; or where an agency rested its previous policy on, say, a special need to coordinate with another agency, one would normally expect the agency to focus upon those earlier views of fact, of law, or of policy and explain why they are no longer controlling. Regardless, to say that the agency here must answer the question "why change" is not to require the agency to provide a justification that is "*better* than the reasons for the old [policy]." *Ante*, at 515 (majority opinion). It is only to recognize the obvious fact that *change* is sometimes (not always) a relevant background feature that sometimes (not always) requires focus (upon prior justifications) and explanation lest the adoption of the new policy (in that circumstance) be "arbitrary, capricious, an abuse of discretion."

That is certainly how courts of appeals, the courts that review agency decisions, have always treated the matter in practice. See, *e. g.*, *Pennsylvania Federation of Sportsmen's Clubs, Inc.* v. *Kempthorne*, 497 F. 3d 337, 351 (CA3 2007); *Yale-New Haven Hosp.* v. *Leavitt*, 470 F. 3d 71, 79 (CA2 2006); *Citizens Awareness Network, Inc.* v. *United States*, 391 F. 3d 338, 352 (CA1 2004). But see *NAACP* v. *FCC*, 682 F. 2d 993, 998 (CADC 1982) (using word "heightened"). The majority's holding could in this respect significantly change judicial review in practice, and not in a healthy direction. But see *ante*, at 535–539 (KENNEDY, J., concurring in part and concurring in judgment). After all, if it is *always* legally sufficient for the agency to reply to the question "why change?" with the answer "we prefer the new policy" (even when the agency *has not considered* the major factors that led it to adopt its old policy), then why bother asking the agency to focus on the fact of change? More to the point, *why* would the law exempt this and no other aspect of an agency decision from "arbitrary, capricious" re-

view? Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?

Avoiding the application of any *heightened* standard of review, the Court in *State Farm* recognized that the APA's "nonarbitrary" requirement affords agencies generous leeway when they set policy. 463 U. S., at 42. But it also recognized that this leeway is not absolute. The Court described its boundaries by then listing considerations that help determine whether an explanation is adequate. Mirroring and elaborating upon its statement in *Overton Park*, 401 U. S. 402, the Court said that a reviewing court should take into account whether the agency had "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, *supra*, at 43; see also *Overton Park*, *supra*, at 416.

II

We here must apply the general standards set forth in *State Farm* and *Overton Park* to an agency decision that changes a 25-year-old "fleeting expletive" policy from (1) the old policy that would normally permit broadcasters to transmit a single, fleeting use of an expletive to (2) a new policy that would threaten broadcasters with large fines for transmitting even a single use (including its use by a member of the public) of such an expletive, alone with nothing more. The question is whether that decision satisfies the minimal standards necessary to assure a reviewing court that such a change of policy is not "arbitrary, capricious, [or] an abuse of discretion," 5 U. S. C. § 706(2)(A), particularly as set forth in, *e. g.*, *State Farm* and *Overton Park*, *supra*, at 548–551 and this page. The decision, in my view, does not satisfy those standards.

Consider the requirement that an agency at least minimally "consider . . . important aspect[s] of the problem." *State Farm*, *supra*, at 43. The FCC failed to satisfy this requirement, for it failed to consider two critically important aspects of the problem that underlay its initial policy judgment (one of which directly, the other of which indirectly). First, the FCC said next to nothing about the relation between the change it made in its prior "fleeting expletive" policy and the First-Amendment-related need to avoid "censorship," a matter as closely related to broadcasting regulation as is health to that of the environment. The reason that discussion of the matter is particularly important here is that the FCC had *explicitly* rested its prior policy in large part upon the need to avoid treading too close to the constitutional line.

Thirty years ago, the Court considered the location of that constitutional line. In *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), the Court reviewed an FCC decision forbidding the broadcast of a monologue that deliberately and repeatedly uttered the expletives here at issue more than 100 times in one hour at a time of day when children were likely to hear the broadcast. *Id.*, at 739. The Court held that the FCC's prohibition did not violate the First Amendment. But the Court divided 5 to 4. And two Members of the majority, Justices Powell and Blackmun, explicitly noted that the Court "does not speak to cases involving *the isolated use* of a potentially offensive word . . . as distinguished from the verbal shock treatment administered by respondent here." *Id.*, at 760–761 (Powell, J., concurring in part and concurring in judgment) (emphasis added). This statement by two Members of the majority suggested that they could reach a different result, finding an FCC prohibition unconstitutional, were that prohibition aimed at the fleeting or single use of an expletive.

The FCC subsequently made clear that it thought that Justice Powell's concurrence set forth a constitutional line

that its indecency policy should embody. In 1978, the Commission wrote that the First Amendment "severely limit[s]" the Commission's role in regulating indecency. It added that the Court, in *Pacifica*, had "relied . . . on the repetitive occurrence of the 'indecent' words in question." And it said that, in setting policy, it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding." *In re Application of WGBH Educ. Foundation*, 69 F. C. C. 2d 1250, 1254, ¶ 10.

In 1983, the Commission again wrote that it understood the Court's decision in *Pacifica* to rest on the "'repetitive occurrence of the "indecent" words in question.'" And, again, the Commission explained that its regulation of fleeting or isolated offensive words would reflect Justice Powell's understanding of the First Amendment's scope. *In re Application of Pacifica Foundation*, 95 F. C. C. 2d 750, 760, ¶¶ 17–18. In 1987, the Commission once more explained that its "fleeting expletives" policy reflected the Court's decision in *Pacifica*. It said that, under its policy, "speech that is indecent *must* involve more than an isolated use of an offensive word," adding that "we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *In re Pacifica Foundation*, 2 FCC Rcd. 2698, 2699, ¶ 13 (emphasis added). In another order that same year, the Commission stated that "the First Amendment dictate[s] a careful and restrained approach with regard to review of matters involving broadcast programming"; it then explained, citing *Pacifica*, that "[s]peech that is indecent *must* involve more than the isolated use of an offensive word." *In re Infinity Broadcasting*, 2 FCC Rcd. 2705, 2705, ¶¶ 6–7 (1987) (emphasis added). And in 2001, in giving the industry guidance, the FCC once again said in respect to its regulation of indecent speech that it "must both identify a compelling interest for any regulation . . . and choose the least restrictive means to further that interest." *In re Industry Guidance on Commission's Case Law Interpreting*

18 U. S. C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8000–8001, ¶¶ 3–5.

The FCC thus repeatedly made clear that it based its "fleeting expletive" policy upon the need to avoid treading too close to the constitutional line as set forth in Justice Powell's *Pacifica* concurrence. What then did it say, when it changed its policy, about *why* it abandoned this Constitution-based reasoning? The FCC devoted "four full pages of small-type, single-spaced text," *ante*, at 526 (majority opinion), responding to industry arguments that, *e. g.*, changes in the nature of the broadcast industry made *all* indecency regulation, *i. e.*, 18 U. S. C. § 1464, unconstitutional. In doing so it repeatedly *reaffirmed* its view that *Pacifica* remains good law. *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002, and Mar. 8, 2005*, 21 FCC Rcd. 13299, 13317–13321, ¶¶ 43–52 (2006) *(Remand Order)*. All the more surprising then that, in respect to *why* it abandoned its prior view about the critical relation between its prior fleeting expletive policy and Justice Powell's *Pacifica* concurrence, it says no more than the following: "[O]ur decision is not inconsistent with the Supreme Court ruling in *Pacifica*. The Court explicitly left open the issue of whether an occasional expletive could be considered indecent." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4982, ¶ 16 (2004) *(Golden Globe Order)*. And (repeating what it already had said), "*[Pacifica]* specifically reserved the question of 'an occasional expletive' and noted that it addressed only the 'particular broadcast' at issue in that case." *Remand Order*, *supra*, at 13308–13309, ¶ 24.

These two sentences are not a summary of the FCC's discussion about why it abandoned its prior understanding of *Pacifica*. They *are* the discussion. These 28 words (repeated in two opinions) do not acknowledge that an entirely different understanding of *Pacifica* underlay the FCC's ear-

lier policy; they do not explain why the agency changed its mind about the line that *Pacifica* draws or its policy's relation to that line; and they tell us nothing at all about what happened to the FCC's earlier determination to search for "compelling interests" and "less restrictive alternatives." They do not explain the transformation of what the FCC had long thought an insurmountable obstacle into an open door. The result is not simply *Hamlet* without the prince, but *Hamlet* with a prince who, in midplay and without explanation, just disappears.

I have found one other related reference to *Pacifica*, but that reference occurs in an opinion written by a *dissenting* Commissioner. That dissenter said that the FCC had "'fail[ed] to address the many serious [constitutional] concerns raised'" by the new policy, while adding that the new policy was "not the restrained enforcement policy encouraged by the Supreme Court in *Pacifica*." *Remand Order*, *supra*, at 13331, 13334. Neither that Commissioner in his dissent, nor I in this dissent, claim that agencies must always take account of possible constitutional issues when they formulate policy. Cf. *ante*, at 516 (majority opinion). But the FCC works in the shadow of the First Amendment, and its view of the application of that Amendment to "fleeting expletives" directly informed its initial policy choice. Under these circumstances, the FCC's failure to address this "aspect" of the problem calls for a remand to the agency. *Overton Park*, 401 U. S., at 420–421.

Second, the FCC failed to consider the potential impact of its new policy upon local broadcasting coverage. This "aspect of the problem" is particularly important because the FCC explicitly took account of potential broadcasting impact. *Golden Globe Order*, *supra*, at 4980, ¶ 11 ("The ease with which broadcasters today can block even fleeting words in a live broadcast is an element in our decision"). Indeed, in setting forth "bleeping" technology changes (presumably lowering bleeping costs) as justifying the policy change, it

implicitly reasoned that lower costs, making it easier for broadcasters to install bleeping equipment, made it less likely that the new policy would lead broadcasters to reduce coverage, say, by canceling coverage of public events. *Ibid.* ("[T]echnological advances have made it possible . . . to prevent the broadcast of a single offending word or action without blocking or disproportionately disrupting the message of the speaker or performer").

What then did the FCC say about the likelihood that smaller independent broadcasters, including many public service broadcasters, still would not be able to afford "bleeping" technology and, as a consequence, would reduce local coverage, indeed cancel coverage, of many public events? It said nothing at all.

The FCC cannot claim that local coverage lacks special importance. To the contrary, "the concept of localism has been a cornerstone of broadcast regulation for decades." *In re Broadcast Localism*, 23 FCC Rcd. 1324, 1326, 1327, ¶¶ 3, 5 (2008). That policy seeks to provide "viewers and listeners . . . access to locally responsive programming including, but not limited to, local news and public affairs matter" *id.*, at 1326, ¶ 3, and to ensure "diversity in what is seen and heard over the airwaves," *ibid.* That policy has long favored local broadcasting, both as a means to increase coverage of local events and, insofar as it increases the number of broadcast voices, as an end in itself. See, *e. g.*, *In re Reexamination of Comparative Standards for Noncommercial Educ. Applicants*, 15 FCC Rcd. 7386, 7399, ¶ 29 (2000) (adopting a system for selecting applicants for broadcast channels that "would foster our goal of broadcast diversity by enabling the local public to be served by differing . . . licensees"); *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13644, ¶¶ 77, 79 (2003) ("We remain firmly committed to the policy of promoting localism among broadcast outlets. . . . A . . . measure of localism is the quantity and quality of local news and public affairs programming").

Neither can the FCC now claim that the impact of its new policy on local broadcasting is insignificant and obviously so. Broadcasters tell us, as they told the FCC, the contrary. See Brief for Former FCC Commissioners et al. as *Amici Curiae* 17–19; App. 235–237; Joint Comments of Fox Television Stations, Inc., et al., *In re Remand of Section III.B of Commission's Mar. 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints* 14–15, http://www.fcc.gov/DA06–1739/joint-networks.pdf (all Internet materials as visited Apr. 7, 2009, and available in Clerk of Court's case file). They told the FCC, for example, that the costs of bleeping/delay systems, up to $100,000 for installation and annual operation, place that technology beyond the financial reach of many smaller independent local stations. See *id.*, at 14 ("The significant equipment and personnel costs associated with installing, maintaining, and operating delay equipment sufficient to cover all live news, sports, and entertainment programs could conceivably exceed the net profits of a small local station for an entire year"); *id.*, at App. XI. And they ask what the FCC thinks will happen when a small local station without bleeping equipment wants to cover, say, a local city council meeting, a high school football game, a dance contest at a community center, or a Fourth of July parade.

Relevant literature supports the broadcasters' financial claims. See, *e. g.*, Ho, Taking No Chances, Austin American-Statesman, June 18, 2006, p. J1; Dotinga, Dirty-Word Filters Prove Costly, Wired.com, July 9, 2004, http://www.wired.com/entertainment/music/news/2004/07/64127; Stations, Cable Networks Finding Indecency Rules Expensive, Public Broadcasting Report, Aug. 4, 2006. It also indicates that the networks with which some small stations are affiliated are not liable for the stations' local transmissions (unless the networks own them). Ho, *supra*, at J1; Public Stations Fear Indecency Fine Jump Means Premium Hikes, Public Broadcasting Report, July 7, 2006. The result

is that smaller stations, fearing "fleeting expletive" fines of up to $325,000, may simply cut back on their coverage. See Romano, Reporting Live. Very Carefully, Broadcasting & Cable, July 4, 2005, p. 8; see also *ibid.* ("Afraid to take chances" of getting fined under the FCC's new policy, "local broadcasters are responding by altering—or halting altogether—the one asset that makes local stations so valuable to their communities: live TV"); Daneman, WRUR Drops Its Live Radio Programs, Rochester Democrat and Chronicle, May 27, 2004, p. 1B (reporting that a local broadcast station ceased broadcasting all local live programming altogether in response to the Commission's policy change). And there are many such smaller stations. See, *e. g.*, Corporation for Public Broadcasting, Frequently Asked Questions, available at http://www.cpb.org/aboutpb/faq/stations.html (noting there are over 350 local public television stations and nearly 700 local public radio stations that receive support from the Corporation for Public Broadcasting).

As one local station manager told the FCC:

> "To lessen the risk posed by the new legal framework . . . I have directed [the station's] news staff that [our station] may no longer provide live, direct-to-air coverage" of "live events where crowds are present . . . unless they affect matters of public safety or convenience. Thus, news coverage by [my station] of live events where crowds are present essentially will be limited to civil emergencies." App. 236–237 (declaration of Dennis Fisher).

What did the FCC say in response to this claim? What did it say about the likely impact of the new policy on the coverage that its new policy is most likely to affect, coverage of *local* live events—city council meetings, local sports events, community arts productions, and the like? It said nothing at all.

The plurality acknowledges that the Commission entirely failed to discuss this aspect of the regulatory problem. But it sees "no need" for discussion in light of its, *i. e.*, the plurality's, own "doubt[s]" that "small-town broadcasters run a heightened risk of liability for indecent utterances" as a result of the change of policy. *Ante,* at 527. The plurality's "doubt[s]" rest upon its views (1) that vulgar expression is less prevalent (at least among broadcast guests) in smaller towns, *ibid.;* (2) that the greatest risk the new policy poses for "small-town broadcasters" arises when they broadcast local "news and public affairs," *ibid.;* and (3) that the *Remand Order* says "little about how the Commission would treat smaller broadcasters who cannot afford screening equipment," while also pointing out that the new policy "'does not . . . impose undue burdens on broadcasters'" and emphasizing that the case before it did not involve "'breaking news,'" *ante,* at 528, 527.

As to the first point, about the prevalence of vulgarity in small towns, I confess ignorance. But I do know that there are independent stations in many large and medium sized cities. See Television & Cable Factbook, Directory of Television Stations in Operation 2008. As to the second point, I too believe that coverage of local public events, if not news, lies at the heart of the problem.

I cannot agree with the plurality, however, about the critical third point, namely, that the new policy obviously provides smaller independent broadcasters with adequate assurance that they will not be fined. The new policy removes the "fleeting expletive" exception, an exception that assured smaller independent stations that they would not be fined should someone swear at a public event. In its place, it puts a policy that places all broadcasters at risk when they broadcast fleeting expletives, including expletives uttered at public events. The *Remand Order* says that there "is *no outright news exemption from our indecency rules.*" 21 FCC Rcd., at 13327, ¶ 71 (emphasis added). The best it can pro-

vide by way of assurance is to say that "it *may* be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event *under some circumstances*." *Id.*, at 13311, ¶ 33 (emphasis added). It does list those circumstances as including the "possibility of human error in using delay equipment." *Id.*, at 13313, ¶ 35. But it says *nothing* about a station's *inability to afford* delay equipment (a matter that in individual cases could itself prove debatable). All the FCC had to do was to *consider* this matter and either grant an exemption or explain why it did not grant an exemption. But it did not. And the result is a rule that may well chill coverage—the kind of consequence that the law has considered important for decades, to which the broadcasters pointed in their arguments before the FCC, and which the FCC nowhere discusses. See, *e. g.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression"); see also *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 244 (2002); *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U. S. 539, 556–557 (1963); *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (1952) (Frankfurter, J., concurring).

Had the FCC used traditional administrative notice-and-comment procedures, 5 U. S. C. § 553, the two failures I have just discussed would clearly require a court to vacate the resulting agency decision. See *ACLU* v. *FCC*, 823 F. 2d 1554, 1581 (CADC 1987) *(per curiam)* ("Notice and comment rulemaking procedures obligate the FCC to respond to *all* significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public" (emphasis added; internal quotation marks omitted)). Here the agency did not make new policy through the medium of notice-and-comment proceedings.

But the same failures here—where the policy is important, the significance of the issues clear, the failures near complete—should lead us to the same conclusion. The agency's failure to discuss these two "important aspect[s] of the problem" means that the resulting decision is "'arbitrary, capricious, an abuse of discretion'" requiring us to remand the matter to the agency. *State Farm*, 463 U. S., at 43; *Overton Park*, 401 U. S., at 416.

III

The three reasons the FCC did set forth in support of its change of policy cannot make up for the failures I have discussed. Consider each of them. First, as I have pointed out, the FCC based its decision in part upon the fact that "bleeping/delay systems" technology has advanced. I have already set forth my reasons for believing that that fact, without more, cannot provide a sufficient justification for its policy change. *Supra*, at 556–561 and this page.

Second, the FCC says that the expletives here in question always invoke a coarse excretory or sexual image; hence it makes no sense to distinguish between whether one uses the relevant terms as an expletive or as a literal description. The problem with this answer is that it does not help to justify the *change* in policy. The FCC was aware of the coarseness of the "image" the first time around. See, *e. g.*, *Remand Order*, *supra*, at 13308, ¶ 23 (asserting that FCC has always understood the words as coarse and indecent). And it explained the first time around why it nonetheless distinguished between their literal use and their use as fleeting expletives. See, *e. g.*, *In re Application of WGBH Educ. Foundation*, 69 F. C. C. 2d, at 1254–1255, ¶¶ 10–11 (discussing First Amendment considerations and related need to avoid reduced broadcast coverage). Simply to announce that the words, whether used descriptively or as expletives, call forth similar "images" is not to address those reasons.

Third, the FCC said that "perhaps" its "most importan[t]" justification for the new policy lay in the fact that its new "contextual" approach to fleeting expletives is better and more "[c]onsistent with" the agency's "general approach to indecency" than was its previous "categorica[l]" approach, which offered broadcasters virtual immunity for the broadcast of fleeting expletives. *Remand Order*, 21 FCC Rcd., at 13308, ¶ 23. This justification, however, offers no support for the change without an understanding of *why*, *i. e.*, *in what way*, the FCC considered the new approach better or more consistent with the agency's general approach.

The Solicitor General sets forth one way in which the new policy might be more consistent with statutory policy. The indecency statute prohibits the broadcast of "any . . . indecent . . . language." 18 U. S. C. § 1464. The very point of the statute, he says, is to eliminate nuisance; and the use of expletives, even once, can constitute such a nuisance. The Solicitor General adds that the statutory word "any" indicates that Congress did not intend a safe harbor for a fleeting use of that language. Brief for Petitioners 24–25. The fatal flaw in this argument, however, lies in the fact that the Solicitor General and not the agency has made it. We must consider the lawfulness of an agency's decision on the basis of the reasons the agency gave, not on the basis of those it *might have* given. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196–197 (1947); *State Farm*, *supra*, at 50. And the FCC did not make this claim. Hence, we cannot take it into account and need not evaluate its merits.

In fact, the FCC found that the new policy was better in part because, in its view, the new policy better protects children against what it described as "'the first blow'" of broadcast indecency that results from the "'pervasive'" nature of broadcast media. It wrote that its former policy of "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" *Remand Order*, *supra*, at 13309, ¶ 25.

The difficulty with this argument, however, is that it does not explain the *change*. The FCC has long used the theory of the "first blow" to justify its regulation of broadcast indecency. See, *e. g.*, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U. S. C. § 1464*, 5 FCC Rcd. 5297, 5301–5302, ¶¶ 34–35 (1990). Yet the FCC has also long followed its original "fleeting expletives" policy. Nor was the FCC ever unaware of the fact to which the majority points, namely, that children's surroundings influence their behavior. See, *e. g.*, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U. S. C. § 1464*, 8 FCC Rcd. 704, 705–706, ¶ 11 (1993). So, to repeat the question: What, in respect to the "first blow," has changed?

The FCC points to no empirical (or other) evidence to demonstrate that it previously understated the importance of avoiding the "first blow." Like the majority, I do not believe that an agency must always conduct full empirical studies of such matters. *Ante*, at 519–520. But the FCC could have referred to, and explained, relevant empirical studies that suggest the contrary. One review of the empirical evidence, for example, reports that "[i]t is doubtful that children under the age of 12 understand sexual language and innuendo; therefore it is unlikely that vulgarities have any negative effects." Kaye & Sapolsky, Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television, 2004 Mass Communication & Soc'y 429, 433 (Vol. 7) (citing two studies). The Commission need not have accepted this conclusion. But its failure to discuss this or any other such evidence, while providing no empirical evidence at all that favors its position, must weaken the logical force of its conclusion. See *State Farm*, *supra*, at 43 (explaining that an agency's failure to "examine the relevant data" is a factor in determining whether the decision is "arbitrary").

The FCC also found the new policy better because it believed that its prior policy "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as

they did so one at a time." *Remand Order*, 21 FCC Rcd., at 13309, ¶ 25. This statement, however, raises an obvious question: Did that happen? The FCC's initial "fleeting expletives" policy was in effect for 25 years. Had broadcasters during those 25 years aired a series of expletives "one at a time"? If so, it should not be difficult to find evidence of that fact. But the FCC refers to none. Indeed, the FCC did not even claim that a change had taken place in this respect. It spoke only of the pure "logic" of the initial policy "permitting" such a practice. That logic would have been apparent to anyone, including the FCC, in 1978 when the FCC set forth its initial policy.

Finally, the FCC made certain statements that suggest it did not believe it was changing prior policy in any major way. It referred to that prior policy as based on "staff letters and dicta" and it said that at least one of the instances before it (namely, the Cher broadcast) would have been actionably indecent under that prior policy. *Id.*, at 13306–13307, 13324, ¶¶ 20–21, 60. As we all agree, however, in fact the FCC did change its policy in a major way. See *ante*, at 517 (majority opinion). To the extent that the FCC minimized that fact when considering the change, it did not fully focus on the fact of change. And any such failure would make its decision still less supportable. See *National Cable*, 545 U. S., at 981.

IV

Were the question a closer one, the doctrine of constitutional avoidance would nonetheless lead me to remand the case. See *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also *grave doubts* upon that score" (emphasis added)). That doctrine seeks to avoid unnecessary judicial consideration of constitutional questions, assumes that Congress, no less than the Judicial Branch, seeks to act within constitutional bounds, and thereby diminishes the friction between

the branches that judicial holdings of unconstitutionality might otherwise generate. See *Almendarez-Torres* v. *United States*, 523 U. S. 224, 237–238 (1998); see also *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 172–173 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988); *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 571 (1947); *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring). The doctrine assumes that Congress would prefer a less-than-optimal interpretation of its statute to the grave risk of a constitutional holding that would set the statute entirely aside. See *Almendarez-Torres*, *supra*, at 238 (construction of statute that avoids invalidation best reflects congressional will); cf. *United States* v. *Booker*, 543 U. S. 220, 249, 267 (2005).

Unlike the majority, I can find no convincing reason for refusing to apply a similar doctrine here. The Court has often applied that doctrine where an agency's regulation relies on a plausible but constitutionally suspect interpretation of a statute. See, *e. g.*, *Solid Waste Agency*, *supra*, at 172–174; *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 506–507 (1979). The values the doctrine serves apply whether the agency's decision does, or does not, rest upon a constitutionally suspect interpretation of a statute. And a remand here would do no more than ask the agency to reconsider its policy decision in light of the concerns raised in a judicial opinion. Cf. *Fullilove* v. *Klutznick*, 448 U. S. 448, 551 (1980) (STEVENS, J., dissenting) (a holding that a congressional action implicating the Equal Protection Clause "was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of" that action was unconstitutional). I would not now foreclose, as the majority forecloses, our further consideration of this matter. (Of course, nothing in

the Court's decision today prevents the Commission from reconsidering its current policy in light of potential constitutional considerations or for other reasons.)

V

In sum, the FCC's explanation of its change leaves out two critically important matters underlying its earlier policy, namely, *Pacifica* and local broadcasting coverage. Its explanation rests upon three considerations previously known to the agency ("coarseness," the "first blow," and running single expletives all day, one at a time). With one exception, it provides no empirical or other information explaining why those considerations, which did not justify its new policy before, justify it now. Its discussion of the one exception (technological advances in bleeping/delay systems), failing to take account of local broadcast coverage, is seriously incomplete.

I need not decide whether one or two of these features, standing alone, would require us to remand the case. Here all come together. And taken together they suggest that the FCC's answer to the question, "Why change?" is, "We like the new policy better." This kind of answer, might be perfectly satisfactory were it given by an elected official. But when given by an agency, in respect to a major change of an important policy where much more might be said, it is not sufficient. *State Farm*, 463 U. S., at 41–42.

For these reasons I would find the FCC's decision "arbitrary, capricious, an abuse of discretion," 5 U. S. C. § 706(2)(A), requiring remand of this case to the FCC. And I would affirm the Second Circuit's similar determination.

With respect, I dissent.

Syllabus

DEAN *v.* UNITED STATES

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

No. 08–5274. Argued March 4, 2009—Decided April 29, 2009

An individual convicted for using or carrying a firearm during and in relation to any violent or drug trafficking crime, or possessing a firearm in furtherance of such a crime, receives a 5-year mandatory minimum sentence, in addition to the punishment for the underlying crime. 18 U. S. C. § 924(c)(1)(A)(i). The mandatory minimum increases to 7 years "if the firearm is brandished" and to 10 years "if the firearm is discharged." §§ 924(c)(1)(A)(ii), (iii).

Petitioner Dean was convicted of conspiring to commit a bank robbery and discharging a firearm during an armed robbery. Because the firearm was "discharged" during the robbery, Dean was sentenced to a 10-year mandatory minimum prison term on the firearm count. § 924(c)(1)(A)(iii). On appeal, he contended that the discharge was accidental, and that § 924(c)(1)(A)(iii) requires proof that the defendant intended to discharge the firearm. The Eleventh Circuit affirmed, holding that no proof of intent is required.

Held: Section 924(c)(1)(A)(iii) requires no separate proof of intent. The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident. Pp. 571–577.

(a) Subsection (iii) provides a minimum 10-year sentence "if the firearm is discharged." It does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation. This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U. S. 23, 29. Congress's use of the passive voice further indicates that subsection (iii) does not require proof of intent. Cf. *Watson* v. *United States*, 552 U. S. 74, 81. The statute's structure also suggests no such limitation. Congress expressly included an intent requirement for the 7-year mandatory minimum for brandishing a firearm by separately defining "brandish" to require that the firearm be displayed "in order to intimidate" another person. § 924(c)(4). Congress did not, however, separately define "discharge" to include an intent requirement. It is generally presumed that Congress acts intentionally when including particular language in one section of a statute but not in another. *Russello* v. *United States*, 464 U. S. 16, 23. Contrary to Dean's contention, the phrase "during and in relation to" in the opening paragraph of § 924(c)(1)(A) does

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not modify "is discharged," which appears in a separate subsection and in a different voice than the principal paragraph. "[I]n relation to" is most naturally read to modify only the nearby verbs "uses" and "carries." This reading will not lead to the absurd results posited by Dean. Pp. 572–574.

(b) Dean argues that subsection (iii) must be limited to intentional discharges in order to give effect to the statute's progression of harsher penalties for increasingly culpable conduct. While it is unusual to impose criminal punishment for the consequences of purely accidental conduct, it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts. The fact that the discharge may be accidental does not mean that the defendant is blameless. The sentencing enhancement accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible. See *Harris* v. *United States*, 536 U. S. 545, 553. An individual bringing a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally. A gunshot—whether accidental or intended—increases the risk that others will be injured, that people will panic, or that violence will be used in response. It also traumatizes bystanders, as it did here. Pp. 574–577.

(c) Because the statutory text and structure demonstrate that the discharge provision does not contain an intent requirement, the rule of lenity is not implicated in this case. P. 577.

517 F. 3d 1224, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and ALITO, JJ., joined. STEVENS, J., *post*, p. 578, and BREYER, J., *post*, p. 583, filed dissenting opinions.

Scott J. Forster, by appointment of the Court, 555 U. S. 1095, argued the cause for petitioner. With him on the briefs were *Jeffrey T. Green*, *Quin M. Sorenson*, and *Sarah O'Rourke Schrup*.

Deanne E. Maynard argued the cause for the United States. With her on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Glavin*, *Deputy Solicitor General Dreeben*, and *Vijay Shanker*.*

**David Salmons*, *Robert V. Zener*, *Pamela Harris*, *Henry J. Bemporad*, *Mary Price*, and *Peter Goldberger* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Accidents happen. Sometimes they happen to individuals committing crimes with loaded guns. The question here is whether extra punishment Congress imposed for the discharge of a gun during certain crimes applies when the gun goes off accidentally.

I

Title 18 U. S. C. § 924(c)(1)(A) criminalizes using or carrying a firearm during and in relation to any violent or drug trafficking crime, or possessing a firearm in furtherance of such a crime. An individual convicted of that offense receives a 5-year mandatory minimum sentence, in addition to the punishment for the underlying crime. § 924(c)(1)(A)(i). The mandatory minimum increases to 7 years "if the firearm is brandished" and to 10 years "if the firearm is discharged." §§ 924(c)(1)(A)(ii), (iii).

In this case, a masked man entered a bank, waved a gun, and yelled at everyone to get down. He then walked behind the teller counter and started removing money from the teller stations. He grabbed bills with his left hand, holding the gun in his right. At one point, he reached over a teller to remove money from her drawer. As he was collecting the money, the gun discharged, leaving a bullet hole in the partition between two stations. The robber cursed and dashed out of the bank. Witnesses later testified that he seemed surprised that the gun had gone off. No one was hurt. App. 16–19, 24, 27, 47–48, 79.

Police arrested Christopher Michael Dean and Ricardo Curtis Lopez for the crime. Both defendants were charged with conspiracy to commit a robbery affecting interstate commerce, in violation of 18 U. S. C. § 1951(a), and aiding and abetting each other in using, carrying, possessing, and discharging a firearm during an armed robbery, in violation of § 924(c)(1)(A)(iii) and § 2. App. 11–12. At trial, Dean admitted that he had committed the robbery, *id.*, at 76–81, and

a jury found him guilty on both the robbery and firearm counts. The District Court sentenced Dean to a mandatory minimum term of 10 years in prison on the firearm count, because the firearm "discharged" during the robbery. § 924(c)(1)(A)(iii); App. 136.

Dean appealed, contending that the discharge was accidental, and that the sentencing enhancement in § 924(c)(1)(A)(iii) requires proof that the defendant intended to discharge the firearm. The Court of Appeals affirmed, holding that separate proof of intent was not required. 517 F. 3d 1224, 1229 (CA11 2008). That decision created a conflict among the Circuits over whether the accidental discharge of a firearm during the specified crimes gives rise to the 10-year mandatory minimum. See *United States* v. *Brown,* 449 F. 3d 154 (CADC 2006) (holding that it does not). We granted certiorari to resolve that conflict. 555 U. S. 1028 (2008).

II

Section 924(c)(1)(A) provides:

> "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> "(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

The principal paragraph defines a complete offense and the subsections "explain how defendants are to 'be sentenced.'" *Harris* v. *United States,* 536 U. S. 545, 552 (2002). Subsection (i) "sets a catchall minimum" sentence of not less than

five years. *Id.*, at 552–553. Subsections (ii) and (iii) increase the minimum penalty if the firearm "is brandished" or "is discharged." See *id.*, at 553. The parties disagree over whether § 924(c)(1)(A)(iii) contains a requirement that the defendant intend to discharge the firearm. We hold that it does not.

A

"We start, as always, with the language of the statute." *Williams* v. *Taylor*, 529 U. S. 420, 431 (2000). The text of subsection (iii) provides that a defendant shall be sentenced to a minimum of 10 years "if the firearm is discharged." It does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation. As we explained in *Bates* v. *United States*, 522 U. S. 23 (1997), in declining to infer an "'intent to defraud'" requirement into a statute, "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Id.*, at 29.

Congress's use of the passive voice further indicates that subsection (iii) does not require proof of intent. The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. Cf. *Watson* v. *United States*, 552 U. S. 74, 81 (2007) (use of passive voice in statutory phrase "to be used" in 18 U. S. C. § 924(d)(1) reflects "agnosticism . . . about who does the using"). It is whether something happened—not how or why it happened—that matters.

The structure of the statute also suggests that subsection (iii) is not limited to the intentional discharge of a firearm. Subsection (ii) provides a 7-year mandatory minimum sentence if the firearm "is brandished." Congress expressly included an intent requirement for that provision, by defining "brandish" to mean "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, *in order to intimidate* that person." § 924(c)(4) (emphasis added). The defendant must have in-

tended to brandish the firearm, because the brandishing must have been done for a specific purpose. Congress did not, however, separately define "discharge" to include an intent requirement. "[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." *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted).

Dean argues that the statute is not silent on the question presented. Congress, he contends, included an intent element in the opening paragraph of § 924(c)(1)(A), and that element extends to the sentencing enhancements. Section 924(c)(1)(A) criminalizes using or carrying a firearm "during and in relation to" any violent or drug trafficking crime. In *Smith* v. *United States*, 508 U. S. 223 (1993), we stated that the phrase "in relation to" means "that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Id.*, at 238. Dean argues that the adverbial phrase thus necessarily embodies an intent requirement, and that the phrase modifies all the verbs in the statute—not only use, carry, and possess, but also brandish and discharge. Such a reading requires that a perpetrator knowingly discharge the firearm for the enhancement to apply. If the discharge is accidental, Dean argues, it is not "in relation to" the underlying crime.

The most natural reading of the statute, however, is that "in relation to" modifies only the nearby verbs "uses" and "carries." The next verb—"possesses"—is modified by its own adverbial clause, "in furtherance of." The last two verbs—"is brandished" and "is discharged"—appear in separate subsections and are in a different voice than the verbs in the principal paragraph. There is no basis for reading "in relation to" to extend all the way down to modify "is discharged." The better reading of the statute is that the

adverbial phrases in the opening paragraph—"in relation to" and "in furtherance of"—modify their respective nearby verbs, and that neither phrase extends to the sentencing factors.

But, Dean argues, such a reading will lead to absurd results. The discharge provision on its face contains no temporal or causal limitations. In the absence of an intent requirement, the enhancement would apply "regardless of when the actions occur, or by whom or for what reason they are taken." Brief for Petitioner 11–12. It would, for example, apply if the gun used during the crime were discharged "weeks (or years) before or after the crime." Reply Brief for Petitioner 11.

We do not agree that implying an intent requirement is necessary to address such concerns. As the Government recognizes, sentencing factors such as the one here "often involve . . . special features of the manner in which a basic crime was carried out." Brief for United States 29 (quoting *Harris*, 536 U. S., at 553; internal quotation marks omitted). The basic crime here is using or carrying a firearm during and in relation to a violent or drug trafficking crime, or possessing a firearm in furtherance of any such crime. Fanciful hypotheticals testing whether the discharge was a "special featur[e]" of how the "basic crime was carried out," *id.*, at 553 (internal quotation marks omitted), are best addressed in those terms, not by contorting and stretching the statutory language to imply an intent requirement.

B

Dean further argues that even if the statute is viewed as silent on the intent question, that silence compels a ruling in his favor. There is, he notes, a presumption that criminal prohibitions include a requirement that the Government prove the defendant intended the conduct made criminal. In light of this presumption, we have "on a number of occasions read a state-of-mind component into an offense even

when the statutory definition did not in terms so provide." *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 437 (1978). "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples* v. *United States*, 511 U. S. 600, 606 (1994).

Dean argues that the presumption is especially strong in this case, given the structure and purpose of the statute. In his view, the three subsections are intended to provide harsher penalties for increasingly culpable conduct: a 5-year minimum for using, carrying, or possessing a firearm; a 7-year minimum for brandishing a firearm; and a 10-year minimum for discharging a firearm. Incorporating an intent requirement into the discharge provision is necessary to give effect to that progression, because an accidental discharge is less culpable than intentional brandishment. See *Brown*, 449 F. 3d, at 156.

It is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts. See 2 W. LaFave, Substantive Criminal Law §14.4, pp. 436–437 (2d ed. 2003). The felony-murder rule is a familiar example: If a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder. See 18 U. S. C. §1111. The Sentencing Guidelines reflect the same principle. See United States Sentencing Commission, Guidelines Manual §2A2.2(b)(3) (Nov. 2008) (USSG) (increasing offense level for aggravated assault according to the seriousness of the injury); §2D2.3 (increasing offense level for operating or directing the operation of a common carrier under the influence of alcohol or drugs if death or serious bodily injury results).

Blackstone expressed the idea in the following terms:

> "[I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused

> from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour." 4 W. Blackstone, Commentaries on the Laws of England 26–27 (1769).

Here the defendant is already guilty of unlawful conduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense. That unlawful conduct was not an accident. See *Smith*, 508 U. S., at 238.

The fact that the actual discharge of a gun covered under § 924(c)(1)(A)(iii) may be accidental does not mean that the defendant is blameless. The sentencing enhancement in subsection (iii) accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible. See *Harris*, *supra*, at 553. An individual who brings a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally. A gunshot in such circumstances—whether accidental or intended—increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response. Those criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the underlying violent or drug trafficking crime, leave the gun at home, or—best yet—avoid committing the felony in the first place.

Justice Stevens contends that the statute should be read to require a showing of intent because harm resulting from a discharge may be punishable under other provisions, such as the Sentencing Guidelines (but only if "bodily injury" results). *Post*, at 583 (dissenting opinion) (citing USSG § 2B3.1(b)(3)). But Congress in § 924(c)(1)(A)(iii) elected to impose a mandatory term, without regard to more generally

applicable sentencing provisions. Punishment available under such provisions therefore does not suggest that the statute at issue here is limited to intentional discharges.

And although the point is not relevant under the correct reading of the statute, it is wrong to assert that the gunshot here "caused no harm." *Post*, at 578. By pure luck, no one was killed or wounded. But the gunshot plainly added to the trauma experienced by those held during the armed robbery. See, *e. g.*, App. 22 (the gunshot "shook us all"); *ibid.* ("Melissa in the lobby popped up and said, 'oh, my God, has he shot Nora?' ").

C

Dean finally argues that any doubts about the proper interpretation of the statute should be resolved in his favor under the rule of lenity. See Brief for Petitioner 6. "The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Muscarello* v. *United States*, 524 U. S. 125, 138 (1998); see also *Smith*, *supra*, at 239 ("The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable"). "To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." *Muscarello*, *supra*, at 138–139 (internal quotation marks omitted). In this case, the statutory text and structure convince us that the discharge provision does not contain an intent requirement. Dean's contrary arguments are not enough to render the statute grievously ambiguous.

* * *

Section 924(c)(1)(A)(iii) requires no separate proof of intent. The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident. The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

JUSTICE STEVENS, dissenting.

Accidents happen, but they seldom give rise to criminal liability. Indeed, if they cause no harm they seldom give rise to any liability. The Court today nevertheless holds that petitioner is subject to a mandatory additional sentence—a species of criminal liability—for an accident that caused no harm. For two reasons, 18 U. S. C. § 924(c)(1)(A)(iii) should not be so construed. First, the structure of § 924(c)(1)(A) suggests that Congress intended to provide escalating sentences for increasingly culpable conduct and that the discharge provision therefore applies only to intentional discharges. Second, even if the statute did not affirmatively support that inference, the common-law presumption that provisions imposing criminal penalties require proof of *mens rea* would lead to the same conclusion. Cf. *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70 (1994). Accordingly, I would hold that the Court of Appeals erred in concluding that petitioner could be sentenced under § 924(c)(1)(A)(iii) absent evidence that he intended to discharge his gun.

I

It is clear from the structure and history of § 924(c)(1)(A) that Congress intended § 924(c)(1)(A)(iii) to apply only to intentional discharges. The statute's structure supports the inference that Congress intended to impose increasingly harsh punishment for increasingly culpable conduct. The lesser enhancements for carrying or brandishing provided by clauses (i) and (ii) clearly require proof of intent. Clause (i) imposes a 5-year mandatory minimum sentence for using or carrying a firearm "during and in relation to" a crime of violence or drug trafficking offense, or possessing a firearm "in furtherance" of such an offense. As we have said before, the provision's relational terms convey that it does not reach inadvertent conduct. See *Smith* v. *United States*, 508 U. S. 223, 238 (1993) ("The phrase 'in relation to' . . . at a minimum, clarifies that the firearm must have some purpose or effect

with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence"). Similarly, clause (ii) mandates an enhanced penalty for brandishing a firearm only upon proof that a defendant had the specific intent to intimidate. See § 924(c)(4). In that context, the most natural reading of clause (iii), which imposes the greatest mandatory penalty, is that it provides additional punishment for the more culpable act of intentional discharge.[1]

The legislative history also indicates that Congress intended to impose an enhanced penalty only for intentional discharge. In *Bailey* v. *United States*, 516 U. S. 137, 148 (1995), the Court held that "use" of a firearm for purposes of § 924(c)(1) required some type of "active employment," such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire." Congress responded to *Bailey* by amending § 924(c)(1), making it an offense to "posses[s]" a firearm "in furtherance of" one of the predicate offenses and adding sentencing enhancements for brandishing and discharge. See Pub. L. 105–386, § 1(a)(1), 112 Stat. 3469; see also 144 Cong. Rec. 26608 (1998) (remarks of Sen. DeWine) (referring to the amendments as the "Bailey Fix Act"). Given the close relationship between the *Bailey* decision and Congress' enactment of the brandishing and discharge provisions, those terms are best read as codifying some of the more culpable among the "active employment[s]" of a firearm that the Court identified in *Bailey*.

II

Even if there were no evidence that Congress intended § 924(c)(1)(A)(iii) to apply only to intentional discharges, the

[1] Contrary to the Court's suggestion, *ante*, at 572–573, Congress' provision of a specific intent element for brandishing and not for discharge only supports the conclusion that Congress did not intend enhancements under the discharge provision to require proof of specific intent; it supports no inference that Congress also intended to eliminate any general intent requirement and thereby make offenders strictly liable.

presumption that criminal provisions include an intent requirement would lead me to the same conclusion. Consistent with the common-law tradition, the requirement of *mens rea* has long been the rule of our criminal jurisprudence. See *United States* v. *United States Gypsum Co.*, 438 U. S. 422 (1978). The concept of crime as a "concurrence of an evil-meaning mind with an evil-doing hand . . . took deep and early root in American soil." *Morissette* v. *United States*, 342 U. S. 246, 251–252 (1952). Legislating against that backdrop, States often omitted intent elements when codifying the criminal law, and "courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Id.*, at 252. Similarly, absent a clear statement by Congress that it intended to create a strict-liability offense, a *mens rea* requirement has generally been presumed in federal statutes. See *id.*, at 273; *Staples* v. *United States*, 511 U. S. 600, 605–606 (1994). With only a few narrowly delineated exceptions for such crimes as statutory rape and public welfare offenses, the presumption remains the rule today. See *Morissette*, 342 U. S., at 251–254, and n. 8; see also *Staples*, 511 U. S., at 606–607 (discussing *United States* v. *Balint*, 258 U. S. 250 (1922)).

Although mandatory minimum sentencing provisions are of too recent genesis to have any common-law pedigree, see *Harris* v. *United States*, 536 U. S. 545, 579, 581, n. 5 (2002) (THOMAS, J., dissenting), there is no sensible reason for treating them differently from offense elements for purposes of the presumption of *mens rea*. Sentencing provisions of this type have substantially the same effect on a defendant's liberty as aggravated offense provisions. Although a sentencing judge has discretion to issue sentences under § 924(c)(1)(A) within the substantial range bounded on one end by the 5-, 7-, or 10-year mandatory minimum sentence and on the other by the statutory maximum sentence, judges in practice rarely exercise that discretion. As JUSTICE

THOMAS noted in *Harris*, "the sentence imposed when a defendant is found only to have 'carried' a firearm 'in relation to' a drug trafficking offense appears to be, almost uniformly, if not invariably, five years," and "those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison while those found to have discharged a firearm are sentenced only to 10 years." *Id.*, at 578; see also United States Sentencing Commission, Guidelines Manual §2K2.4, comment., n. 2 (Nov. 2008) (USSG) (stating that the minimum sentence required by §924(c)(1)(A) is the Guideline sentence and any increase is an upward departure). If anything, imposition of a mandatory minimum sentence under §924(c)(1)(A) will likely have a greater effect on a defendant's liberty than will conviction for another offense because, unlike sentences for most federal offenses, sentences imposed pursuant to that section must be served consecutively to any other sentence. See §924(c)(1)(D)(ii).

As the foregoing shows, mandatory minimum sentencing provisions are in effect no different from aggravated offense provisions. The common-law tradition of requiring proof of *mens rea* to establish criminal culpability should thus apply equally to such sentencing factors. Absent a clear indication that Congress intended to create a strict-liability enhancement, courts should presume that a provision that mandates enhanced criminal penalties requires proof of intent. This conclusion is bolstered by the fact that we have long applied the rule of lenity—which is similar to the *mens rea* rule in both origin and purpose—to provisions that increase criminal penalties as well as those that criminalize conduct. See *United States* v. *R. L. C.*, 503 U. S. 291, 305 (1992) (plurality opinion); *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980); *Ladner* v. *United States*, 358 U. S. 169, 178 (1958).[2]

[2] To be sure, there are also inquiries for which the Court has said that sentencing provisions are different. In *Harris* v. *United States*, 536 U. S. 545, 557 (2002) (plurality opinion), and *McMillan* v. *Pennsylvania*, 477 U. S. 79, 87–88 (1986), the Court distinguished for purposes of constitu-

Accordingly, I would apply the presumption in this case and avoid the strange result of imposing a substantially harsher penalty for an act caused not by an "evil-meaning mind" but by a clumsy hand.

The majority urges the result in this case is not unusual because legislatures commonly "punish individuals for the unintended consequences of their *unlawful* acts," *ante*, at 575, but the collection of examples that follows this assertion is telling. The Court cites the felony-murder rule, 18 U. S. C. § 1111, and Sentencing Guidelines provisions that permit increased punishment based on the seriousness of the harm caused by the predicate act, see USSG § 2A2.2(b)(3) (increasing the offense level for aggravated assault according to the seriousness of the injury); § 2D2.3 (increasing the offense level for operating a common carrier under the influence of alcohol or drugs if death or serious injury results). These examples have in common the provision of enhanced penalties for the infliction of some additional harm. By contrast, § 924(c)(1)(A)(iii) punishes discharges whether or not any harm is realized. Additionally, in each of the majority's examples Congress or the Sentencing Commission made explicit its intent to punish the resulting harm regardless of the perpetrator's *mens rea*. Section 924(c)(1)(A)(iii) contains no analogous statement. For these reasons, § 924(c)(1)(A)(iii) is readily distinguishable from the provisions the majority cites.

Contrary to the majority's suggestion, the existence of provisions that penalize the unintended consequences of felo-

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tional analysis mandatory minimum sentencing schemes from offense elements and provisions that increase the statutory maximum sentence. I continue to agree with JUSTICE THOMAS' compelling dissent in *Harris*, in which he rejected the distinction on the ground that mandatory minimum sentencing provisions have at least as significant an effect on a defendant's liberty as additional convictions or statutory maximum provisions. 536 U. S., at 577–578. The logic of treating these provisions similarly is buttressed by our subsequent decision in *United States* v. *Booker*, 543 U. S. 220, 233–234 (2005).

nious conduct underscores the reasonableness of reading § 924(c)(1)(A)(iii) to require proof of intent. When harm results from a firearm discharge during the commission of a violent felony or drug trafficking offense, the defendant will be punishable pursuant to USSG § 2B3.1(b)(3) (increasing the offense level for robbery according to the resulting degree of bodily injury), the felony-murder rule, or a similar provision. That a defendant will be subject to punishment for the harm resulting from a discharge whether or not he is also subject to the enhanced penalty imposed by § 924(c)(1)(A)(iii) indicates that the latter provision was intended to serve a different purpose—namely, to punish the more culpable act of intentional discharge.

III

In sum, the structure and history of § 924(c)(1)(A) indicate that Congress meant to impose the more substantial penalty provided by clause (iii) only in cases of intentional discharge. Were the statute unclear in that regard, I would reach the same conclusion by applying the presumption that Congress intended to include a *mens rea* requirement. Mandatory sentencing provisions are not meaningfully distinguishable from statutes defining crimes to which we have previously applied the presumption; the rule of *Morissette* and *Staples* and not the felony-murder rule should therefore guide our analysis. Because there is insufficient evidence to rebut the presumption in this case, I respectfully dissent.

JUSTICE BREYER, dissenting.

For many of the reasons that JUSTICE STEVENS sets forth, I believe the statutory provision before us applies to intentional, but not to accidental, discharges of firearms. As JUSTICE STEVENS points out, this Court in *Bailey* v. *United States*, 516 U. S. 137, 148 (1995), held that simple possession of a firearm, without some type of "active employment," such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire," did not consti-

tute "use" of a firearm. See *ante*, at 579 (dissenting opinion). It seems possible, if not likely, that Congress, in this statute, amended then-existing law by criminalizing the "simple possession" that *Bailey* found insufficient and then imposed a set of ever more severe mandatory sentences for the conduct that the Court listed in *Bailey* when it considered ways in which an offender might use a firearm. See *ante*, at 579. If so, the statutory words "is discharged," 18 U. S. C. § 924(c)(1)(A)(iii), refer to what *Bailey* called "firing," and they do not encompass an accidental discharge.

I concede that the Court lists strong arguments to the contrary. But, in my view, the "rule of lenity" tips the balance against the majority's position. The "rule of lenity" as ordinarily applied reflects the law's insistence that a criminal statute provide "fair warning . . . of what the law intends to do if a certain line is passed." *United States* v. *Bass*, 404 U. S. 336, 348 (1971) (internal quotation marks omitted). But here, where a mandatory minimum sentence is at issue, its application reflects an additional consideration, namely, that its application will likely produce an interpretation that hews more closely to Congress' sentencing intent.

That is because, in the case of a mandatory minimum, an interpretation that errs on the side of *exclusion* (an interpretive error on the side of leniency) still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence (because of the court's interpretation of the statute) is not legislatively *required*. See, *e. g.*, United States Sentencing Commission, Guidelines Manual § 2B3.1(b)(2) (Nov. 2008) (Specific Offense Characteristics) (possibly calling for a 7-to-9-year increase in the sentencing range in a case like this one). The sentencing judge is most likely to give a low non-Guidelines sentence in an unusual case—where the nature of the accident, for example, makes clear that the offender was not responsible and perhaps that the discharge put no one at risk. See, *e. g.*,

Koon v. *United States*, 518 U. S. 81, 92–94 (1996). And, of course, the unusual nature of such a case means it is the kind of case that Congress did *not* have in mind when it enacted the statute. Moreover, an error that excludes (erroneously) a set of instances Congress meant to include (such as accidental discharge) could lead the Sentencing Commission to focus on those cases and exercise its investigative and judgmental powers to decide how those cases should be handled. This investigation would, in turn, make available to Congress a body of evidence and analysis that will help it reconsider the statute if it wishes to do so.

On the other hand, an interpretation that errs on the side of *inclusion* requires imposing 10 years of additional imprisonment on individuals whom Congress would not have intended to punish so harshly. Such an interpretation would prevent a sentencing court from giving a lower sentence even in an unusual case, for example, where the accident is unintended, unforeseeable, and imposes no additional risk. And such an interpretation, by erroneously taking discretion away from the sentencing judge, would ensure results that depart dramatically from those Congress would have intended. Cf. *Harris* v. *United States*, 536 U. S. 545, 570 (2002) (BREYER, J., concurring in part and concurring in judgment) ("[S]tatutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency"). Moreover, because such unusual cases are (by definition) rare, these errors would provide little incentive to the Sentencing Commission or Congress to reconsider the statute.

These interpretive asymmetries give the rule of lenity special force in the context of mandatory minimum provisions. Because I believe the discharge provision here is sufficiently ambiguous to warrant the application of that rule, I respectfully dissent.

Syllabus

KANSAS *v.* VENTRIS

CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 07–1356. Argued January 21, 2009—Decided April 29, 2009

Respondent Donnie Ray Ventris and Rhonda Theel were charged with murder and other crimes. Prior to trial, an informant planted in Ventris's cell heard him admit to shooting and robbing the victim, but Ventris testified at trial that Theel committed the crimes. When the State sought to call the informant to testify to his contradictory statement, Ventris objected. The State conceded that Ventris's Sixth Amendment right to counsel had likely been violated, but argued that the statement was admissible for impeachment purposes. The trial court allowed the testimony. The jury convicted Ventris of aggravated burglary and aggravated robbery. Reversing, the Kansas Supreme Court held that the informant's statements were not admissible for any reason, including impeachment.

Held: Ventris's statement to the informant, concededly elicited in violation of the Sixth Amendment, was admissible to impeach his inconsistent testimony at trial. Pp. 590–594.

(a) Whether a confession that was not admissible in the prosecution's case in chief nonetheless can be admitted for impeachment purposes depends on the nature of the constitutional guarantee violated. The Fifth Amendment guarantee against compelled self-incrimination is violated by introducing a coerced confession at trial, whether by way of impeachment or otherwise. *New Jersey* v. *Portash*, 440 U. S. 450, 458–459. But for the Fourth Amendment guarantee against unreasonable searches or seizures, where exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee, admissibility is determined by an exclusionary-rule balancing test. See *Walder* v. *United States*, 347 U. S. 62, 65. The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct. See, *e. g.*, *Harris* v. *New York*, 401 U. S. 222, 225–226. The core of the Sixth Amendment right to counsel is a trial right, but the right covers pretrial interrogations to ensure that police manipulation does not deprive the defendant of "'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah* v. *United States*, 377 U. S. 201, 204. This right to be free of uncounseled interrogation is infringed at the time of the interrogation, not when it is admitted into evidence. It is that deprivation

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that demands the remedy of exclusion from the prosecution's case in chief. Pp. 590–593.

(b) The interests safeguarded by excluding tainted evidence for impeachment purposes are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Stone* v. *Powell*, 428 U. S. 465, 488. Once the defendant testifies inconsistently, denying the prosecution "the traditional truth-testing devices of the adversary process," *Harris*, *supra*, at 225, is a high price to pay for vindicating the right to counsel at the prior stage. On the other hand, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence for officers, who have an incentive to comply with the Constitution, since statements lawfully obtained can be used for all purposes, not simply impeachment. In every other context, this Court has held that tainted evidence is admissible for impeachment. See, *e. g.*, *Oregon* v. *Hass*, 420 U. S. 714, 723. No distinction here alters that balance. Pp. 593–594.

285 Kan. 595, 176 P. 3d 920, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 594.

Stephen R. McAllister, Solicitor General of Kansas, argued the cause for petitioner. With him on the briefs were *Steve Six*, Attorney General, and *Jared S. Maag*, Deputy Solicitor General.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, and *Deputy Solicitor General Dreeben*.

Matthew J. Edge, by appointment of the Court, 555 U. S. 1030, argued the cause for respondent. With him on the brief was *Randall L. Hodgkinson*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New Mexico et al. by *Gary K. King*, Attorney General of New Mexico, and *Joel Jacobsen*, Assistant Attorney General, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard*

JUSTICE SCALIA delivered the opinion of the Court.

We address in this case the question whether a defendant's incriminating statement to a jailhouse informant, concededly elicited in violation of Sixth Amendment strictures, is admissible at trial to impeach the defendant's conflicting statement.

I

In the early hours of January 7, 2004, after two days of no sleep and some drug use, Rhonda Theel and respondent Donnie Ray Ventris reached an ill-conceived agreement to confront Ernest Hicks in his home. The couple testified that the aim of the visit was simply to investigate rumors that Hicks abused children, but the couple may have been inspired by the potential for financial gain: Theel had recently learned that Hicks carried large amounts of cash.

The encounter did not end well. One or both of the pair shot and killed Hicks with shots from a .38-caliber revolver, and the companions drove off in Hicks's truck with approximately $300 of his money and his cell phone. On receiving a tip from two friends of the couple who had helped transport them to Hicks's home, officers arrested Ventris and Theel and charged them with various crimes, chief among them murder and aggravated robbery. The State dropped the

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of Arizona, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Jack Conway* of Kentucky, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Mike McGrath* of Montana, *Kelly A. Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.,* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Robert F. McDonnell* of Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Amy Howe, *Kevin K. Russell*, *Thomas C. Goldstein*, *Pamela S. Karlan*, and *Jeffrey L. Fisher* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

murder charge against Theel in exchange for her guilty plea to the robbery charge and her testimony identifying Ventris as the shooter.

Prior to trial, officers planted an informant in Ventris's holding cell, instructing him to "keep [his] ear open and listen" for incriminating statements. App. 146. According to the informant, in response to his statement that Ventris appeared to have "something more serious weighing in on his mind," Ventris divulged that "[h]e'd shot this man in his head and in his chest" and taken "his keys, his wallet, about $350.00, and . . . a vehicle." *Id.*, at 154, 150.

At trial, Ventris took the stand and blamed the robbery and shooting entirely on Theel. The government sought to call the informant, to testify to Ventris's prior contradictory statement; Ventris objected. The State conceded that there was "probably a violation" of Ventris's Sixth Amendment right to counsel but nonetheless argued that the statement was admissible for impeachment purposes because the violation "doesn't give the Defendant . . . a license to just get on the stand and lie." *Id.*, at 143. The trial court agreed and allowed the informant's testimony, but instructed the jury to "consider with caution" all testimony given in exchange for benefits from the State. *Id.*, at 30. The jury ultimately acquitted Ventris of felony murder and misdemeanor theft but returned a guilty verdict on the aggravated burglary and aggravated robbery counts.

The Kansas Supreme Court reversed the conviction, holding that "[o]nce a criminal prosecution has commenced, the defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony." 285 Kan. 595, 606, 176 P. 3d 920, 928 (2008). Chief Justice McFarland dissented, *id.*, at 611, 176 P. 3d, at 930. We granted the State's petition for certiorari, 554 U. S. 944 (2008).

II

The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." The core of this right has historically been, and remains today, "the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial." *Michigan* v. *Harvey*, 494 U. S. 344, 348 (1990). We have held, however, that the right extends to having counsel present at various pretrial "critical" interactions between the defendant and the State, *United States* v. *Wade*, 388 U. S. 218, 224 (1967), including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge, *Massiah* v. *United States*, 377 U. S. 201, 206 (1964). The State has conceded throughout these proceedings that Ventris's confession was taken in violation of *Massiah*'s dictates and was therefore not admissible in the prosecution's case in chief. Without affirming that this concession was necessary, see *Kuhlmann* v. *Wilson*, 477 U. S. 436, 459–460 (1986), we accept it as the law of the case. The only question we answer today is whether the State must bear the additional consequence of inability to counter Ventris's contradictory testimony by placing the informant on the stand.

A

Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes that explicitly mandates exclusion from trial, and sometimes it does not. The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise. *New Jersey* v. *Portash*, 440 U. S. 450, 458–459 (1979). The Fourth

Amendment, on the other hand, guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence; exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee. Inadmissibility has not been automatic, therefore, but we have instead applied an exclusionary-rule balancing test. See *Walder* v. *United States*, 347 U. S. 62, 65 (1954). The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct. See *Harris* v. *New York*, 401 U. S. 222, 225–226 (1971); *Harvey*, *supra*, at 348–350.

Respondent argues that the Sixth Amendment's right to counsel is a "right an accused is to enjoy a[t] trial." Brief for Respondent 11. The core of the right to counsel is indeed a trial right, ensuring that the prosecution's case is subjected to "the crucible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). See also *Powell* v. *Alabama*, 287 U. S. 45, 57–58 (1932). But our opinions under the Sixth Amendment, as under the Fifth, have held that the right covers pretrial interrogations to ensure that police manipulation does not render counsel entirely impotent—depriving the defendant of "'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah*, *supra*, at 204 (quoting *Spano* v. *New York*, 360 U. S. 315, 326 (1959) (Douglas, J., concurring)). See also *Miranda* v. *Arizona*, 384 U. S. 436, 468–469 (1966).

Our opinion in *Massiah*, to be sure, was equivocal on what precisely constituted the violation. It quoted various authorities indicating that the violation occurred at the moment of the postindictment interrogation because such questioning "'contravenes the basic dictates of fairness in the conduct of criminal causes.'" 377 U. S., at 205 (quoting *People* v. *Waterman*, 9 N. Y. 2d 561, 565, 175 N. E. 2d 445, 448 (1961)). But the opinion later suggested that the violation

occurred only when the improperly obtained evidence was "used against [the defendant] at his trial." 377 U. S., at 206–207. That question was irrelevant to the decision in *Massiah* in any event. Now that we are confronted with the question, we conclude that the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the "Assistance of Counsel" is denied.

It is illogical to say that the right is not violated until trial counsel's task of opposing conviction has been undermined by the statement's admission into evidence. A defendant is not denied counsel merely because the prosecution has been permitted to introduce evidence of guilt—even evidence so overwhelming that the attorney's job of gaining an acquittal is rendered impossible. In such circumstances the accused continues to enjoy the assistance of counsel; the assistance is simply not worth much. The assistance of counsel has been denied, however, at the prior critical stage which produced the inculpatory evidence. Our cases acknowledge that reality in holding that the stringency of the warnings necessary for a waiver of the assistance of counsel varies according to "the usefulness of counsel to the accused at the particular [pretrial] proceeding." *Patterson* v. *Illinois*, 487 U. S. 285, 298 (1988). It is *that* deprivation which demands a remedy.

The United States insists that "post-charge deliberate elicitation of statements without the defendant's counsel or a valid waiver of counsel is not intrinsically unlawful." Brief for United States as *Amicus Curiae* 17, n. 4. That is true when the questioning is unrelated to charged crimes—the Sixth Amendment right is "offense specific," *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991). We have never said, however, that officers may badger counseled defendants about charged crimes so long as they do not use information they gain. The constitutional violation occurs when the uncounseled interrogation is conducted.

B

This case does not involve, therefore, the prevention of a constitutional violation, but rather the scope of the remedy for a violation that has already occurred. Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Stone* v. *Powell*, 428 U. S. 465, 488 (1976). "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his untruths." *Walder*, *supra*, at 65. Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of "the traditional truth-testing devices of the adversary process," *Harris*, *supra*, at 225, is a high price to pay for vindication of the right to counsel at the prior stage.

On the other side of the scale, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence. Officers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of *Massiah* would be of use for impeachment is exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment. Not likely to happen—or at least not likely enough to risk squandering the opportunity of using a properly obtained statement for the prosecution's case in chief.

In any event, even if "the officer may be said to have little to lose and perhaps something to gain by way of possibly

uncovering impeachment material," we have multiple times rejected the argument that this "speculative possibility" can trump the costs of allowing perjurious statements to go unchallenged. *Oregon* v. *Hass*, 420 U. S. 714, 723 (1975). We have held in every other context that tainted evidence—evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid—is admissible for impeachment. See *ibid.; Walder*, 347 U. S., at 65; *Harris*, 401 U. S., at 226; *Harvey*, 494 U. S., at 348. We see no distinction that would alter the balance here.*

* * *

We hold that the informant's testimony, concededly elicited in violation of the Sixth Amendment, was admissible to challenge Ventris's inconsistent testimony at trial. The judgment of the Kansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

In *Michigan* v. *Harvey*, 494 U. S. 344 (1990), the Court held that a statement obtained from a defendant in violation

*Respondent's *amicus* insists that jailhouse snitches are so inherently unreliable that this Court should craft a broader exclusionary rule for uncorroborated statements obtained by that means. Brief for National Association of Criminal Defense Lawyers 25–26. Our legal system, however, is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses, and we have long purported to avoid "establish[ing] this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967). It would be especially inappropriate to fabricate such a rule in this case, where it appears the jury took to heart the trial judge's cautionary instruction on the unreliability of rewarded informant testimony by acquitting Ventris of felony murder.

of the Sixth Amendment could be used to impeach his testimony at trial. As I explained in a dissent joined by three other Members of the Court, that holding eroded the principle that "those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen." *Id.*, at 369. It was my view then, as it is now, that "the Sixth Amendment is violated when the fruits of the State's impermissible encounter with the represented defendant are used for impeachment just as it is when the fruits are used in the prosecutor's case in chief." *Id.*, at 355.

In this case, the State has conceded that it violated the Sixth Amendment as interpreted in *Massiah* v. *United States*, 377 U. S. 201, 206 (1964), when it used a jailhouse informant to elicit a statement from the defendant. No *Miranda* warnings were given to the defendant,[1] nor was he otherwise alerted to the fact that he was speaking to a state agent. Even though the jury apparently did not credit the informant's testimony, the Kansas Supreme Court correctly concluded that the prosecution should not be allowed to exploit its pretrial constitutional violation during the trial itself. The Kansas court's judgment should be affirmed.

This Court's contrary holding relies on the view that a defendant's pretrial right to counsel is merely "prophylactic" in nature. See *ante*, at 591. The majority argues that any violation of this prophylactic right occurs solely at the time the State subjects a counseled defendant to an uncounseled interrogation, not when the fruits of the encounter are used against the defendant at trial. *Ante*, at 592. This reasoning is deeply flawed.

The pretrial right to counsel is not ancillary to, or of lesser importance than, the right to rely on counsel at trial. The Sixth Amendment grants the right to counsel "[i]n all crimi-

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[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

nal prosecutions," and we have long recognized that the right applies in periods before trial commences, see *United States* v. *Wade*, 388 U. S. 218, 224 (1967). We have never endorsed the notion that the pretrial right to counsel stands at the periphery of the Sixth Amendment. To the contrary, we have explained that the pretrial period is "perhaps the most critical period of the proceedings" during which a defendant "requires the guiding hand of counsel." *Powell* v. *Alabama*, 287 U. S. 45, 57, 69 (1932); see *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985) (recognizing the defendant's "right to rely on counsel as a 'medium' between him and the State" in all critical stages of prosecution). Placing the prophylactic label on a core Sixth Amendment right mischaracterizes the sweep of the constitutional guarantee.

Treating the State's actions in this case as a violation of a prophylactic right, the Court concludes that introducing the illegally obtained evidence at trial does not itself violate the Constitution. I strongly disagree. While the constitutional breach began at the time of interrogation, the State's use of that evidence at trial compounded the violation. The logic that compels the exclusion of the evidence during the State's case in chief extends to any attempt by the State to rely on the evidence, even for impeachment. The use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process—the fairness of which the Sixth Amendment was designed to protect. See *Strickland* v. *Washington*, 466 U. S. 668, 685 (1984); see also *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 276 (1942) ("[The] procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property' ").

When counsel is excluded from a critical pretrial interaction between the defendant and the State, she may be unable to effectively counter the potentially devastating, and poten-

tially false,[2] evidence subsequently introduced at trial. Inexplicably, today's Court refuses to recognize that this is a constitutional harm.[3] Yet in *Massiah*, the Court forcefully explained that a defendant is "denied the basic protections of [the Sixth Amendment] guarantee when there [is] used against him at his trial evidence of his own incriminating words" that were "deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U. S., at 206. Sadly, the majority has retreated from this robust understanding of the right to counsel.

Today's decision is lamentable not only because of its flawed underpinnings, but also because it is another occasion in which the Court has privileged the prosecution at the expense of the Constitution. Permitting the State to cut corners in criminal proceedings taxes the legitimacy of the entire criminal process. "The State's interest in truthseeking is congruent with the defendant's interest in representation by counsel, for it is an elementary premise of our system of criminal justice '"that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."'" *Harvey*, 494 U. S., at 357 (STEVENS, J., dissenting) (quoting *United States* v. *Cronic*, 466 U. S. 648, 655 (1984)). Although the Court may

[2] The likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored. See generally Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae*. Indeed, by deciding to acquit respondent of felony murder, the jury seems to have dismissed the informant's trial testimony as unreliable.

[3] In the majority's telling, "simply" having counsel whose help is "not worth much" is not a Sixth Amendment concern. *Ante*, at 592. Of course, the Court points to no precedent for this stingy view of the Counsel Clause, for we have never held that the Sixth Amendment only protects a defendant from actual denials of counsel. Indeed our venerable ineffective-assistance-of-counsel jurisprudence is built on a more realistic understanding of what the Constitution guarantees. See *Strickland* v. *Washington*, 466 U. S. 668 (1984); *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel").

not be concerned with the use of ill-gotten evidence in derogation of the right to counsel, I remain convinced that such shabby tactics are intolerable in all cases. I respectfully dissent.

Syllabus

BURLINGTON NORTHERN & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 07–1601. Argued February 24, 2009—Decided May 4, 2009*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is designed to promote the cleanup of hazardous waste sites and to ensure that cleanup costs are borne by those responsible for the contamination. In 1960, Brown & Bryant, Inc. (B&B), an agricultural chemical distributor, began operating on a parcel of land located in Arvin, California. B&B later expanded onto an adjacent parcel owned by petitioners Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (Railroads). As part of its business, B&B purchased and stored various hazardous chemicals, including the pesticide D–D, which it bought from petitioner Shell Oil Company (Shell). Over time, many of these chemicals spilled during transfers and deliveries, and as a result of equipment failures.

Investigations of B&B by the California Department of Toxic Substances Control and the federal Environmental Protection Agency (Governments) revealed significant soil and ground water contamination and in 1989, the Governments exercised their CERCLA authority to clean up the Arvin site, spending over $8 million by 1998. Seeking to recover their costs, the Governments initiated legal action against Shell and the Railroads. The District Court ruled in favor of the Governments, finding that both the Railroads and Shell were potentially responsible parties under CERCLA—the Railroads because they owned part of the facility and Shell because it had "arranged for disposal . . . of hazardous substances," 42 U. S. C. § 9607(a)(3), through D–D's sale and delivery. The District Court apportioned liability, holding the Railroads liable for 9% of the Governments' total response costs, and Shell liable for 6%. On appeal, the Ninth Circuit agreed that Shell could be held liable as an arranger under § 9607(a)(3) and affirmed the District Court's decision in that respect. Although the Court of Appeals agreed that the harm in these cases was theoretically capable of apportionment, it found the facts present in the record insufficient to support apportionment, and

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*Together with No. 07–1607, *Shell Oil Co.* v. *United States et al.*, also on certiorari to the same court.

therefore held Shell and the Railroads jointly and severally liable for the Governments' response costs.

Held:

1. Shell is not liable as an arranger for the contamination at the Arvin facility. Section 9607(a)(3) liability may not extend beyond the limits of the statute itself. Because CERCLA does not specifically define what it means to "arrang[e] for" disposal of a hazardous substance, the phrase should be given its ordinary meaning. In common parlance, "arrange" implies action directed to a specific purpose. Thus, under § 9607(a)(3)'s plain language, an entity may qualify as an arranger when it takes intentional steps to dispose of a hazardous substance. To qualify as an arranger, Shell must have entered into D–D sales with the intent that at least a portion of the product be disposed of during the transfer process by one or more of § 6903(3)'s methods. The facts found by the District Court do not support such a conclusion. The evidence shows that Shell was aware that minor, accidental spills occurred during D–D's transfer from the common carrier to B&B's storage tanks after the product had come under B&B's stewardship; however, it also reveals that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of spills. Thus, Shell's mere knowledge of continuing spills and leaks is insufficient grounds for concluding that it "arranged for" D–D's disposal. Pp. 608–613.

2. The District Court reasonably apportioned the Railroads' share of the site remediation costs at 9%. Calculating liability based on three figures—the percentage of the total area of the facility that was owned by the Railroads, the duration of B&B's business divided by the term of the Railroads' lease, and the court's determination that only two polluting chemicals (not D–D) spilled on the leased parcel required remediation and that those chemicals were responsible for roughly two-thirds of the remediable site contamination—the District Court ultimately determined that the Railroads were responsible for 9% of the remediation costs. The District Court's detailed findings show that the primary pollution at the site was on a portion of the facility most distant from the Railroad parcel and that the hazardous-chemical spills on the Railroad parcel contributed to no more than 10% of the total site contamination, some of which did not require remediation. Moreover, although the evidence adduced by the parties did not allow the District Court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination or the exact percentage of harm caused by each chemical, the evidence showed that fewer spills occurred on the Railroad parcel and that not all of them crossed to the B&B site, where most of the contamination originated, thus sup-

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porting the conclusion that the parcel contributed only two chemicals in quantities requiring remediation. Pp. 613–619.

520 F. 3d 918, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. GINSBURG, J., filed a dissenting opinion, *post*, p. 620.

Kathleen M. Sullivan argued the cause for petitioner in No. 07–1607. With her on the briefs were *Crystal Nix Hines*, *William B. Adams*, *Cisselon Nichols Hurd*, and *Michael Johnson*.

Maureen E. Mahoney argued the cause for petitioners in No. 07–1601. With her on the briefs were *J. Scott Ballenger*, *Charles G. Cole*, *Bennett Evan Cooper*, *Roger Nober*, *Orest B. Dachniwsky*, *J. Michael Hemmer*, *David P. Young*, and *Robert C. Bylsma*.

Deputy Solicitor General Stewart argued the cause for respondents in both cases. With him on the brief for the United States were former *Solicitor General Garre*, *Acting Assistant Attorney General Guzman*, *Pratik A. Shah*, *James R. MacAyeal*, *Aaron P. Avila*, and *Patricia K. Hirsch*. *Edmund G. Brown, Jr.*, Attorney General of California, *James Humes*, Chief Assistant Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Gordon Burns*, Deputy Solicitor General, *Ken Alex*, Senior Assistant Attorney General, *Donald A. Robinson*, Supervising Deputy Attorney General, and *Ann Rushton* and *Janill L. Richards*, Deputy Attorneys General, filed a brief for respondent State of California.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Association of American Railroads by *Carter G. Phillips*, *G. Paul Moates*, and *Eric A. Shumsky;* for the Chamber of Commerce of the United States of America et al. by *Thomas C. Jackson*, *Robin S. Conrad*, *Amar D. Sarwal*, *Donald D. Evans*, *Leslie Hulse*, *Douglas T. Nelson*, *Harry M. Ng*, *Jan S. Amundson*, and *Quentin Riegel;* for General Electric Co. by *Laurence H. Tribe*, *Thomas C. Goldstein*, *Michael C. Small*, and *Jonathan Massey;* for the Product Liability Advisory Council, Inc., by *Charles H.*

JUSTICE STEVENS delivered the opinion of the Court.

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Act), 94 Stat. 2767, as amended, 42 U. S. C. §§ 9601–9675, in response to the serious environmental and health risks posed by industrial pollution. See *United States* v. *Bestfoods*, 524 U. S. 51, 55 (1998). The Act was designed to promote the "'timely cleanup of hazardous waste sites'" and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination. *Consolidated Edison Co. of N. Y.* v. *UGI Util., Inc.*, 423 F. 3d 90, 94 (CA2 2005); see also *Meghrig* v. *KFC Western, Inc.*, 516 U. S. 479, 483 (1996); *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F. 2d 1074, 1081 (CA1 1986). These cases raise the questions whether and to what extent a party associated with a contaminated site may be held responsible for the full costs of remediation.

I

In 1960, Brown & Bryant, Inc. (B&B), began operating an agricultural chemical distribution business, purchasing pesticides and other chemical products from suppliers such as Shell Oil Company (Shell). Using its own equipment, B&B applied its products to customers' farms. B&B opened its business on a 3.8-acre parcel of former farmland in Arvin, California, and in 1975, expanded operations onto an adjacent

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Briefs of *amici curiae* urging reversal in No. 07–1607 were filed for the Civil Justice Association of California by *Fred J. Hiestand;* for the International Association of Defense Counsel by *Mary-Christine Sungaila, Jeremy B. Rosen, Bradley S. Pauley,* and *Felix Shafir;* and for Teck Cominco Metals, Ltd., by *Theodore B. Olson, Matthew D. McGill,* and *Amir C. Tayrani.*

Joel W. Nomkin filed a brief for Newmont USA Ltd. et al. as *amici curiae* in both cases.

0.9-acre parcel of land owned jointly by the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Transportation Company (now known respectively as the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company) (Railroads). Both parcels of the Arvin facility were graded toward a sump and drainage pond located on the southeast corner of the primary parcel. See Appendix, *infra*. Neither the sump nor the drainage pond was lined until 1979, allowing waste water and chemical runoff from the facility to seep into the ground water below.

During its years of operation, B&B stored and distributed various hazardous chemicals on its property. Among these were the herbicide dinoseb, sold by Dow Chemicals, and the pesticides D–D and Nemagon, both sold by Shell. Dinoseb was stored in 55-gallon drums and 5-gallon containers on a concrete slab outside B&B's warehouse. Nemagon was stored in 30-gallon drums and 5-gallon containers inside the warehouse. Originally, B&B purchased D–D in 55-gallon drums; beginning in the mid-1960's, however, Shell began requiring its distributors to maintain bulk storage facilities for D–D. From that time onward, B&B purchased D–D in bulk.[1]

When B&B purchased D–D, Shell would arrange for delivery by common carrier, f.o.b. destination.[2] When the product arrived, it was transferred from tanker trucks to a bulk storage tank located on B&B's primary parcel. From there, the chemical was transferred to bobtail trucks, nurse tanks,

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[1] Because D–D is corrosive, bulk storage of the chemical led to numerous tank failures and spills as the chemical rusted tanks and eroded valves.

[2] F.o.b. destination means "the seller must at his own expense and risk transport the goods to [the destination] and there tender delivery of them . . . ." U. C. C. § 2–319(1)(b) (2001). The District Court found that B&B assumed "stewardship" over the D–D as soon as the common carrier entered the Arvin facility. App. to Pet. for Cert. in No. 07–1601, p. 124a, ¶ 160.

and pull rigs. During each of these transfers leaks and spills could—and often did—occur. Although the common carrier and B&B used buckets to catch spills from hoses and gaskets connecting the tanker trucks to its bulk storage tank, the buckets sometimes overflowed or were knocked over, causing D–D to spill onto the ground during the transfer process.

Aware that spills of D–D were commonplace among its distributors, in the late 1970's Shell took several steps to encourage the safe handling of its products. Shell provided distributors with detailed safety manuals and instituted a voluntary discount program for distributors that made improvements in their bulk handling and safety facilities. Later, Shell revised its program to require distributors to obtain an inspection by a qualified engineer and provide self-certification of compliance with applicable laws and regulations. B&B's Arvin facility was inspected twice, and in 1981, B&B certified to Shell that it had made a number of recommended improvements to its facilities.

Despite these improvements, B&B remained a "'[s]loppy' [o]perator." App. to Pet. for Cert. in No. 07–1601, p. 130a, ¶ 186(Y). Over the course of B&B's 28 years of operation, delivery spills, equipment failures, and the rinsing of tanks and trucks allowed Nemagon, D–D, and dinoseb to seep into the soil and upper levels of ground water of the Arvin facility. In 1983, the California Department of Toxic Substances Control (DTSC) began investigating B&B's violation of hazardous waste laws, and the United States Environmental Protection Agency (EPA) soon followed suit, discovering significant contamination of soil and ground water. Of particular concern was a plume of contaminated ground water located under the facility that threatened to leach into an adjacent supply of potential drinking water.[3]

[3] The ground water at the Arvin site is divided into three zones. The A-zone is located 60–80 feet below the ground. It has been tested and found to have high levels of contamination. The B-zone is located 150 feet

Although B&B undertook some efforts at remediation, by 1989 it had become insolvent and ceased all operations. That same year, the Arvin facility was added to the National Priority List, see 54 Fed. Reg. 41027, and subsequently, DTSC and EPA (Governments) exercised their authority under 42 U. S. C. § 9604 to undertake cleanup efforts at the site. By 1998, the Governments had spent more than $8 million responding to the site contamination; their costs have continued to accrue.

In 1991, EPA issued an administrative order to the Railroads directing them, as owners of a portion of the property on which the Arvin facility was located, to perform certain remedial tasks in connection with the site. The Railroads did so, incurring expenses of more than $3 million in the process. Seeking to recover at least a portion of their response costs, in 1992 the Railroads brought suit against B&B in the United States District Court for the Eastern District of California. In 1996, that lawsuit was consolidated with two recovery actions brought by DTSC and EPA against Shell and the Railroads.

The District Court conducted a 6-week bench trial in 1999 and four years later entered a judgment in favor of the Governments. In a lengthy order supported by 507 separate findings of fact and conclusions of law, the court held that both the Railroads and Shell were potentially responsible parties (PRPs) under CERCLA—the Railroads because they were owners of a portion of the facility, see 42 U. S. C. §§ 9607(a)(1)–(2), and Shell because it had "arranged for" the disposal of hazardous substances through its sale and delivery of D–D, see § 9607(a)(3).

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below ground. Although the B-zone is not currently used as a source of drinking water, it has the potential to serve as such a source. No contamination has yet been found in that zone. The C-zone is an aquifer located 200 feet below ground. It is the sole current source of drinking water and, thus far, has suffered no contamination from the Arvin site.

Although the court found the parties liable, it did not impose joint and several liability on Shell and the Railroads for the entire response cost incurred by the Governments. The court found that the site contamination created a single harm but concluded that the harm was divisible and therefore capable of apportionment. Based on three figures—the percentage of the total area of the facility that was owned by the Railroads, the duration of B&B's business divided by the term of the Railroads' lease, and the Court's determination that only two of three polluting chemicals spilled on the leased parcel required remediation and that those two chemicals were responsible for roughly two-thirds of the overall site contamination requiring remediation—the court apportioned the Railroads' liability as 9% of the Governments' total response cost.[4] Based on estimations of chemical spills of Shell products, the court held Shell liable for 6% of the total site response cost.

The Governments appealed the District Court's apportionment, and Shell cross-appealed the court's finding of liability. The Court of Appeals acknowledged that Shell did not qualify as a "traditional" arranger under § 9607(a)(3), insofar as it had not contracted with B&B to directly dispose of a hazardous waste product. 520 F. 3d 918, 948 (CA9 2008). Nevertheless, the court stated that Shell could still be held liable under a " 'broader' category of arranger liability" if the "disposal of hazardous wastes [wa]s a foreseeable byproduct of,

[4] Although the Railroads did not produce precise figures regarding the exact quantity of chemical spills on each parcel in each year of the facility's operation, the District Court found it "indisputable that the overwhelming majority of hazardous substances were released from the B&B parcel." *Id.*, at 248a, ¶ 477. The court explained that "the predominant activities conducted on the Railroad parcel through the years were storage and some washing and rinsing of tanks, other receptacles, and chemical application vehicles. Mixing, formulating, loading, and unloading of ag-chemical hazardous substances, which contributed most of the liability causing releases, were predominantly carried out by B&B on the B&B parcel." *Id.*, at 247a–248a, ¶ 476.

but not the purpose of, the transaction giving rise to" arranger liability. *Ibid.* Relying on CERCLA's definition of "disposal," which covers acts such as "leaking" and "spilling," 42 U. S. C. § 6903(3), the Ninth Circuit concluded that an entity could arrange for "disposal" "even if it did not intend to dispose" of a hazardous substance. 520 F. 3d, at 949.

Applying that theory of arranger liability to the District Court's findings of fact, the Ninth Circuit held that Shell arranged for the disposal of a hazardous substance through its sale and delivery of D–D:

> "Shell arranged for delivery of the substances to the site by its subcontractors; was aware of, and to some degree dictated, the transfer arrangements; knew that some leakage was likely in the transfer process; and provided advice and supervision concerning safe transfer and storage. Disposal of a hazardous substance was thus a necessary part of the sale and delivery process." *Id.*, at 950.

Under such circumstances, the court concluded, arranger liability was not precluded by the fact that the purpose of Shell's action had been to transport a useful and previously unused product to B&B for sale.

On the subject of apportionment, the Court of Appeals found "no dispute" on the question whether the harm caused by Shell and the Railroads was capable of apportionment. *Id.*, at 942. The court observed that a portion of the site contamination occurred before the Railroad parcel became part of the facility, only some of the hazardous substances were stored on the Railroad parcel, and "only some of the water on the facility washed over the Railroads' site." *Ibid.* With respect to Shell, the court noted that not all of the hazardous substances spilled on the facility had been sold by Shell. Given those facts, the court readily concluded that "the contamination traceable to the Railroads and Shell, with adequate information, would be allocable, as would be the

cost of cleaning up that contamination." *Ibid.* Nevertheless, the Court of Appeals held that the District Court erred in finding that the record established a reasonable basis for apportionment. Because the burden of proof on the question of apportionment rested with Shell and the Railroads, the Court of Appeals reversed the District Court's apportionment of liability and held Shell and the Railroads jointly and severally liable for the Governments' cost of responding to the contamination of the Arvin facility.

The Railroads and Shell moved for rehearing en banc, which the Court of Appeals denied over the dissent of eight judges. See *id.*, at 952 (Bea, J., dissenting). We granted certiorari to determine whether Shell was properly held liable as an entity that had "arranged for disposal" of hazardous substances within the meaning of § 9607(a)(3), and whether Shell and the Railroads were properly held liable for all response costs incurred by EPA and the State of California. See 554 U. S. 945 (2008). Finding error on both points, we now reverse.

II

CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs:

> "(1) the owner and operator of a vessel or a facility,
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> "(2) any person[5] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> "(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treat-

[5] For purposes of the statute, a "person" is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U. S. C. § 9601(21).

> ment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> "(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . ." 42 U. S. C. § 9607(a).

Once an entity is identified as a PRP, it may be compelled to clean up a contaminated area or reimburse the Government for its past and future response costs. See *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 161 (2004).[6]

In these cases, it is undisputed that the Railroads qualify as PRPs under both §§ 9607(a)(1) and 9607(a)(2) because they owned the land leased by B&B at the time of the contamination and continue to own it now. The more difficult question is whether Shell also qualifies as a PRP under § 9607(a)(3) by virtue of the circumstances surrounding its sales to B&B.

To determine whether Shell may be held liable as an arranger, we begin with the language of the statute. As relevant here, § 9607(a)(3) applies to an entity that "arrange[s] for disposal . . . of hazardous substances." It is plain from

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[6] Under CERCLA, PRPs are liable for:

"(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

"(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

"(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

"(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title." § 9607(a)(4).

the language of the statute that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination. See *Freeman* v. *Glaxo Wellcome, Inc.*, 189 F. 3d 160, 164 (CA2 1999); *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F. 2d 1313, 1318 (CA11 1990). Less clear is the liability attaching to the many permutations of "arrangements" that fall between these two extremes—cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the "sale" of a hazardous substance are less than clear. In such cases, courts have concluded that the determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a "disposal" or a "sale" and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions. See *Freeman*, 189 F. 3d, at 164; *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R. Co.*, 142 F. 3d 769, 775 (CA4 1998) ("'[T]here is no bright line between a sale and a disposal under CERCLA. A party's responsibility . . . must by necessity turn on a fact-specific inquiry into the nature of the transaction'" (quoting *United States* v. *Petersen Sand & Gravel*, 806 F. Supp. 1346, 1354 (ND Ill. 1992))); *Florida Power & Light Co.*, 893 F. 2d, at 1318.

Although we agree that the question whether § 9607(a)(3) liability attaches is fact intensive and case specific, such liability may not extend beyond the limits of the statute itself. Because CERCLA does not specifically define what it means to "arrang[e] for" disposal of a hazardous substance, see, *e. g.*, *United States* v. *Cello-Foil Prods., Inc.*, 100 F. 3d 1227, 1231 (CA6 1996); *Amcast Indus. Corp.* v. *Detrex Corp.*, 2 F. 3d 746,

751 (CA7 1993); *Florida Power & Light Co.*, 893 F. 2d, at 1317, we give the phrase its ordinary meaning. *Crawford* v. *Metropolitan Government of Nashville and Davidson Cty.*, 555 U. S. 271, 276 (2009); *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). In common parlance, the word "arrange" implies action directed to a specific purpose. See Merriam-Webster's Collegiate Dictionary 64 (10th ed. 1993) (defining "arrange" as "to make preparations for: PLAN[;] . . . to bring about an agreement or understanding concerning"); see also *Amcast Indus. Corp.*, 2 F. 3d, at 751 (words "'arranged for' . . . imply intentional action"). Consequently, under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance. See *Cello-Foil Prods., Inc.*, 100 F. 3d, at 1231 ("[I]t would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has 'otherwise arranged for disposal . . . of hazardous substances' ").

The Governments do not deny that the statute requires an entity to "arrang[e] for" disposal; however, they interpret that phrase by reference to the statutory term "disposal," which the Act broadly defines as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water." 42 U. S. C. § 6903(3); see also § 9601(29) (adopting the definition of "disposal" contained in the Solid Waste Disposal Act).[7] The Governments assert that by including unintentional acts such as "spilling" and "leaking" in the definition of disposal, Congress intended to impose liability on entities not only when they directly dispose of waste products but also when

[7] "Hazardous waste" is defined as "a solid waste, or combination of solid wastes, which . . . may . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." § 6903(5)(B); § 9601(29).

they engage in legitimate sales of hazardous substances[8] knowing that some disposal may occur as a collateral consequence of the sale itself. Applying that reading of the statute, the Governments contend that Shell arranged for the disposal of D–D within the meaning of § 9607(a)(3) by shipping D–D to B&B under conditions it knew would result in the spilling of a portion of the hazardous substance by the purchaser or common carrier. See Brief for United States 24 ("Although the delivery of a useful product was the ultimate *purpose* of the arrangement, Shell's continued participation in the delivery, with knowledge that spills and leaks would result, was sufficient to establish Shell's intent to dispose of hazardous substances"). Because these spills resulted in wasted D–D, a result Shell anticipated, the Governments insist that Shell was properly found to have arranged for the disposal of D–D.

While it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity "planned for" the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product. In order to qualify as an arranger, Shell must have entered into the sale of D–D with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in § 6903(3). Here, the facts found by the District Court do not support such a conclusion.

Although the evidence adduced at trial showed that Shell was aware that minor, accidental spills occurred during the transfer of D–D from the common carrier to B&B's bulk storage tanks after the product had arrived at the Arvin facility and had come under B&B's stewardship, the evidence does

[8] CERCLA defines "hazardous substance" to include a variety of chemicals and toxins including those designated by EPA as air pollutants, water pollutants, and solid wastes. § 9601(14).

not support an inference that Shell intended such spills to occur. To the contrary, the evidence revealed that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions. Although Shell's efforts were less than wholly successful, given these facts, Shell's mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding that Shell "arranged for" the disposal of D–D within the meaning of § 9607(a)(3). Accordingly, we conclude that Shell was not liable as an arranger for the contamination that occurred at B&B's Arvin facility.

III

Having concluded that Shell is not liable as an arranger, we need not decide whether the Court of Appeals erred in reversing the District Court's apportionment of Shell's liability for the cost of remediation. We must, however, determine whether the Railroads were properly held jointly and severally liable for the full cost of the Governments' response efforts.

The seminal opinion on the subject of apportionment in CERCLA actions was written in 1983 by Chief Judge Carl Rubin of the United States District Court for the Southern District of Ohio. *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802. After reviewing CERCLA's history, Chief Judge Rubin concluded that although the Act imposed a "strict liability standard," *id.*, at 805, it did not mandate "joint and several" liability in every case, see *id.*, at 807. Rather, Congress intended the scope of liability to "be determined from traditional and evolving principles of common law." *Id.*, at 808. The *Chem-Dyne* approach has been fully embraced by the Courts of Appeals. See, *e. g.*, *In re Bell Petroleum Servs., Inc.*, 3 F. 3d 889, 901–902 (CA5 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F. 2d 252, 268

(CA3 1992); *O'Neil* v. *Picillo*, 883 F. 2d 176, 178 (CA1 1989); *United States* v. *Monsanto Co.*, 858 F. 2d 160, 171–173 (CA4 1988).

Following *Chem-Dyne*, the Courts of Appeals have acknowledged that "[t]he universal starting point for divisibility of harm analyses in CERCLA cases" is § 433A of the Restatement (Second) of Torts. *United States* v. *Hercules, Inc.*, 247 F. 3d 706, 717 (CA8 2001); *Chem-Nuclear Systems, Inc.* v. *Bush*, 292 F. 3d 254, 259 (CADC 2002); *United States* v. *R. W. Meyer, Inc.*, 889 F. 2d 1497, 1507 (CA6 1989). Under the Restatement,

> "when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. Restatement (Second) of Torts, §§ 433A, 881 (1976); Prosser, Law of Torts (4th ed. 1971), pp. 313–314 . . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Restatement (Second) of Torts, § 875; Prosser at 315–316." *Chem-Dyne Corp.*, 572 F. Supp., at 810.

In other words, apportionment is proper when "there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A(1)(b), p. 434 (1963–1964) (hereinafter Restatement).

Not all harms are capable of apportionment, however, and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists. See *Chem-Dyne Corp.*, 572 F. Supp., at 810 (citing Restatement § 433B (1976)) (placing burden of proof on party seeking apportionment). When two or more causes produce a single, indivisible harm, "courts have refused to make an arbitrary apportionment for its own sake,

and each of the causes is charged with responsibility for the entire harm." *Id.*, § 433A, Comment *i*, at 440 (1963–1964).

Neither the parties nor the lower courts dispute the principles that govern apportionment in CERCLA cases, and both the District Court and Court of Appeals agreed that the harm created by the contamination of the Arvin site, although singular, was theoretically capable of apportionment. The question then is whether the record provided a reasonable basis for the District Court's conclusion that the Railroads were liable for only 9% of the harm caused by contamination at the Arvin facility.

The District Court criticized the Railroads for taking a "'scorched earth,' all-or-nothing approach to liability," failing to acknowledge any responsibility for the release of hazardous substances that occurred on their parcel throughout the 13-year period of B&B's lease. According to the District Court, the Railroads' position on liability, combined with the Governments' refusal to acknowledge the potential divisibility of the harm, complicated the apportioning of liability. See App. to Pet. for Cert. in No. 07–1601, at 236a–237a, ¶ 455 ("All parties . . . effectively abdicated providing any helpful arguments to the court and have left the court to independently perform the equitable apportionment analysis demanded by the circumstances of the case").[9] Yet despite the

[9] As the Governments point out, insofar as the District Court made reference to equitable considerations favoring apportionment, it erred. Equitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs. See generally *United States* v. *Hercules, Inc.*, 247 F. 3d 706, 718–719 (CA8 2001); *United States* v. *Brighton*, 153 F. 3d 307, 318–319 (CA6 1998); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F. 3d 1489, 1513 (CA11 1996). As the Court of Appeals explained, "[a]pportionment . . . looks to whether defendants may avoid joint and several liability by establishing a fixed amount of damage for which they are liable," while contribution actions allow jointly and severally liable PRPs to recover from each other on the basis of equitable

parties' failure to assist the court in linking the evidence supporting apportionment to the proper allocation of liability, the District Court ultimately concluded that this was "a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination." *Id.*, at 239a, ¶ 462. Consequently, the District Court apportioned liability, assigning the Railroads 9% of the total remediation costs.

The District Court calculated the Railroads' liability based on three figures. First, the court noted that the Railroad parcel constituted only 19% of the surface area of the Arvin site. Second, the court observed that the Railroads had leased their parcel to B&B for 13 years, which was only 45% of the time B&B operated the Arvin facility. Finally, the court found that the volume of hazardous-substance-releasing activities on the B&B property was at least 10 times greater than the releases that occurred on the Railroad parcel, and it concluded that only spills of two chemicals, Nemagon and dinoseb (not D–D), substantially contributed to the contamination that had originated on the Railroad parcel and that those two chemicals had contributed to two-thirds of the overall site contamination requiring remediation. The court then multiplied .19 by .45 by .66 (two-thirds) and rounded up to determine that the Railroads were responsible for approximately 6% of the remediation costs. "Allowing for calculation errors up to 50%," the court con-

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considerations. 520 F. 3d 918, 939–940 (CA9 2008); see also 42 U. S. C. § 9613(f)(1) (providing that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). The error is of no consequence, however, because despite the District Court's reference to equity, its actual apportionment decision was properly rooted in evidence that provided a reasonable basis for identifying the portion of the harm attributable to the Railroads.

cluded that the Railroads could be held responsible for 9% of the total CERCLA response cost for the Arvin site. *Id.*, at 252a, ¶ 489.

The Court of Appeals criticized the evidence on which the District Court's conclusions rested, finding a lack of sufficient data to establish the precise proportion of contamination that occurred on the relative portions of the Arvin facility and the rate of contamination in the years prior to B&B's addition of the Railroad parcel. The court noted that neither the duration of the lease nor the size of the leased area alone was a reliable measure of the harm caused by activities on the property owned by the Railroads, and—as the court's upward adjustment confirmed—the court had relied on estimates rather than specific and detailed records as a basis for its conclusions.

Despite these criticisms, we conclude that the facts contained in the record reasonably supported the apportionment of liability. The District Court's detailed findings make it abundantly clear that the primary pollution at the Arvin facility was contained in an unlined sump and an unlined pond in the southeastern portion of the facility most distant from the Railroads' parcel and that the spills of hazardous chemicals that occurred on the Railroad parcel contributed to no more than 10% of the total site contamination, see *id.*, at 247a–248a, some of which did not require remediation. With those background facts in mind, we are persuaded that it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis. Although the Court of Appeals faulted the District Court for relying on the "simplest of considerations: percentages of land area, time of ownership, and types of hazardous products," 520 F. 3d, at 943, these were the same factors the court had earlier acknowledged were *relevant* to the apportionment analysis, see *id.*, at 936, n. 18 ("We of course agree with our sister circuits that, if adequate information is available, divisibility may be established by 'volu-

metric, chronological, or other types of evidence,' including appropriate geographic considerations" (citations omitted)).

The Court of Appeals also criticized the District Court's assumption that spills of Nemagon and dinoseb were responsible for only two-thirds of the chemical spills requiring remediation, observing that each PRP's share of the total harm was not necessarily equal to the quantity of pollutants that were deposited on its portion of the total facility. Although the evidence adduced by the parties did not allow the court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination or the exact percentage of harm caused by each chemical, the evidence did show that fewer spills occurred on the Railroad parcel and that of those spills that occurred, not all were carried across the Railroad parcel to the B&B sump and pond from which most of the contamination originated. The fact that no D–D spills on the Railroad parcel required remediation lends strength to the District Court's conclusion that the Railroad parcel contributed only Nemagon and dinoseb in quantities requiring remediation.

The District Court's conclusion that those two chemicals accounted for only two-thirds of the contamination requiring remediation finds less support in the record; however, any miscalculation on that point is harmless in light of the District Court's ultimate allocation of liability, which included a 50% margin of error equal to the 3% reduction in liability the District Court provided based on its assessment of the effect of the Nemagon and dinoseb spills. Had the District Court limited its apportionment calculations to the amount of time the Railroad parcel was in use and the percentage of the facility located on that parcel, it would have assigned the Railroads 9% of the response cost. By including a two-thirds reduction in liability for the Nemagon and dinoseb with a 50% "margin of error," the District Court reached the same result. Because the District Court's ultimate allocation of liability is supported by the evidence and comports

with the apportionment principles outlined above, we reverse the Court of Appeals' conclusion that the Railroads are subject to joint and several liability for all response costs arising out of the contamination of the Arvin facility.

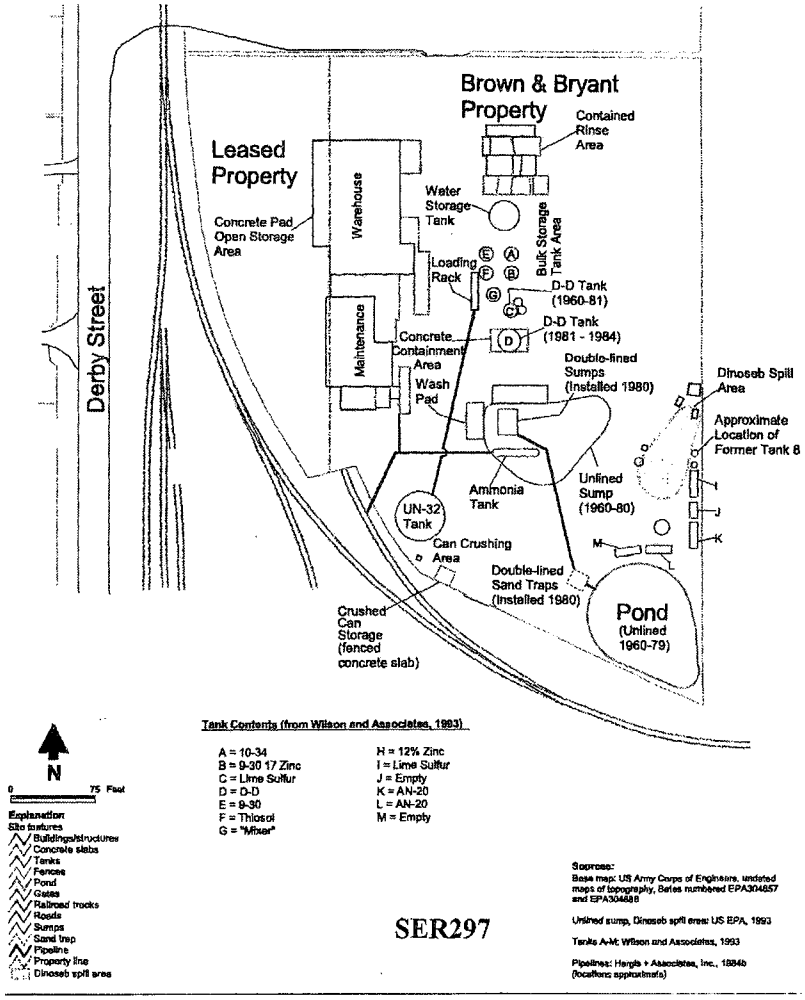
IV

For the foregoing reasons, we conclude that the Court of Appeals erred by holding Shell liable as an arranger under CERCLA for the costs of remediating environmental contamination at the Arvin, California, facility. Furthermore, we conclude that the District Court reasonably apportioned the Railroads' share of the site remediation costs at 9%. The judgment is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

[Appendix to opinion of the Court follows this page.]

APPENDIX



JUSTICE GINSBURG, dissenting.

Although the question is close, I would uphold the determinations of the courts below that Shell qualifies as an arranger within the compass of the Comprehensive Envi-

ronmental Response, Compensation and Liability Act (CERCLA). See 42 U. S. C. § 9607(a)(3). As the facts found by the District Court bear out, App. to Pet. for Cert. in No. 07–1601, pp. 113a–129a, 208a–213a, Shell "arranged for disposal . . . of hazardous substances" owned by Shell when the arrangements were made.[1]

In the 1950's and early 1960's, Shell shipped most of its products to Brown and Bryant (B&B) in 55-gallon drums, thereby ensuring against spillage or leakage during delivery and transfer. *Id.*, at 89a, 115a. Later, Shell found it economically advantageous, in lieu of shipping in drums, to require B&B to maintain bulk storage facilities for receipt of the chemicals B&B purchased from Shell. *Id.*, at 115a. By the mid-1960's, Shell was delivering its chemical to B&B in bulk tank truckloads. *Id.*, at 89a, 115a. As the Court recognizes, "bulk storage of the chemical led to numerous tank failures and spills as the chemical rusted tanks and eroded valves." *Ante*, at 603, n. 1.

Shell furthermore specified the equipment to be used in transferring the chemicals from the delivery truck to B&B's storage tanks. App. to Pet. for Cert. in No. 07–1601, pp. 120a–122a, 124a.[2] In the process, spills and leaks were inevitable; indeed spills occurred every time deliveries were made. 520 F. 3d 918, 950–951 (CA9 2008). See also App.

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[1] "Disposal" is defined in 42 U. S. C. § 6903(3) to include "spilling [or] leaking" of "any . . . hazardous waste into or on any land or water so that [the] . . . hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters."

[2] Shell shipped the chemicals to B&B "F.O.B. Destination." At oral argument, the Court asked Shell's counsel: Suppose there had been "no transfer of ownership until the delivery [was] complete?" In that event, counsel responded, "Shell would have been the owner of the waste." Tr. of Oral Arg. 8. The Court credits the fact that at the time of the spills, the chemicals, having been shipped "F.O.B. Destination," "had come under B&B's stewardship." *Ante*, at 612. In my view, CERCLA liability, or the absence thereof, should not turn, in any part, on such an eminently shipper-fixable specification as "F.O.B. Destination."

to Pet. for Cert. in No. 07–1601, pp. 119a–122a, ¶ 142 ("It is undisputed that spills were inherent in the delivery process that Shell arranged . . . .").

That Shell sold B&B useful products, the Ninth Circuit observed, did not exonerate Shell from CERCLA liability, for the sales "necessarily and immediately result[ed] in the leakage of hazardous substances." 520 F. 3d, at 950. The deliveries, Shell was well aware, directly and routinely resulted in disposals of hazardous substances (through spills and leaks) for more than 20 years. "[M]ere knowledge" may not be enough, *ante*, at 613, but Shell did not simply know of the spills and leaks without contributing to them. Given the control rein held by Shell over the mode of delivery and transfer, 520 F. 3d, at 950–951, the lower courts held and I agree, Shell was properly ranked an arranger. Relieving Shell of any obligation to pay for the cleanup undertaken by the United States and California is hardly commanded by CERCLA's text, and is surely at odds with CERCLA's objective—to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public.

As to apportioning costs, the District Court undertook a heroic labor. The Railroads and Shell, the court noted, had pursued a " 'scorched earth,' all-or-nothing approach to liability. Neither acknowledged an iota of responsibility . . . . Neither party offered helpful arguments to apportion liability." App. to Pet. for Cert. in No. 07–1601, p. 236a, ¶ 455. Consequently, the court strived "independently [to] perform [an] equitable apportionment analysis." *Id.*, at 237a, ¶ 455. Given the party presentation principle basic to our procedural system, *Greenlaw* v. *United States*, 554 U. S. 237, 243–244 (2008), it is questionable whether the court should have pursued the matter *sua sponte*. See *Castro* v. *United States*, 540 U. S. 375, 386 (2003) (SCALIA, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is

best for them, and are responsible for advancing the facts and arguments entitling them to relief."). Cf. Kaplan, von Mehren, & Schaefer, Phases of German Civil Procedure I, 71 Harv. L. Rev. 1193, 1224 (1958) (describing court's obligation, under Germany's Code of Civil Procedure, to see to it that the case is fully developed).

The trial court's mode of procedure, the United States urged before this Court, "deprived the government of a fair opportunity to respond to the court's theories of apportionment and to rebut their factual underpinnings—an opportunity the governmen[t] would have had if those theories had been advanced by petitioners themselves." Brief for United States 41.[3] I would return these cases to the District Court to give all parties a fair opportunity to address that court's endeavor to allocate costs. Because the Court's disposition precludes that opportunity, I dissent from the Court's judgment.

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[3] For example, on brief, the United States observed: "[P]etitioners identify no record support for the district court's assumption that each party's contribution to the overall harm is proportional to the relative volume of hazardous substances attributable to it." Brief for United States 45. And at oral argument, counsel for the United States stressed that the District Court "framed the relevant inquiry as what percentage of the contamination was attributable to the railroad parcel, to the Shell-controlled deliveries, and to the B&B parcel. But it made no finding . . . as to what the cost of [remediation] would have been . . . if the only source of contamination had been the railroad parcel." Tr. of Oral Arg. 52. See also *id.*, at 56 ("[T]he crucial question is what response costs the government would have been required to bear . . . if only the railroad parcel's contamination had been at issue . . . .").

Syllabus

ARTHUR ANDERSEN LLP ET AL. *v.* CARLISLE ET AL.

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

No. 08–146. Argued March 3, 2009—Decided May 4, 2009

After consulting with petitioners, respondents Wayne Carlisle, James Bushman, and Gary Strassel used a shelter to minimize taxes from the sale of their company. Limited liability companies created by Carlisle, Bushman, and Strassel (also respondents) entered into investment-management agreements with Bricolage Capital, LLC, that provided for arbitration of disputes. After the Internal Revenue Service found the tax shelter illegal, respondents filed a diversity suit against petitioners. Claiming that equitable estoppel required respondents to arbitrate their claims per the agreements with Bricolage, petitioners invoked § 3 of the Federal Arbitration Act (FAA), 9 U. S. C. § 3, which entitles litigants to stay an action that is "referable to arbitration under an agreement in writing." Section 16(a)(1)(A) of the FAA allows an appeal from "an order . . . refusing a stay of any action under section 3." The District Court denied petitioners' stay motions, and the Sixth Circuit dismissed their interlocutory appeal for want of jurisdiction.

Held:

1. The Sixth Circuit had jurisdiction to review the denial of petitioners' requests for a § 3 stay. By its clear and unambiguous terms, § 16(a)(1)(A) entitles any litigant asking for a § 3 stay to an immediate appeal from that motion's denial—regardless of whether the litigant is in fact eligible for a stay. Jurisdiction over the appeal "must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order," *Behrens* v. *Pelletier*, 516 U. S. 299, 311. The statute unambiguously makes the underlying merits irrelevant, for even a request's utter frivolousness cannot turn a denial into something other than "an order . . . refusing a stay of any action under section 3," § 16(a)(1)(A). Pp. 627–629.

2. A litigant who was not a party to the arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce the agreement. Neither FAA § 2—the substantive mandate making written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract"—nor § 3 purports to alter state contract law regarding the scope of agreements. Accordingly, whenever the relevant state law would make a contract to arbitrate a particular dispute enforceable by

a nonsignatory, that signatory is entitled to request and obtain a stay under §3 because that dispute is "referable to arbitration under an agreement in writing." Because traditional state-law principles allow enforcement of contracts by (or against) nonparties through, *e. g.*, assumption or third-party beneficiary theories, the Sixth Circuit erred in holding that §3 relief is categorically not available to nonsignatories. Questions as to the nature and scope of the applicable state contract law in the present case have not been briefed here and can be addressed on remand. Pp. 629–632.

521 F. 3d 597, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which ROBERTS, C. J., and STEVENS, J., joined, *post*, p. 633.

M. Miller Baker argued the cause for petitioners. With him on the briefs were *Paul M. Thompson*, *Jeffrey W. Mikoni*, *Jeffrey E. Stone*, *Douglas E. Whitney*, *Jocelyn D. Francoeur*, *Rory K. Little*, *Robert B. Craig*, and *Donald L. Stepner*.

Paul M. De Marco argued the cause for respondents. With him on the brief were *Stanley M. Chesley*, *James R. Cummins*, and *Jean M. Geoppinger*.*

JUSTICE SCALIA delivered the opinion of the Court.

Section 3 of the Federal Arbitration Act (FAA) entitles litigants in federal court to a stay of any action that is "referable to arbitration under an agreement in writing." 9 U. S. C. §3. Section 16(a)(1)(A), in turn, allows an appeal from "an order . . . refusing a stay of any action under section 3." We address in this case whether appellate courts have jurisdiction under §16(a) to review denials of stays requested

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Virginia W. Hoptman*, *Robin S. Conrad*, and *Amar D. Sarwal;* and for the Washington Legal Foundation by *Thomas S. Jones*, *Leon F. DeJulius, Jr.*, *Daniel J. Popeo*, and *Richard A. Samp*.

by litigants who were not parties to the relevant arbitration agreement, and whether § 3 can ever mandate a stay in such circumstances.

I

Respondents Wayne Carlisle, James Bushman, and Gary Strassel set out to minimize their taxes from the 1999 sale of their construction-equipment company. Arthur Andersen LLP, a firm that had long served as their company's accountant, auditor, and tax adviser, introduced them to Bricolage Capital, LLC, which in turn referred them for legal advice to Curtis, Mallet-Prevost, Colt & Mosle, LLP. According to respondents, these advisers recommended a "leveraged option strategy" tax shelter designed to create illusory losses through foreign-currency-exchange options. As a part of the scheme, respondents invested in various stock warrants through newly created limited liability companies (LLCs), which are also respondents in this case. The respondent LLCs entered into investment-management agreements with Bricolage, specifying that "[a]ny controversy arising out of or relating to this Agreement or the br[ea]ch thereof, shall be settled by arbitration conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association." App. 80–81, 99–100, 118–119.

As with all that seems too good to be true, a controversy did indeed arise. The warrants respondents purchased turned out to be almost entirely worthless, and the Internal Revenue Service (IRS) determined in August 2000 that the "leveraged option strategy" scheme was an illegal tax shelter. The IRS initially offered conditional amnesty to taxpayers who had used such arrangements, but petitioners failed to inform respondents of that option. Respondents ultimately entered into a settlement program in which they paid the IRS all taxes, penalties, and interest owed.

Respondents filed this diversity suit in the Eastern District of Kentucky against Bricolage, Arthur Andersen, and

others[1] (all except Bricolage and its employees hereinafter referred to as petitioners), alleging fraud, civil conspiracy, malpractice, breach of fiduciary duty, and negligence. Petitioners moved to stay the action, invoking § 3 of the FAA and arguing that the principles of equitable estoppel demanded that respondents arbitrate their claims under their investment agreements with Bricolage.[2] The District Court denied the motions.

Petitioners filed an interlocutory appeal, which the Court of Appeals for the Sixth Circuit dismissed for want of jurisdiction. *Carlisle* v. *Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F. 3d 597, 602 (2008). We granted certiorari, 555 U. S. 1010 (2008).

II

Ordinarily, courts of appeals have jurisdiction only over "final decisions" of district courts. 28 U. S. C. § 1291. The FAA, however, makes an exception to that finality requirement, providing that "[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title." 9 U. S. C. § 16(a)(1)(A). By that provision's clear and unambiguous terms, any litigant who asks for a stay under § 3 is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay. Because each petitioner in this case explicitly asked for a stay pursuant to § 3, App. 52, 54, 63, 65, the Sixth Circuit had jurisdiction to review the District Court's denial.

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[1] Also named in the suit were two employees of Bricolage (Andrew Beer and Samyak Veera); Curtis, Mallet-Prevost, Colt & Mosle, LLP; William Bricker (the lawyer respondents worked with at the law firm); Prism Connectivity Ventures, LLC (the entity from whom the worthless warrants were purchased); Integrated Capital Associates, Inc. (a prior owner of the worthless warrants who had also been a client of the law firm); and Intercontinental Pacific Group, Inc. (a firm with the same principals as Integrated Capital Associates).

[2] Bricolage also moved for a stay under § 3, but it filed for bankruptcy while its motion was pending, and the District Court denied the motion as moot.

The courts that have declined jurisdiction over § 3 appeals of the sort at issue here have done so by conflating the jurisdictional question with the merits of the appeal. They reason that because stay motions premised on equitable estoppel seek to expand (rather than simply vindicate) agreements, they are not cognizable under §§ 3 and 4, and therefore the relevant motions are not actually "under" those provisions. See, in addition to the opinion below, 521 F. 3d, at 602, *DSMC Inc.* v. *Convera Corp.*, 349 F. 3d 679, 682–685 (CADC 2003); *In re Universal Serv. Fund Tel. Billing Practice Litigation* v. *Sprint Communications Co.*, 428 F. 3d 940, 944–945 (CA10 2005). The dissent makes this step explicit, by reading the appellate jurisdictional provision of § 16 as "calling for a look-through" to the substantive provisions of § 3. *Post*, at 634. Jurisdiction over the appeal, however, "must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order." *Behrens* v. *Pelletier*, 516 U. S. 299, 311 (1996).[3] The jurisdictional statute here unambiguously makes the underlying merits irrelevant, for even utter frivolousness of the underlying request for a § 3 stay cannot turn

[3] Federal courts lack subject-matter jurisdiction when an asserted federal claim is "'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998) (quoting *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 666 (1974)). Respondents have not relied upon this line of cases as an alternative rationale for rejection of jurisdiction, and there are good reasons for treating subject-matter jurisdiction differently, in that respect, from the appellate jurisdiction here conferred. A frivolous federal claim, if sufficient to confer jurisdiction, would give the court power to hear related state-law claims, see 28 U. S. C. § 1367; no such collateral consequences are at issue here. And while an insubstantial federal claim can be said not to "aris[e] under the Constitution, laws, or treaties of the United States," § 1331, insubstantiality of the merits can hardly convert a judge's "order . . . refusing a stay" into an "order . . . refusing" something else. But we need not resolve this question today.

a denial into something other than "[a]n order . . . refusing a stay of any action under section 3." 9 U. S. C. § 16(a).

Respondents argue that this reading of § 16(a) will produce a long parade of horribles, enmeshing courts in fact-intensive jurisdictional inquiries and permitting frivolous interlocutory appeals. Even if these objections could surmount the plain language of the statute, we would not be persuaded. Determination of whether § 3 was invoked in a denied stay request is immeasurably more simple and less factbound than the threshold determination respondents would replace it with: whether the litigant was a party to the contract (an especially difficult question when the written agreement is not signed). It is more appropriate to grapple with that merits question after the court has accepted jurisdiction over the case. Second, there are ways of minimizing the impact of abusive appeals. Appellate courts can streamline the disposition of meritless claims and even authorize the district court's retention of jurisdiction when an appeal is certified as frivolous. See *Behrens*, *supra*, at 310–311. And, of course, those inclined to file dilatory appeals must be given pause by courts' authority to "award just damages and single or double costs to the appellee" whenever an appeal is "frivolous." Fed. Rule App. Proc. 38.

III

Even if the Court of Appeals were correct that it had no jurisdiction over meritless appeals, its ground for finding this appeal meritless was in error. We take the trouble to address that alternative ground, since if the Court of Appeals is correct on the merits point we will have awarded petitioners a remarkably hollow victory. We consider, therefore, the Sixth Circuit's underlying determination that those who are not parties to a written arbitration agreement are categorically ineligible for relief.

Section 2—the FAA's substantive mandate—makes written arbitration agreements "valid, irrevocable, and enforce-

able, save upon such grounds as exist at law or in equity for the revocation of a contract." That provision creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts "to place such agreements upon the same footing as other contracts." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989) (internal quotation marks omitted). Section 3, in turn, allows litigants already in federal court to invoke agreements made enforceable by § 2. That provision requires the court, "on application of one of the parties,"[4] to stay the action if it involves an "issue referable to arbitration under an agreement in writing." 9 U. S. C. § 3.

Neither provision purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them). Indeed § 2 explicitly retains an external body of law governing revocation (such grounds "as exist at law or in equity").[5] And we think § 3 adds no substantive restriction to § 2's enforceability mandate. "[S]tate law," therefore, is applicable to deter-

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[4] Respondents do not contest that the term "parties" in § 3 refers to parties to the litigation rather than parties to the contract. The adjacent provision, which explicitly refers to the "subject matter of a suit arising out of the controversy between the parties," 9 U. S. C. § 4, unambiguously refers to adversaries in the action, and "identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 232 (2007). Even without benefit of that canon, we would not be disposed to believe that the statute allows a party to the contract who is not a party to the litigation to apply for a stay of the proceeding.

[5] We have said many times that federal law requires that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983). Whatever the meaning of this vague prescription, it cannot possibly require the disregard of state law *permitting* arbitration by or against nonparties to the written arbitration agreement.

mine which contracts are binding under § 2 and enforceable under § 3 "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry* v. *Thomas*, 482 U. S. 483, 493, n. 9 (1987). See also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995). Because "traditional principles" of state law allow a contract to be enforced by or against nonparties to the contract through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001), the Sixth Circuit's holding that nonparties to a contract are categorically barred from § 3 relief was error.

Respondents argue that, as a matter of federal law, claims to arbitration by nonparties are not "referable to arbitration *under* an agreement in writing," 9 U. S. C. § 3 (emphasis added), because they "seek to bind a signatory to an arbitral obligation *beyond* that signatory's strictly contractual obligation to arbitrate," Brief for Respondents 26. Perhaps that would be true if § 3 mandated stays only for disputes between parties to a written arbitration agreement. But that is not what the statute says. It says that stays are required if the claims are "referable to arbitration under an agreement in writing." If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled.[6]

Respondents' final fallback consists of reliance upon dicta in our opinions, such as the statement that "arbitration . . .

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[6] We thus reject the dissent's contention that contract law's longstanding endorsement of third-party enforcement is "a weak premise for inferring an intent to allow third parties to obtain a § 3 stay," *post*, at 634. It seems to us not weak at all, in light of the terms of the statute. There is no doubt that, where state law permits it, a third-party claim is "referable to arbitration under an agreement in writing." It is not our role to conform an unambiguous statute to what we think "Congress probably intended," *ibid.*

is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration," *First Options, supra,* at 943, and the statement that "[i]t goes without saying that a contract cannot bind a nonparty," *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 294 (2002). The former statement pertained to *issues* parties agreed to arbitrate, and the latter referred to an entity (the Equal Employment Opportunity Commission) which obviously had no third-party obligations under the contract in question. Neither these nor any of our other cases have presented for decision the question whether arbitration agreements that are otherwise enforceable by (or against) third parties trigger protection under the FAA.

Respondents may be correct in saying that courts' application of equitable estoppel to impose an arbitration agreement upon strangers to the contract has been "somewhat loose." Brief for Respondents 27, n. 15. But we need not decide here whether the relevant state contract law recognizes equitable estoppel as a ground for enforcing contracts against third parties, what standard it would apply, and whether petitioners would be entitled to relief under it. These questions have not been briefed before us and can be addressed on remand. It suffices to say that no federal law bars the State from allowing petitioners to enforce the arbitration agreement against respondents and that § 3 would require a stay in this case if it did.

* * *

We hold that the Sixth Circuit had jurisdiction to review the denial of petitioners' requests for a § 3 stay and that a litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce the agreement. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom THE CHIEF JUSTICE and JUSTICE STEVENS join, dissenting.

Section 16 of the Federal Arbitration Act (FAA) authorizes an interlocutory appeal from the denial of a motion under § 3 to stay a district-court action pending arbitration. The question is whether it opens the door to such an appeal at the behest of one who has not signed a written arbitration agreement. Based on the longstanding congressional policy limiting interlocutory appeals, I think the better reading of the statutory provisions disallows such an appeal, and I therefore respectfully dissent.

Section 16(a) of the FAA provides that "[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title." 9 U. S. C. § 16(a). The Court says that any litigant who asks for and is denied a § 3 stay is entitled to an immediate appeal. *Ante*, at 627. The majority's assumption is that "under section 3" is merely a labeling requirement, without substantive import, but this fails to read § 16 in light of the "firm congressional policy against interlocutory or 'piecemeal' appeals." *Abney* v. *United States*, 431 U. S. 651, 656 (1977).

The right of appeal is "a creature of statute," *ibid.*, and Congress has granted the federal courts of appeals jurisdiction to review "final decisions," 28 U. S. C. § 1291. "This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice." *DiBella* v. *United States*, 369 U. S. 121, 124 (1962). Congress has, however, "recognized the need of exceptions for interlocutory orders in certain types of proceedings where the damage of error unreviewed before the judgment is definitive and complete . . . has been deemed greater than the disruption caused by intermediate appeal." *Ibid.* Section 16 functions as one such exception, but departures from "the dominant rule in federal appellate practice," 9 J. Moore, J. Lucas, & B. Ward, Moore's Federal Practice ¶ 110.06 (2d ed. 1996), are extraordinary interruptions to the normal process of litigation and ought to be limited carefully.

An obvious way to limit the scope of such an extraordinary interruption would be to read the § 16 requirement that the stay have been denied "under section 3" as calling for a look-through to the provisions of § 3, and to read § 3 itself as offering a stay only to signatories of an arbitration agreement. It is perfectly true that in general a third-party beneficiary can enforce a contract, but this is a weak premise for inferring an intent to allow third parties to obtain a § 3 stay and take a § 16 appeal. While it is hornbook contract law that third parties may enforce contracts for their benefit as a matter of course, interlocutory appeals are a matter of limited grace. Because it would therefore seem strange to assume that Congress meant to grant the right to appeal a § 3 stay denial to anyone as peripheral to the core agreement as a nonsignatory, it follows that Congress probably intended to limit those able to seek a § 3 stay.

Asking whether a § 3 movant is a signatory provides a bright-line rule with predictable results to aid courts in determining jurisdiction over § 16 interlocutory appeals. And that rule has the further virtue of mitigating the risk of intentional delay by savvy parties who seek to frustrate litigation by gaming the system. Why not move for a § 3 stay? If granted, arbitration will be mandated, and if denied, a lengthy appeal may wear down the opponent. The majority contends, *ante*, at 629, that "there are ways of minimizing the impact of abusive appeals." Yes, but the sanctions suggested apply to the frivolous, not to the farfetched; and as the majority's opinion concludes, such an attenuated claim of equitable estoppel as petitioners raise here falls well short of the sanctionable.

Because petitioners were not parties to the written arbitration agreement, I would hold they could not move to stay the District Court proceedings under § 3, with the consequence that the Court of Appeals would have no jurisdiction under § 16 to entertain their appeal. I would accordingly affirm the judgment of the Sixth Circuit.

Syllabus

CARLSBAD TECHNOLOGY, INC. *v.* HIF BIO, INC., ET AL.

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

No. 07–1437. Argued February 24, 2009—Decided May 4, 2009

Respondents filed a state-court suit alleging that petitioner had violated state and federal law in connection with a patent dispute. After removing the case to Federal District Court under 28 U. S. C. § 1441(c), which allows removal if the case includes at least one claim over which the federal court has original jurisdiction, petitioner moved to dismiss the suit's only federal claim, which arose under the Racketeer Influenced and Corrupt Organizations Act (RICO). Agreeing that respondents had failed to state a RICO claim upon which relief could be granted, the District Court dismissed the claim; declined to exercise supplemental jurisdiction over the remaining state-law claims under § 1367(c)(3), which allows such a course if the court "has dismissed all claims over which it has original jurisdiction"; and remanded the case to state court. The Federal Circuit dismissed petitioner's appeal, finding that the remand order could be colorably characterized as based on a "lack of subject matter jurisdiction" over the state-law claims, § 1447(c), and was therefore "not reviewable on appeal," § 1447(d).

Held: A district court's order remanding a case to state court after declining to exercise supplemental jurisdiction over state-law claims is not a remand for lack of subject-matter jurisdiction for which appellate review is barred by §§ 1447(c) and (d). With respect to supplemental jurisdiction, a federal court has subject-matter jurisdiction over specified state-law claims, see §§ 1367(a), (c), and its decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary, see, *e. g.*, *Osborn* v. *Haley*, 549 U. S. 225, 245. It is undisputed that when this case was removed, the District Court had original jurisdiction over the federal RICO claim under § 1331 and supplemental jurisdiction over the state-law claims, which were "so related to claims . . . within such original jurisdiction that they form[ed] part of the same case or controversy," § 1367(a). On dismissing the RICO claim, the court retained its statutory supplemental jurisdiction over the state-law claims. Its decision not to exercise that statutory authority was not based on a jurisdictional defect, but on its

discretionary choice. See *Chicago* v. *International College of Surgeons*, 522 U. S. 156, 173. Pp. 638–641.

508 F. 3d 659, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. STEVENS, J., *post*, p. 641, and SCALIA, J., *post*, p. 642, filed concurring opinions. BREYER, J., filed a concurring opinion, in which SOUTER, J., joined, *post*, p. 644.

Glenn W. Rhodes argued the cause for petitioner. With him on the briefs were *Richard L. Stanley* and *Stephanie M. Byerly.*

Theodore Allison argued the cause for respondents. With him on the brief was *Bub-Joo S. Lee.*

JUSTICE THOMAS delivered the opinion of the Court.

In this case, we decide whether a federal court of appeals has jurisdiction to review a district court's order that remands a case to state court after declining to exercise supplemental jurisdiction over state-law claims under 28 U. S. C. § 1367(c). The Court of Appeals for the Federal Circuit held that appellate review of such an order is barred by § 1447(d) because it viewed the remand order in this case as resting on the District Court's lack of subject-matter jurisdiction over the state-law claims. We disagree and reverse the judgment of the Court of Appeals.

I

In 2005, respondents filed a complaint against petitioner and others in California state court, alleging that petitioner had violated state and federal law in connection with a patent dispute. Petitioner removed the case to the United States District Court for the Central District of California pursuant to § 1441(c), which allows removal of an "entire case" when it includes at least one claim over which the federal district court has original jurisdiction. Petitioner then filed a motion to dismiss the only federal claim in the lawsuit, which arose under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, for failure

to adequately allege a pattern of racketeering. *HIF Bio, Inc.* v. *Yung Shin Pharmaceuticals Indus. Co.*, 508 F. 3d 659, 662 (CA Fed. 2007). The District Court agreed that respondents had failed to state a RICO claim upon which relief could be granted and dismissed the claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court also declined to exercise supplemental jurisdiction over the remaining state-law claims pursuant to 28 U. S. C. § 1367(c)(3), which provides that a district court "may decline to exercise supplemental jurisdiction over a claim" if "the district court has dismissed all claims over which it has original jurisdiction." The District Court then remanded the case to state court as authorized by this Court's decision in *Carnegie-Mellon Univ.* v. *Cohill*, 484 U. S. 343 (1988).

Petitioner appealed to the United States Court of Appeals for the Federal Circuit, arguing that the District Court should have exercised supplemental jurisdiction over the state-law claims because they implicate federal patent-law rights. 508 F. 3d, at 663. The Court of Appeals dismissed the appeal, finding that the remand order could "be colorably characterized as a remand based on lack of subject matter jurisdiction" and, therefore, could not be reviewed under §§ 1447(c) and (d), which provide in part that remands for "lack of subject matter jurisdiction" are "not reviewable on appeal or otherwise." See *id.*, at 667.

This Court has not yet decided whether a district court's order remanding a case to state court after declining to exercise supplemental jurisdiction is a remand for lack of subject-matter jurisdiction for which appellate review is barred by §§ 1447(c) and (d). See *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 235, n. 4 (2007) ("We have never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of . . . § 1447(c) and § 1447(d)"). We granted certiorari to resolve this question, 555 U. S. 943 (2008), and now hold that such remand orders are not based on a lack of subject-matter jurisdiction. Ac-

cordingly, we reverse the judgment of the Court of Appeals and remand for further proceedings.

II

Appellate review of remand orders is limited by 28 U. S. C. § 1447(d), which states:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

This Court has consistently held that § 1447(d) must be read *in pari materia* with § 1447(c), thus limiting the remands barred from appellate review by § 1447(d) to those that are based on a ground specified in § 1447(c). See *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 345–346 (1976); see also *Powerex*, *supra*, at 229; *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 711–712 (1996); *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 127 (1995).*

One type of remand order governed by § 1447(c)—the type at issue in this case—is a remand order based on a lack of "subject matter jurisdiction." § 1447(c) (providing, in relevant part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded"). The question presented in this case is whether the District Court's remand order,

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*We do not revisit today whether *Thermtron* was correctly decided. Neither the brief for petitioner nor the brief for respondents explicitly asked the Court to do so here, and counsel for both parties clearly stated at oral argument that they were not asking for *Thermtron* to be overruled. See Tr. of Oral Arg. 16, 22; cf. *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999). We also note that the parties in *Powerex*, *Quackenbush*, and *Things Remembered* did not ask for *Thermtron* to be overruled.

which rested on its decision declining to exercise supplemental jurisdiction over respondents' state-law claims, is a remand based on a "lack of subject matter jurisdiction" for purposes of §§ 1447(c) and (d). It is not.

"Subject matter jurisdiction defines the court's authority to hear a given type of case," *United States* v. *Morton*, 467 U. S. 822, 828 (1984); it represents "the extent to which a court can rule on the conduct of persons or the status of things," Black's Law Dictionary 870 (8th ed. 2004). This Court's precedent makes clear that whether a court has subject-matter jurisdiction over a claim is distinct from whether a court chooses to exercise that jurisdiction. See, *e. g.*, *Quackenbush*, *supra*, at 712 (holding that an abstention-based remand is not a remand for "lack of subject matter jurisdiction" for purposes of §§ 1447(c) and (d)); *Ankenbrandt* v. *Richards*, 504 U. S. 689, 704 (1992) (questioning whether, "even though subject-matter jurisdiction might be proper, sufficient grounds exist to warrant abstention from the exercise of that jurisdiction"); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9, 16, n. 8 (1987) (referring to exhaustion requirement as "a matter of comity" that does "not deprive the federal courts of subject-matter jurisdiction" but does "rende[r] it appropriate for the federal courts to decline jurisdiction in certain circumstances").

With respect to supplemental jurisdiction in particular, a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise. See §§ 1367(a), (c). A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary. See § 1367(c) ("The district courts *may* decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction" (emphasis added)); *Osborn* v. *Haley*, 549 U. S. 225, 245 (2007) ("Even if only state-law claims remained after resolution of the federal question, the District Court would have

discretion, consistent with Article III, to retain jurisdiction"); *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006) ("[W]hen a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U. S. C. § 1367, over pendent state-law claims"); see also 13D C. Wright, A. Miller, E. Cooper, & R. Freer, Federal Practice and Procedure § 3567.3, pp. 428–432 (3d ed. 2008) ("Once it has dismissed the claims that invoked original bases of subject matter jurisdiction, all that remains before the federal court are state-law claims. . . . The district court retains discretion to exercise supplemental jurisdiction [over them]"). As a result, "the [district] court's exercise of its discretion under § 1367(c) is not a jurisdictional matter. Thus, the court's determination may be reviewed for abuse of discretion, but may not be raised at any time as a jurisdictional defect." 16 J. Moore et al., Moore's Federal Practice § 106.05[4], p. 106–27 (3d ed. 2009).

It is undisputed that when this case was removed to federal court, the District Court had original jurisdiction over the federal RICO claim pursuant to 28 U. S. C. § 1331 and supplemental jurisdiction over the state-law claims because they were "so related to claims in the action within such original jurisdiction that they form[ed] part of the same case or controversy under Article III of the United States Constitution," § 1367(a). Upon dismissal of the federal claim, the District Court retained its statutory supplemental jurisdiction over the state-law claims. Its decision declining to exercise that statutory authority was not based on a jurisdictional defect but on its discretionary choice not to hear the claims despite its subject-matter jurisdiction over them. See *Chicago* v. *International College of Surgeons*, 522 U. S. 156, 173 (1997) ("Depending on a host of factors, then—including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal

claims—district courts may decline to exercise jurisdiction over supplemental state law claims"). The remand order, therefore, is not based on a "lack of subject matter jurisdiction" for purposes of the bar to appellate review created by §§ 1447(c) and (d).

The Court of Appeals held to the contrary based on its conclusion that "every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction." 508 F. 3d, at 667. But, as explained above, §§ 1367(a) and (c) provide a basis for subject-matter jurisdiction over any properly removed state claim. See *Osborn*, *supra*, at 245; *Arbaugh*, *supra*, at 514. We thus disagree with the Court of Appeals that the remand at issue here "can be colorably characterized as a lack of subject matter jurisdiction." 508 F. 3d, at 667.

* * *

When a district court remands claims to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d). The judgment of the Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

In his dissenting opinion in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 360 (1976), then-Justice Rehnquist remarked that he could "perceive no justification for the Court's decision to ignore the express directive of Congress in favor of what it personally perceives to be 'justice' in this case." He began his dissent with a comment that is also applicable to the case before us today: "The Court of Appeals not unreasonably believed that 28 U. S. C. § 1447(d) means what it says. It says:

> 'An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .'" *Id.*, at 354.

Today, as in *Thermtron*, the Court holds that § 1447(d) does not mean what it says.

If we were writing on a clean slate, I would adhere to the statute's text. But *Thermtron*'s limiting construction applies equally to this case as it did to *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 229–230 (2007), *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 711–712 (1996), and *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 127–128 (1995), and *stare decisis* compels the conclusion that the District Court's remand order is reviewable notwithstanding § 1447(d)'s unambiguous contrary command. The Court's adherence to precedent in this case represents a welcome departure from its sometimes single-minded focus on literal text. Accordingly, I join the Court's opinion.

JUSTICE SCALIA, concurring.

The Court today does nothing more than accurately apply to the facts of this case our holding in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336 (1976). *Ante*, at 638–641.* As the Court notes, neither party has asked us to reconsider *Thermtron*, and we thus have no occasion to revisit that decision here, see *ante*, at 638, n.

I write separately, though, to note that our decision in *Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case. Title 28 U. S. C. § 1447(d) states that "[a]n order remanding a case to the State court

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*Contrary to JUSTICE BREYER's suggestion, this case does not involve reading another "exceptio[n]" into 28 U. S. C. § 1447(d)'s language. See *post*, at 645 (concurring opinion). Not, that is, if you think *Thermtron* was rightly decided. Unlike *Osborn* v. *Haley*, 549 U. S. 225 (2007), this case simply involves applying *Thermtron*'s *in pari materia* reading of § 1447(d) to the facts of this case.

from which it was removed is not reviewable on appeal or otherwise." The statute provides a single exception—not remotely implicated in this case—for certain civil rights cases removed under § 1443. See § 1447(d). As then-Justice Rehnquist understatingly observed in his *Thermtron* dissent, it would not be "unreasonabl[e] [to] believ[e] that 28 U. S. C. § 1447(d) means what it says," 423 U. S., at 354; and what it says is no appellate review of remand orders. See also *Osborn* v. *Haley*, 549 U. S. 225, 263 (2007) (SCALIA, J., dissenting). Since the District Court's order in this case "remand[ed] a case to the State court from which it was removed," it should be—in the words of § 1447(d)—"not reviewable on appeal or otherwise." Q. E. D.

Over the years, the Court has replaced the statute's clear bar on appellate review with a hodgepodge of jurisdictional rules that have no evident basis even in common sense. Under our decisions, there is no appellate jurisdiction to review remands for lack of subject-matter jurisdiction, see *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 232 (2007), though with exception, see *Osborn* v. *Haley*, *supra*, at 243–244; there is jurisdiction to review remands of supplemental state-law claims, and other remands based on abstention, see *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 711–712 (1996), though presumably no jurisdiction to review remands based on the "defects" referenced in § 1447(c). See also *post*, at 644–645 (BREYER, J., concurring) (discussing similar anomalies). If this muddle represents a *welcome* departure from the literal text, see *ante*, at 642 (STEVENS, J., concurring), the world is mad.

This mess—entirely of our own making—does not in my view require expert reexamination of this area of the law, see *post*, at 645 (BREYER, J., concurring). It requires only the reconsideration of our decision in *Thermtron*—and a welcome *return* to the Court's focus on congressionally enacted text.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion. I write separately to note an anomaly about the way 28 U. S. C. § 1447 works. In this case, we consider a District Court's decision not to retain on its docket a case that *once* contained federal-law issues but *now* contains only state-law issues. All agree that the law grants the District Court broad discretion to determine whether it should keep such cases on its docket, that a decision to do so (or not to do so) rarely involves major legal questions, and that (even if wrong) a district court decision of this kind will not often have major adverse consequences. We now hold that § 1447 *permits* appellate courts to review a district court decision of this kind, even if only for abuse of discretion.

Contrast today's decision with our decision two Terms ago in *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224 (2007). In that case, we considered a District Court's decision to remand a case in which a Canadian province-owned power company had sought removal—a matter that the Foreign Sovereign Immunities Act of 1976 specifically authorizes federal judges (in certain instances) to decide. See §§ 1441(d); 1603(a). The case presented a difficult legal question involving the commercial activities of a foreign sovereign; and the District Court's decision (if wrong) had potentially serious adverse consequences, namely, preventing a sovereign power from obtaining the *federal* trial to which the law (in its view) entitled it. We nonetheless held that § 1447 *forbids* appellate courts from reviewing a district court decision of this kind. *Id.*, at 238–239.

Thus, we have held that § 1447 *permits* review of a district court decision in an instance where that decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm. And we have held that § 1447 *forbids* review of a district court decision in an instance where that decision

may well be wrong and where a wrong decision could work considerable harm. Unless the circumstances I describe are unusual, something is wrong. And the fact that we have read other exceptions in the statute's absolute-sounding language suggests that such circumstances are not all that unusual. See *Osborn* v. *Haley*, 549 U. S. 225, 240–244 (2007); *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 350–352 (1976).

Consequently, while joining the majority, I suggest that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate.

Syllabus

FLORES-FIGUEROA *v.* UNITED STATES

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

No. 08–108. Argued February 25, 2009—Decided May 4, 2009

A federal statute forbidding "[a]ggravated identity theft" imposes a mandatory consecutive 2-year prison term on an individual convicted of certain predicate crimes if, during (or in relation to) the commission of those other crimes, the offender "*knowingly* . . . uses, without lawful authority, *a means of identification of another person.*" 18 U. S. C. § 1028A(a)(1) (emphasis added). After petitioner Flores-Figueroa, a Mexican citizen, gave his employer counterfeit Social Security and alien registration cards containing his name but other people's identification numbers, he was arrested and charged with two immigration offenses and aggravated identity theft. Flores moved for acquittal on the latter charge, claiming that the Government could not prove that he *knew* that the documents' numbers were assigned to other people. The District Court agreed with the Government that the word "knowingly" in § 1028A(a)(1) does not modify the statute's last three words, "of another person," and, after trial, found Flores guilty on all counts. The Eighth Circuit affirmed.

Held: Section 1028A(a)(1) requires the Government to show that the defendant knew that the means of identification at issue belonged to another person. As a matter of ordinary English grammar, "knowingly" is naturally read as applying to all the subsequently listed elements of the crime. Where a transitive verb has an object, listeners in most contexts assume that an adverb (such as "knowingly") that modifies the verb tells the listener how the subject performed the entire action, including the object. The Government does not provide a single example of a sentence that, when used in typical fashion, would lead the hearer to a contrary understanding. And courts ordinarily interpret criminal statutes consistently with the ordinary English usage. See, *e. g., Liparota* v. *United States,* 471 U. S. 419. The Government argues that this position is incorrect because it would either require the same language to be interpreted differently in a neighboring provision or would render the language in that provision superfluous. This argument fails for two reasons. Finally, the Government's arguments based on the statute's purpose and on the practical problems of enforcing it are not sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of Congress' words. Pp. 650–657.

274 Fed. Appx. 501, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 657. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 659.

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

Toby J. Heytens argued the cause for the United States. With him on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Glavin*, *Deputy Solicitor General Dreeben*, and *William C. Brown*.*

JUSTICE BREYER delivered the opinion of the Court.

A federal criminal statute forbidding "[a]ggravated identity theft" imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes *if*, during (or in relation to) the commission of those other crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person*." 18 U. S. C. § 1028A(a)(1) (emphasis added). The question is whether the statute requires the Government to show that the defendant *knew* that the "means of identification" he or she unlawfully transferred, possessed, or used, in fact, belonged to "another person." We conclude that it does.

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*Briefs of *amici curiae* urging reversal were filed for the Advocates for Human Rights et al. by *Nancy Morawetz;* for the Electronic Privacy Information Center et al. by *Marc Rotenberg;* for the Mexican American Legal Defense and Educational Fund et al. by *Lois D. Thompson;* for the National Association of Criminal Defense Lawyers by *Sri Srinivasan*, *Irving L. Gornstein*, and *Pamela Harris;* and for Professors of Criminal Law by *Iris E. Bennett*.

Stephen V. Masterson filed a brief for the Maryland Crime Victims' Resource Center, Inc., et al. as *amici curiae* urging affirmance.

Neal Goldfarb filed a brief for Professors of Linguistics as *amici curiae*.

I

A

The statutory provision in question references a set of predicate crimes, including, for example, theft of government property, fraud, or engaging in various unlawful activities related to passports, visas, and immigration. § 1028A(c). It then provides that if any person who commits any of those other crimes (in doing so) "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," the judge must add two years' imprisonment to the offender's underlying sentence. § 1028A(a)(1). All parties agree that the provision applies only where the offender knows that he is transferring, possessing, or using *something.* And the Government reluctantly concedes that the offender likely must know that he is transferring, possessing, or using that *something* without lawful authority. But they do not agree whether the provision requires that a defendant also know that the *something* he has unlawfully transferred is, for example, a real ID belonging to another person rather than, say, a fake ID (*i. e.*, a group of numbers that does not correspond to any real Social Security number).

Petitioner Ignacio Flores-Figueroa argues that the statute requires that the Government prove that he *knew* that the "means of identification" belonged to someone else, *i. e.*, was "a means of identification *of another person.*" The Government argues that the statute does not impose this particular knowledge requirement. The Government concedes that the statute uses the word "knowingly," but that word, the Government claims, does not modify the statute's last phrase ("a means of identification of another person") or, at the least, it does not modify the last three words of that phrase ("of another person").

B

The facts of this case illustrate the legal problem. Ignacio Flores-Figueroa is a citizen of Mexico. In 2000, to secure

employment, Flores gave his employer a false name, birth date, and Social Security number, along with a counterfeit alien registration card. The Social Security number and the number on the alien registration card were not those of a real person. In 2006, Flores presented his employer with new counterfeit Social Security and alien registration cards; these cards (unlike Flores' old alien registration card) used his real name. But this time the numbers on both cards were in fact numbers assigned to other people.

Flores' employer reported his request to U. S. Immigration and Customs Enforcement. Customs discovered that the numbers on Flores' new documents belonged to other people. The United States then charged Flores with two predicate crimes, namely, entering the United States without inspection, 8 U. S. C. § 1325(a), and misusing immigration documents, 18 U. S. C. § 1546(a). And it charged him with aggravated identity theft, 18 U. S. C. § 1028A(a)(1), the crime at issue here.

Flores moved for a judgment of acquittal on the "aggravated identity theft" counts. He claimed that the Government could not prove that he *knew* that the numbers on the counterfeit documents were numbers assigned to other people. The Government replied that it need not prove that knowledge, and the District Court accepted the Government's argument. After a bench trial, the court found Flores guilty of the predicate crimes and aggravated identity theft. The Court of Appeals upheld the District Court's determination. 274 Fed. Appx. 501 (CA8 2008) *(per curiam)*. And we granted certiorari to consider the "knowledge" issue—a matter about which the Circuits have disagreed. Compare *United States* v. *Godin*, 534 F. 3d 51 (CA1 2008) (knowledge requirement applies to "of another person"); *United States* v. *Miranda-Lopez*, 532 F. 3d 1034 (CA9 2008) (same); *United States* v. *Villanueva-Sotelo*, 515 F. 3d 1234 (CADC 2008) (same), with *United States* v. *Mendoza-Gonzalez*, 520 F. 3d 912 (CA8 2008) (knowledge requirement

does not apply to "of another person"); *United States* v. *Hurtado*, 508 F. 3d 603 (CA11 2007) *(per curiam)* (same); *United States* v. *Montejo*, 442 F. 3d 213 (CA4 2006) (same).

II

There are strong textual reasons for rejecting the Government's position. As a matter of ordinary English grammar, it seems natural to read the statute's word "knowingly" as applying to all the subsequently listed elements of the crime. The Government cannot easily claim that the word "knowingly" applies only to the statute's first four words, or even its first seven. It makes little sense to read the provision's language as heavily penalizing a person who "transfers, possesses, or uses, without lawful authority" a *something*, but does not know, at the very least, that the "something" (perhaps inside a box) is a "means of identification." Would we apply a statute that makes it unlawful "*knowingly* to possess drugs" to a person who steals a passenger's bag without knowing that the bag has drugs inside?

The Government claims more forcefully that the word "knowingly" applies to all but the statute's last three words, *i. e.*, "of another person." The statute, the Government says, does not require a prosecutor to show that the defendant *knows* that the means of identification the defendant has unlawfully used in fact belongs to another person. But how are we to square this reading with the statute's language?

In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence. Thus, if a bank official says, "Smith knowingly transferred the funds to his brother's account," we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's. Nor would it matter if the bank official said "Smith knowingly transferred the funds to the account

of his brother." In either instance, if the bank official later told us that Smith did not know the account belonged to Smith's brother, we should be surprised.

Of course, a statement that does *not* use the word "knowingly" may be unclear about just what Smith knows. Suppose Smith mails his bank draft to Tegucigalpa, which (perhaps unbeknownst to Smith) is the capital of Honduras. If the bank official says, "Smith sent a bank draft to the capital of Honduras," he has expressed next to nothing about Smith's knowledge of that geographic identity. But if the official were to say, "Smith *knowingly* sent a bank draft to the capital of Honduras," then the official has suggested that Smith knows his geography.

Similar examples abound. If a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy *and* that the toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese. Or consider the Government's own example, "'John knowingly discarded the homework of his sister.'" Brief for United States 9. The Government rightly points out that this sentence "does not *necessarily*" imply that John knew whom the homework belonged to. *Ibid.* (emphasis added). But that is what the sentence, as *ordinarily* used, does imply.

At the same time, dissimilar examples are not easy to find. The Government says that "knowingly" modifies only the verbs in the statute, while remaining indifferent to the subject's knowledge of at least part of the transitive verb's object. In certain contexts, a listener might understand the word "knowingly" to be used in that way. But the Government has not provided us with a single example of a sentence that, when used in typical fashion, would lead the hearer to believe that the word "knowingly" modifies only a transitive

verb without the full object, *i. e.*, that it leaves the hearer gravely uncertain about the subject's state of mind in respect to the full object of the transitive verb in the sentence. The likely reason is that such sentences typically involve special contexts or themselves provide a more detailed explanation of background circumstances that call for such a reading. As JUSTICE ALITO notes, the inquiry into a sentence's meaning is a contextual one. See *post*, at 661 (opinion concurring in part and concurring in judgment). No special context is present here. See *infra*, at 654–657.

The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage. That is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word "knowingly" as applying that word to each element. *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 79 (1994) (STEVENS, J., concurring). For example, in *Liparota* v. *United States*, 471 U. S. 419 (1985), this Court interpreted a federal food stamp statute that said, " '[w]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards *in any manner not authorized by [law]*' " is subject to imprisonment. *Id.*, at 420, n. 1. The question was whether the word "knowingly" applied to the phrase "in any manner not authorized by [law]." *Id.*, at 423. The Court held that it did, *id.*, at 433, despite the legal cliche "ignorance of the law is no excuse."

More recently, we had to interpret a statute that penalizes "[a]ny person who—(1) knowingly transports or ships [using any means or facility of] interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct," 18 U. S. C. § 2252(a)(1)(A). *X-Citement Video*, *supra.* In issue was whether the term "knowingly" in paragraph (1) modified the phrase "the use of a minor" in subparagraph (A). *Id.*, at 69. The language in issue in *X-Citement Video* (like the

language in *Liparota*) was more ambiguous than the language here not only because the phrase "the use of a minor" was not the direct object of the verbs modified by "knowingly," but also because it appeared in a different subsection. 513 U. S., at 68–69. Moreover, the fact that many sex crimes involving minors do not ordinarily require that a perpetrator know that his victim is a minor supported the Government's position. Nonetheless, we again found that the intent element applied to "the use of a minor." *Id.*, at 72, and n. 2. Again the Government, while pointing to what it believes are special features of each of these cases, provides us with no convincing counterexample, although there may be such statutory instances.

The Government correctly points out that in these cases more was at issue than proper use of the English language. But if more is at issue here, what is it? The Government makes a further textual argument, a complex argument based upon a related provision of the statute. That provision applies "[a]ggravated identity theft" where the predicate crime is terrorism. See § 1028A(a)(2). The provision uses the same language as the provision before us up to the end, where it adds the words "or a false identification document." Thus, it penalizes anyone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document." *Ibid.*

The Government's argument has four steps. Step One: We should not interpret a statute in a manner that makes some of its language superfluous. See, *e. g.*, *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001). Step Two: A person who knows that he is transferring, possessing, or using a "'means of identification'" "'without lawful authority,'" must know that the document either (1) belongs "'to another person'" or (2) is a "'false identification document'" because "'*there are no other choices.*'" Brief for United States 14 (emphasis added). Step Three: Requiring the offender to *know* that

the "means of identification" belongs to another person would consequently be superfluous in this terrorism provision. Step Four: We should not interpret the same phrase ("of another person") in the two related sections differently.

If we understand the argument correctly, it seems to suffer two serious flaws. If the two listed circumstances (where the ID belongs to another person; where the ID is false) are the only two circumstances possibly present when a defendant (in this particular context) unlawfully uses a "means of identification," then why list them at all? Why not just stop after criminalizing the knowing unlawful use of a "means of identification"? (Why specify that Congress does not mean the statute to cover, say, the use of dog tags?) The fact is, however, that the Government's reasoning at Step Two is faulty. The two listed circumstances are *not* the only two circumstances possibly present when a defendant unlawfully uses a "means of identification." One could, for example, verbally provide a seller or an employer with a made-up Social Security number, not an "identification *document*," and the number verbally transmitted to the seller or employer might, or might not, turn out to belong to another person. The word "knowingly" applied to the "other person" requirement (even in a statute that similarly penalizes use of a "false identification *document*") would not be surplus.

The Government also considers the statute's purpose to be a circumstance showing that the linguistic context here is special. It describes that purpose as "provid[ing] enhanced protection for individuals whose identifying information is used to facilitate the commission of crimes." *Id.*, at 5. And it points out that without the knowledge requirement, potential offenders will take great care to avoid wrongly using IDs that belong to others, thereby enhancing the protection that the statute offers.

The question, however, is whether Congress intended to achieve this enhanced protection by permitting conviction

of those who do not *know* the ID they unlawfully use refers to a real person, *i. e.*, those who do not *intend* to cause this further harm. And, in respect to this latter point, the statute's history (outside of the statute's language) is inconclusive.

On the one hand, some statements in the legislative history offer the Government a degree of support. The relevant House Report refers, for example, both to "identity theft" (use of an ID belonging to someone else) and to "identity fraud" (use of a false ID), often without distinguishing between the two. See, *e. g.*, H. R. Rep. No. 108–528, p. 25 (2004) (statement of Rep. Coble). And, in equating fraud and theft, Congress might have meant the statute to cover both—at least where the fraud takes the form of using an ID that (without the offender's knowledge) belongs to someone else.

On the other hand, Congress separated the fraud crime from the theft crime in the statute itself. The title of one provision (not here at issue) is "Fraud and related activity in connection with identification documents, authentication features, and information." 18 U. S. C. § 1028. The title of another provision (the provision here at issue) uses the words "identity *theft*." § 1028A (emphasis added). Moreover, the examples of theft that Congress gives in the legislative history all involve instances where the offender would know that what he has taken identifies a different real person. H. R. Rep. No. 108–528, at 4–5 (identifying as examples of "identity theft" " 'dumpster diving,' " "accessing information that was originally collected for an authorized purpose," "hack[ing] into computers," and "steal[ing] paperwork likely to contain personal information").

Finally, and perhaps of greatest practical importance, there is the difficulty in many circumstances of proving beyond a reasonable doubt that a defendant has the necessary knowledge. Take an instance in which an alien who unlawfully entered the United States gives an employer identifi-

cation documents that *in fact* belong to others. How is the Government to prove that the defendant *knew* that this was so? The Government may be able to show that such a defendant knew the papers were not his. But perhaps the defendant did not care whether the papers (1) were real papers belonging to another person or (2) were simply counterfeit papers. The difficulties of proof along with the defendant's necessary guilt of a predicate crime and the defendant's necessary knowledge that he has acted "without lawful authority," make it reasonable, in the Government's view, to read the statute's language as dispensing with the knowledge requirement.

We do not find this argument sufficient, however, to turn the tide in the Government's favor. For one thing, in the classic case of identity theft, intent is generally not difficult to prove. For example, where a defendant has used another person's identification information to get access to that person's bank account, the Government can prove knowledge with little difficulty. The same is true when the defendant has gone through someone else's trash to find discarded credit card and bank statements, or pretends to be from the victim's bank and requests personal identifying information. Indeed, the examples of identity theft in the legislative history (dumpster diving, computer hacking, and the like) are all examples of the types of classic identity theft where intent should be relatively easy to prove, and there will be no practical enforcement problem. For another thing, to the extent that Congress may have been concerned about criminalizing the conduct of a broader class of individuals, the concerns about practical enforceability are insufficient to outweigh the clarity of the text. Similar interpretations that we have given other similarly phrased statutes also created practical enforcement problems. See, *e. g., X-Citement Video,* 513 U. S. 64; *Liparota,* 471 U. S. 419. But had Congress placed conclusive weight upon practical enforcement, the statute would likely not read the way it now reads. In-

stead, Congress used the word "knowingly" followed by a list of offense elements. And we cannot find indications in statements of its purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words that it wrote.

We conclude that § 1028A(a)(1) requires the Government to show that the defendant knew that the means of identification at issue belonged to another person. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I agree with the Court that to convict petitioner for "knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person," 18 U. S. C. § 1028A(a)(1), the Government must prove that he "*knew* that the 'means of identification' he . . . unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" *Ante*, at 647. "Knowingly" is not limited to the statute's verbs, *ante*, at 650. Even the Government must concede that. See *United States* v. *Villanueva-Sotelo*, 515 F. 3d 1234, 1237 (CADC 2008) ("According to the government, this text is unambiguous: the statute's knowledge requirement extends only so far as 'means of identification'"). But once it is understood to modify the object of those verbs, there is no reason to believe it does not extend to the phrase which limits that object ("of another person"). Ordinary English usage supports this reading, as the Court's numerous sample sentences amply demonstrate. See *ante*, at 650–651.

But the Court is not content to stop at the statute's text, and I do not join that further portion of the Court's opinion. First, the Court relies in part on the principle that "courts

ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Ante*, at 652. If that is meant purely as a description of what most cases do, it is perhaps true, and perhaps not. I have not canvassed all the cases and am hence agnostic. If it is meant, however, as a normative description of what courts *should* ordinarily do when interpreting such statutes—and the reference to JUSTICE STEVENS' concurring opinion in *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 79 (1994), suggests as much—then I surely do not agree. The structure of the text in *X-Citement Video* plainly separated the "use of a minor" element from the "knowingly" requirement, wherefore I thought (and think) that case was wrongly decided. See *id.*, at 80–81 (SCALIA, J., dissenting). It is one thing to infer the common-law tradition of a *mens rea* requirement where Congress has not addressed the mental element of a crime. See *Staples* v. *United States*, 511 U. S. 600, 605 (1994); *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 437–438 (1978). It is something else to expand a *mens rea* requirement that the statutory text has carefully limited.

I likewise cannot join the Court's discussion of the (as usual, inconclusive) legislative history. *Ante*, at 655. Relying on the statement of a single Member of Congress or an unvoted-upon (and for all we know unread) Committee Report to expand a statute beyond the limits its text suggests is always a dubious enterprise. And consulting those incunabula with an eye to making criminal what the text would otherwise permit is even more suspect. See *United States* v. *R. L. C.*, 503 U. S. 291, 307–309 (1992) (SCALIA, J., concurring in part and concurring in judgment). Indeed, it is not unlike the practice of Caligula, who reportedly "wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people," 1 W. Blackstone, Commentaries on the Laws of England 46 (1765).

The statute's text is clear, and I would reverse the judgment of the Court of Appeals on that ground alone.

JUSTICE ALITO, concurring in part and concurring in the judgment.

While I am in general agreement with the opinion of the Court, I write separately because I am concerned that the Court's opinion may be read by some as adopting an overly rigid rule of statutory construction. The Court says that "[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Ante,* at 650. The Court adds that counterexamples are "not easy to find," *ante,* at 651, and I suspect that the Court's opinion will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense.

I think that the Court's point about ordinary English usage is overstated. Examples of sentences that do not conform to the Court's rule are not hard to imagine. For example: "The mugger knowingly assaulted two people in the park—an employee of company X and a jogger from town Y." A person hearing this sentence would not likely assume that the mugger knew about the first victim's employer or the second victim's hometown. What matters in this example, and the Court's, is context.

More to the point, ordinary writers do not often construct the particular kind of sentence at issue here, *i. e.*, a complex sentence in which it is important to determine from the sentence itself whether the adverb denoting the actor's intent applies to every characteristic of the sentence's direct object. Such sentences are a staple of criminal codes, but in ordinary speech, a different formulation is almost always used when the speaker wants to be clear on the point. For example, a speaker might say: "Flores-Figueroa used a Social Security

number that he knew belonged to someone else" or "Flores-Figueroa used a Social Security number that just happened to belong to a real person." But it is difficult to say with the confidence the Court conveys that there is an "ordinary" understanding of the usage of the phrase at issue in this case.

In interpreting a criminal statute such as the one before us, I think it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption. For example, 18 U. S. C. § 2423(a) makes it unlawful to "knowingly transpor[t] an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." The Courts of Appeals have uniformly held that a defendant need not know the victim's age to be guilty under this statute. See, *e. g.*, *United States* v. *Griffith*, 284 F. 3d 338, 350–351 (CA2 2002); *United States* v. *Taylor*, 239 F. 3d 994, 997 (CA9 2001); cf. *United States* v. *Chin*, 981 F. 2d 1275, 1280 (CADC 1992) (R. Ginsburg, J.) (holding that 21 U. S. C. § 861(a)(1), which makes it unlawful to "knowingly and intentionally . . . employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate" drug laws, does not require the defendant to have knowledge of the minor's age). Similarly, 8 U. S. C. § 1327 makes it unlawful to "knowingly ai[d] or assis[t] any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) . . . to enter the United States." The Courts of Appeals have held that the term "knowingly" in this context does not require the defendant to know that the alien had been convicted of an aggravated felony. See, *e. g.*, *United States* v. *Flores-Garcia*, 198 F. 3d 1119, 1121–1123 (CA9 2000); *United States* v. *Figueroa*, 165 F. 3d 111, 118–119 (CA2 1998).

In the present case, however, the Government has not pointed to contextual features that warrant interpreting 18 U. S. C. § 1028A(a)(1) in a similar way. Indeed, the Government's interpretation leads to exceedingly odd results. Under that interpretation, if a defendant uses a made-up Social Security number without having any reason to know whether it belongs to a real person, the defendant's liability under § 1028A(a)(1) depends on chance: If it turns out that the number belongs to a real person, two years will be added to the defendant's sentence, but if the defendant is lucky and the number does not belong to another person, the statute is not violated.

I therefore concur in the judgment and join the opinion of the Court except insofar as it may be read to adopt an inflexible rule of construction that can rarely be overcome by contextual features pointing to a contrary reading.

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ASHCROFT, FORMER ATTORNEY GENERAL, ET AL. *v.* IQBAL ET AL.

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

No. 07–1015. Argued December 10, 2008—Decided May 18, 2009

Following the September 11, 2001, terrorist attacks, respondent Iqbal, a Pakistani Muslim, was arrested on criminal charges and detained by federal officials under restrictive conditions. Iqbal filed a *Bivens* action against numerous federal officials, including petitioner Ashcroft, the former Attorney General, and petitioner Mueller, the Director of the Federal Bureau of Investigation (FBI). See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388. The complaint alleged, *inter alia*, that petitioners designated Iqbal a person "of high interest" on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments; that the FBI, under Mueller's direction, arrested and detained thousands of Arab Muslim men as part of its September 11 investigation; that petitioners knew of, condoned, and willfully and maliciously agreed to subject Iqbal to harsh conditions of confinement as a matter of policy, solely on account of the prohibited factors and for no legitimate penological interest; and that Ashcroft was the policy's "principal architect" and Mueller was "instrumental" in its adoption and execution. After the District Court denied petitioners' motion to dismiss on qualified-immunity grounds, they invoked the collateral-order doctrine to file an interlocutory appeal in the Second Circuit. Affirming, that court assumed without discussion that it had jurisdiction and focused on the standard set forth in *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, for evaluating whether a complaint is sufficient to survive a motion to dismiss. Concluding that *Twombly*'s "flexible plausibility standard" obliging a pleader to amplify a claim with factual allegations where necessary to render it plausible was inapplicable in the context of petitioners' appeal, the court held that Iqbal's complaint was adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law.

Held:

1. The Second Circuit had subject-matter jurisdiction to affirm the District Court's order denying petitioners' motion to dismiss. Pp. 671–675.

(a) Denial of a qualified-immunity claim can fall within the narrow class of prejudgment orders reviewable under the collateral-order doc-

trine so long as the order "turns on an issue of law." *Mitchell* v. *Forsyth*, 472 U. S. 511, 530. The doctrine's applicability in this context is well established; an order rejecting qualified immunity at the motion-to-dismiss stage is a "final decision" under 28 U. S. C. § 1291, which vests courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." *Behrens* v. *Pelletier*, 516 U. S. 299, 307. Pp. 671–672.

(b) Under these principles, the Court of Appeals had, and this Court has, jurisdiction over the District Court's order. Because the order turned on an issue of law and rejected the qualified-immunity defense, it was a final decision "subject to immediate appeal." *Behrens*, *supra*, at 307. Pp. 672–675.

2. Iqbal's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination. Pp. 675–687.

(a) This Court assumes, without deciding, that Iqbal's First Amendment claim is actionable in a *Bivens* action, see *Hartman* v. *Moore*, 547 U. S. 250, 254, n. 2. Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, see, *e. g.*, *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691, the plaintiff in a suit such as the present one must plead that each Government-official defendant, through his own individual actions, has violated the Constitution. Purposeful discrimination requires more than "intent as volition or intent as awareness of consequences"; it involves a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279. Iqbal must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason, but for the purpose of discriminating on account of race, religion, or national origin. Pp. 675–677.

(b) Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, *Twombly*, 550 U. S., at 555, but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," *id.*, at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. Two working principles underlie *Twombly*. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. *Id.*, at 555. Second, determining whether a complaint states a plausible claim is context specific, requiring the

reviewing court to draw on its experience and common sense. *Id.*, at 556. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Pp. 677–680.

(c) Iqbal's pleadings do not comply with Rule 8 under *Twombly*. Several of his allegations—that petitioners agreed to subject him to harsh conditions as a matter of policy, solely on account of discriminatory factors and for no legitimate penological interest; that Ashcroft was that policy's "principal architect"; and that Mueller was "instrumental" in its adoption and execution—are conclusory and not entitled to be assumed true. Moreover, the factual allegations that the FBI, under Mueller, arrested and detained thousands of Arab Muslim men, and that he and Ashcroft approved the detention policy, do not plausibly suggest that petitioners purposefully discriminated on prohibited grounds. Given that the September 11 attacks were perpetrated by Arab Muslims, it is not surprising that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the policy's purpose was to target neither Arabs nor Muslims. Even if the complaint's well-pleaded facts gave rise to a plausible inference that Iqbal's arrest was the result of unconstitutional discrimination, that inference alone would not entitle him to relief: His claims against petitioners rest solely on their ostensible policy of holding detainees categorized as "of high interest," but the complaint does not contain facts plausibly showing that their policy was based on discriminatory factors. Pp. 680–684.

(d) Three of Iqbal's arguments are rejected. Pp. 684–687.

(i) His claim that *Twombly* should be limited to its antitrust context is not supported by that case or the Federal Rules. Because *Twombly* interpreted and applied Rule 8, which in turn governs the pleading standard "in all civil actions," Rule 1, the case applies to antitrust and discrimination suits alike, see 550 U. S., at 555–556, and n. 3. P. 684.

(ii) Rule 8's pleading requirements need not be relaxed based on the Second Circuit's instruction that the District Court cabin discovery to preserve petitioners' qualified-immunity defense in anticipation of a summary judgment motion. The question presented by a motion to dismiss for insufficient pleadings does not turn on the controls placed on the discovery process. *Twombly*, *supra*, at 559. And because Iqbal's

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complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. Pp. 684–686.

(iii) Rule 9(b)—which requires particularity when pleading "fraud or mistake" but allows "other conditions of a person's mind [to] be alleged generally"—does not require courts to credit a complaint's conclusory statements without reference to its factual context. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade Rule 8's less rigid, though still operative, strictures. Pp. 686–687.

(e) The Second Circuit should decide in the first instance whether to remand to the District Court to allow Iqbal to seek leave to amend his deficient complaint. P. 687.

490 F. 3d 143, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 687. BREYER, J., filed a dissenting opinion, *post*, p. 699.

Former *Solicitor General Garre* argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Katsas*, *Deputy Assistant Attorney General Cohn*, *Curtis E. Gannon*, *Barbara L. Herwig*, and *Robert M. Loeb*. *Michael L. Martinez*, *David E. Bell*, and *Matthew F. Scarlato* filed briefs for Dennis Hasty as respondent under this Court's Rule 12.6 urging reversal. *Brett M. Schuman*, *Lauren J. Resnick*, and *Thomas D. Warren* filed briefs for Michael Rolince et al. as respondents under this Court's Rule 12.6 urging reversal.

Alexander A. Reinert argued the cause for respondents. With him on the brief for respondent Javaid Iqbal were *Joan M. Magoolaghan*, *Elizabeth L. Koob*, and *Rima J. Oken*.*

**Daniel J. Popeo*, *Richard A. Samp*, and *Paul J. Larkin, Jr.*, filed a brief for William P. Barr et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Stephen B. Pershing* and *Les Weisbrod;* for the Japanese American Citizens League et al. by *John E. Higgins;* for National Civil Rights Organizations by *Harold Hongju Koh* and *Cristóbal Joshua Alex;* for Professors of Civil Procedure and Federal Practice by *Allan Ides* and *David L. Shapiro;* for the Sikh Coalition et al. by *Brian E. Robinson;* and for Ibrahim Turkmen et al. by *Michael Winger*.

JUSTICE KENNEDY delivered the opinion of the Court.

Javaid Iqbal (hereinafter respondent) is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 1, 11–12 (Apr. 2003), http://www.usdoj.gov/oig/special/0306/full.pdf?bcsi_scan_61073EC0F74759AD=0&bcsi_scan_filename=full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be "of 'high interest' " to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112–113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal* v. *Hasty*, 490 F. 3d 143, 147–148 (CA2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit

(ADMAX SHU). *Id.*, at 148. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prisons regulations. *Ibid.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.*, at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04–CV–1809 (JG)(JA), ¶¶ 10–11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.*, ¶ 113, at 176a; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, *id.*, ¶¶ 143–145, at 182a; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists," *id.*, ¶ 154, at 184a.

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners desig-

nated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." *Id.*, ¶ 47, at 164a. It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶ 69, at 168a. Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶ 96, at 172a–173a. The pleading names Ashcroft as the "principal architect" of the policy, *id.*, ¶ 10, at 157a, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation," *id.*, ¶ 11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 136a–137a (relying on *Conley* v. *Gibson*, 355 U. S. 41 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly*'s applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F. 3d, at 155. It concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.*, at 157–158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. *Id.*, at 174.

Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise . . . between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.*, at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic"—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.*, at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.*, Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity," *id.*, at 178. We granted certiorari, 554 U. S. 902 (2008), and now reverse.

II

We first address whether the Court of Appeals had subject-matter jurisdiction to affirm the District Court's order denying petitioners' motion to dismiss. Respondent disputed subject-matter jurisdiction in the Court of Appeals, but the court hardly discussed the issue. We are not free to pretermit the question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt. *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006) (citing *United States* v. *Cotton*, 535 U. S. 625, 630 (2002)). According to respondent, the District Court's order denying petitioners' motion to dismiss is not appealable under the collateral-order doctrine. We disagree.

A

With exceptions inapplicable here, Congress has vested the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U. S. C. § 1291. Though the statute's finality requirement ensures that "interlocutory appeals—appeals before the end of district court proceedings—are the exception, not the rule," *Johnson* v. *Jones*, 515 U. S. 304, 309 (1995), it does not prevent "review of all prejudgment orders," *Behrens* v. *Pelletier*, 516 U. S. 299, 305 (1996). Under the collateral-order doctrine a limited set of district-court orders are reviewable "though short of final judgment." *Ibid.* The orders within this narrow category "are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Ibid.* (quoting *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949)).

A district-court decision denying a Government officer's claim of qualified immunity can fall within the narrow class

of appealable orders despite "the absence of a final judgment." *Mitchell* v. *Forsyth*, 472 U. S. 511, 530 (1985). This is so because qualified immunity—which shields Government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights," *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982)—is both a defense to liability and a limited "entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U. S., at 526. Provided it "turns on an issue of law," *id.*, at 530, a district-court order denying qualified immunity "'conclusively determine[s]'" that the defendant must bear the burdens of discovery; is "conceptually distinct from the merits of the plaintiff's claim"; and would prove "effectively unreviewable on appeal from a final judgment," *id.*, at 527–528 (citing *Cohen*, *supra*, at 546). As a general matter, the collateral-order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen*. But the applicability of the doctrine in the context of qualified-immunity claims is well established; and this Court has been careful to say that a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a "final decision" within the meaning of § 1291. *Behrens*, 516 U. S., at 307.

B

Applying these principles, we conclude that the Court of Appeals had jurisdiction to hear petitioners' appeal. The District Court's order denying petitioners' motion to dismiss turned on an issue of law and rejected the defense of qualified immunity. It was therefore a final decision "subject to immediate appeal." *Ibid.* Respondent says that "a qualified immunity appeal based solely on the complaint's failure to state a claim, and not on the ultimate issues relevant to the qualified immunity defense itself, is not a proper subject of interlocutory jurisdiction." Brief for Respondent Iqbal 15 (hereinafter Iqbal Brief). In other words, respondent

contends the Court of Appeals had jurisdiction to determine whether his complaint avers a clearly established constitutional violation but that it lacked jurisdiction to pass on the sufficiency of his pleadings. Our opinions, however, make clear that appellate jurisdiction is not so strictly confined.

In *Hartman* v. *Moore*, 547 U. S. 250 (2006), the Court reviewed an interlocutory decision denying qualified immunity. The legal issue decided in *Hartman* concerned the elements a plaintiff "must plead and prove in order to win" a First Amendment retaliation claim. *Id.*, at 257, n. 5. Similarly, two Terms ago in *Wilkie* v. *Robbins*, 551 U. S. 537 (2007), the Court considered another interlocutory order denying qualified immunity. The legal issue there was whether a *Bivens* action can be employed to challenge interference with property rights. 551 U. S., at 549, n. 4. These cases cannot be squared with respondent's argument that the collateral-order doctrine restricts appellate jurisdiction to the "ultimate issu[e]" whether the legal wrong asserted was a violation of clearly established law while excluding the question whether the facts pleaded establish such a violation. Iqbal Brief 15. Indeed, the latter question is even more clearly within the category of appealable decisions than the questions presented in *Hartman* and *Wilkie*, since whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded. In that sense the sufficiency of respondent's pleadings is both "inextricably intertwined with," *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 51 (1995), and "directly implicated by," *Hartman*, *supra*, at 257, n. 5, the qualified-immunity defense.

Respondent counters that our holding in *Johnson*, 515 U. S. 304, confirms the want of subject-matter jurisdiction here. That is incorrect. The allegation in *Johnson* was that five defendants, all of them police officers, unlawfully beat the plaintiff. *Johnson* considered "the appealability of a portion of" the District Court's summary judgment order

that, "though entered in a 'qualified immunity' case, determine[d] only" that there was a genuine issue of material fact that three of the defendants participated in the beating. *Id.*, at 313.

In finding that order not a "final decision" for purposes of § 1291, the *Johnson* Court cited *Mitchell* for the proposition that only decisions turning "'*on an issue of law*'" are subject to immediate appeal. 515 U. S., at 313. Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide. Or as we said in *Johnson*, it is a "fact-related" legal inquiry. *Id.*, at 314. To conduct it, a court of appeals may be required to consult a "vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials." *Id.*, at 316. That process generally involves matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment. *Ibid.* Finding those concerns predominant, *Johnson* held that the collateral orders that are "final" under *Mitchell* turn on "abstract," rather than "fact-based," issues of law. 515 U. S., at 317.

The concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings. True, the categories of "fact-based" and "abstract" legal questions used to guide the Court's decision in *Johnson* are not well defined. Here, however, the order denying petitioners' motion to dismiss falls well within the latter class. Reviewing that order, the Court of Appeals considered only the allegations contained within the four corners of respondent's complaint; resort to a "vast pretrial record" on petitioners' motion to dismiss was unnecessary. *Id.*, at 316. And determining whether respondent's complaint has the "heft" to state a claim is a task well within an appellate court's core competency. *Twombly*, 550 U. S., at 557. Evaluating the sufficiency of a complaint is not a "fact-based" question of law, so the problem the Court sought to avoid in *Johnson*

is not implicated here. The District Court's order denying petitioners' motion to dismiss is a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction. We proceed to consider the merits of petitioners' appeal.

III

In *Twombly*, *supra*, at 553–554, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 66 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." 534 U. S., at 68. See also *Wilkie*, 551 U. S., at 549–550. That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis* v. *Passman*, 442 U. S. 228 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush* v. *Lucas*, 462 U. S. 367 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U. S. C.

§ 1983." *Hartman*, 547 U. S., at 254, n. 2. Cf. *Wilson* v. *Layne*, 526 U. S. 603, 609 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Iqbal Brief 46 ("[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*"). See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691 (1978) (finding no vicarious liability for a municipal "person" under 42 U. S. C. § 1983); see also *Dunlop* v. *Munroe*, 7 Cranch 242, 269 (1812) (a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Robertson* v. *Sichel*, 127 U. S. 507, 515–516 (1888) ("A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540–541 (1993) (opinion of KENNEDY, J.) (First Amendment); *Washington* v. *Davis*, 426 U. S. 229, 240 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979). It instead involves a decisionmaker's undertak-

ing a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Ibid.* It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." Iqbal Brief 45–46. That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

We turn to respondent's complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is

entitled to relief." As the Court held in *Twombly*, 550 U. S. 544, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555 (citing *Papasan* v. *Allain*, 478 U. S. 265, 286 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U. S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for

a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F. 3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U. S. C. § 1. Recognizing that § 1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 775 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another." 550 U. S., at 551 (internal quotation marks omitted). The complaint also alleged that the defendants' "parallel course of conduct . . . to prevent competition" and inflate prices was indicative of the

unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a " 'legal conclusion' " and, as such, was not entitled to the assumption of truth. *Id.*, at 555. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.*, at 565–566. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.*, at 567. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed. *Id.*, at 570.

B

Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible." *Ibid.*

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 173a–174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy,

id., ¶ 10, at 157a, and that Mueller was "instrumental" in adopting and executing it, *id.*, ¶ 11, at 157a. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, 550 U. S., at 555, namely, that petitioners adopted a policy " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," *Feeney*, 442 U. S., at 279. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly*, 550 U. S., at 554–555. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a " 'contract, combination or conspiracy to prevent competitive entry,' " *id.*, at 551, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." Complaint ¶ 47, App. to Pet. for Cert. 164a. It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶ 69, at 168a. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, *Twombly*, *supra*, at 567, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as "of high interest." Complaint ¶ 69, App. to Pet. for Cert. 168a. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may

have labeled him a person "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "'cleared' by the FBI." *Ibid.* Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U. S., at 570.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly*, the complaint alleged general wrongdoing that extended over a period of years, *id.*, at 551, whereas here the complaint alleges discrete wrongs—for instance, beatings—by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly*, where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. Iqbal Brief 37–38. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U. S., at 554. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike, see 550 U. S., at 555–556, and n. 3.

2

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." Iqbal Brief 27. We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls

placed upon the discovery process. *Twombly*, *supra*, at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side" (internal quotation marks and citation omitted)).

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." *Siegert* v. *Gilley*, 500 U. S. 226, 236 (1991) (KENNEDY, J., concurring in judgment). There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic." 490 F. 3d, at 179.

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even

if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. Iqbal Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 172a–173a. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license

to evade the less rigid—though still operative—strictures of Rule 8. See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1301, p. 291 (3d ed. 2004) ("[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) . . . should control the second sentence of Rule 9(b)"). And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

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

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

This case is here on the uncontested assumption that *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), allows personal liability based on a federal officer's violation of an individual's rights under the First and Fifth Amendments, and it comes to us with the explicit concession of petitioners Ashcroft and Mueller that an officer may be subject to *Bivens* liability as a supervisor on grounds other than *respondeat superior*. The Court apparently rejects this concession and, although it has no bearing on the ma-

jority's resolution of this case, does away with supervisory liability under *Bivens*. The majority then misapplies the pleading standard under *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), to conclude that the complaint fails to state a claim. I respectfully dissent from both the rejection of supervisory liability as a cognizable claim in the face of petitioners' concession, and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure.

I

A

Respondent Iqbal was arrested in November 2001 on charges of conspiracy to defraud the United States and fraud in relation to identification documents, and was placed in pretrial detention at the Metropolitan Detention Center in Brooklyn, New York. *Iqbal* v. *Hasty*, 490 F. 3d 143, 147–148 (CA2 2007). He alleges that Federal Bureau of Investigation (FBI) officials carried out a discriminatory policy by designating him as a person "'of high interest'" in the investigation of the September 11 attacks solely because of his race, religion, or national origin. Owing to this designation he was placed in the detention center's Administrative Maximum Special Housing Unit for over six months while awaiting the fraud trial. *Id.*, at 148. As I will mention more fully below, Iqbal contends that Ashcroft and Mueller were at the very least aware of the discriminatory detention policy and condoned it (and perhaps even took part in devising it), thereby violating his First and Fifth Amendment rights.[1]

Iqbal claims that on the day he was transferred to the special unit, prison guards, without provocation, "picked him up and threw him against the wall, kicked him in the stom-

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[1] Iqbal makes no claim against Ashcroft and Mueller based simply on his right, as a pretrial detainee, to be free from punishment prior to an adjudication of guilt on the fraud charges. See *Bell* v. *Wolfish*, 441 U. S. 520, 535 (1979).

ach, punched him in the face, and dragged him across the room." First Amended Complaint in No. 04–CV–1809 (JG) (JA), ¶ 113, App. to Pet. for Cert. 176a (hereinafter Complaint). He says that after being attacked a second time he sought medical attention but was denied care for two weeks. *Id.*, ¶¶ 187–188, at 189a. According to Iqbal's complaint, prison staff in the special unit subjected him to unjustified strip and body cavity searches, *id.*, ¶¶ 136–140, at 181a, verbally berated him as a "'terrorist'" and "'Muslim killer,'" *id.*, ¶ 87, at 170a–171a, refused to give him adequate food, *id.*, ¶ 91, at 171a–172a, and intentionally turned on air conditioning during the winter and heating during the summer, *id.*, ¶ 84, at 170a. He claims that prison staff interfered with his attempts to pray and engage in religious study, *id.*, ¶¶ 153–154, at 183a–184a, and with his access to counsel, *id.*, ¶¶ 168, 171, at 186a–187a.

The District Court denied Ashcroft and Mueller's motion to dismiss Iqbal's discrimination claim, and the Court of Appeals affirmed. Ashcroft and Mueller then asked this Court to grant certiorari on two questions:

> "1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.
>
> "2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Pet. for Cert. I.

The Court granted certiorari on both questions. The first is about pleading; the second goes to the liability standard.

In the first question, Ashcroft and Mueller did not ask whether "a cabinet-level officer or other high-ranking official" who "knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts committed by subordinate officials" was subject to liability under *Bivens*. In fact, they conceded in their petition for certiorari that they would be liable if they had "actual knowledge" of discrimination by their subordinates and exhibited "'deliberate indifference'" to that discrimination. Pet. for Cert. 29 (quoting *Farmer* v. *Brennan*, 511 U. S. 825, 837 (1994)). Instead, they asked the Court to address whether Iqbal's allegations against them (which they call conclusory) were sufficient to satisfy Rule 8(a)(2), and in particular whether the Court of Appeals misapplied our decision in *Twombly* construing that rule. Pet. for Cert. 11–24.

In the second question, Ashcroft and Mueller asked this Court to say whether they could be held personally liable for the actions of their subordinates based on the theory that they had constructive notice of their subordinates' unconstitutional conduct. *Id.*, at 25–33. This was an odd question to pose, since Iqbal has never claimed that Ashcroft and Mueller are liable on a constructive notice theory. Be that as it may, the second question challenged only one possible ground for imposing supervisory liability under *Bivens*. In sum, both questions assumed that a defendant could raise a *Bivens* claim on theories of supervisory liability other than constructive notice, and neither question asked the parties or the Court to address the elements of such liability.

The briefing at the merits stage was no different. Ashcroft and Mueller argued that the factual allegations in Iqbal's complaint were insufficient to overcome their claim of qualified immunity; they also contended that they could not be held liable on a theory of constructive notice. Again they conceded, however, that they would be subject to supervisory liability if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as

being 'of high interest' and they were deliberately indifferent to that discrimination." Brief for Petitioners 50; see also Reply Brief for Petitioners 21–22. Iqbal argued that the allegations in his complaint were sufficient under Rule 8(a)(2) and *Twombly*, and conceded that as a matter of law he could not recover under a theory of *respondeat superior*. See Brief for Respondent Iqbal 46. Thus, the parties agreed as to a proper standard of supervisory liability, and the disputed question was whether Iqbal's complaint satisfied Rule 8(a)(2).

Without acknowledging the parties' agreement as to the standard of supervisory liability, the Court asserts that it must *sua sponte* decide the scope of supervisory liability here. *Ante*, at 675–677. I agree that, absent Ashcroft and Mueller's concession, that determination would have to be made; without knowing the elements of a supervisory liability claim, there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim. See *Twombly*, 550 U. S., at 557–558. But deciding the scope of supervisory *Bivens* liability in this case is uncalled for. There are several reasons, starting with the position Ashcroft and Mueller have taken and following from it.

First, Ashcroft and Mueller have, as noted, made the critical concession that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability. Iqbal seeks to recover on a theory that Ashcroft and Mueller at least knowingly acquiesced (and maybe more than acquiesced) in the discriminatory acts of their subordinates; if he can show this, he will satisfy Ashcroft and Mueller's own test for supervisory liability. See *Farmer*, *supra*, at 842 (explaining that a prison official acts with "deliberate indifference" if "the official acted or failed to act despite his knowledge of a substantial risk of serious harm"). We do not normally override a party's concession, see, *e. g.*, *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855

(1996) (holding that "[i]t would be inappropriate for us to [e]xamine in this case, without the benefit of the parties' briefing," an issue the Government had conceded), and doing so is especially inappropriate when, as here, the issue is unnecessary to decide the case, see *infra*, at 694. I would therefore accept Ashcroft and Mueller's concession for purposes of this case and proceed to consider whether the complaint alleges at least knowledge and deliberate indifference.

Second, because of the concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require. *Mapp* v. *Ohio*, 367 U. S. 643, 676–677 (1961) (Harlan, J., dissenting). We consequently are in no position to decide the precise contours of supervisory liability here, this issue being a complicated one that has divided the Courts of Appeals. See *infra*, at 693–694. This Court recently remarked on the danger of "bad decisionmaking" when the briefing on a question is "woefully inadequate," *Pearson* v. *Callahan*, 555 U. S. 223, 239 (2009), yet today the majority answers a question with no briefing at all. The attendant risk of error is palpable.

Finally, the Court's approach is most unfair to Iqbal. He was entitled to rely on Ashcroft and Mueller's concession, both in their petition for certiorari and in their merits briefs, that they could be held liable on a theory of knowledge and deliberate indifference. By overriding that concession, the Court denies Iqbal a fair chance to be heard on the question.

B

The majority, however, does ignore the concession. According to the majority, because Iqbal concededly cannot recover on a theory of *respondeat superior*, it follows that he cannot recover under any theory of supervisory liability. *Ante*, at 677. The majority says that in a *Bivens* action, "where masters do not answer for the torts of their servants," "the term 'supervisory liability' is a misnomer," and

that "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ibid.* Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects. *Ante*, at 683 ("[P]etitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic").

The dangers of the majority's readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment," Restatement (Third) of Agency § 2.04 (2005), or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate. See, *e. g.*, *Whitfield* v. *Meléndez-Rivera*, 431 F. 3d 1, 14 (CA1 2005) (distinguishing between *respondeat superior* liability and supervisory liability); *Bennett* v. *Eastpointe*, 410 F. 3d 810, 818 (CA6 2005) (same); *Richardson* v. *Goord*, 347 F. 3d 431, 435 (CA2 2003) (same); *Hall* v. *Lombardi*, 996 F. 2d 954, 961 (CA8 1993) (same).

In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces, see, *e. g.*, *Baker* v. *Monroe Twp.*, 50 F. 3d 1186, 1994 (CA3 1995); *Woodward* v. *Worland*, 977 F. 2d 1392, 1400 (CA10 1992); or where supervisors "'know about the conduct and facilitate it, approve it, condone it, or turn a

blind eye for fear of what they might see,'" *International Action Center* v. *United States*, 365 F. 3d 20, 28 (CADC 2004) (Roberts, J.) (quoting *Jones* v. *Chicago*, 856 F. 2d 985, 992 (CA7 1988) (Posner, J.)); or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, see, *e. g.*, *Hall*, *supra*, at 961; or where the supervisor was grossly negligent, see, *e. g.*, *Lipsett* v. *University of Puerto Rico*, 864 F. 2d 881, 902 (CA1 1988). I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.

Neither is the majority, but what is most remarkable about its foray into supervisory liability is that its conclusion has no bearing on its resolution of the case. The majority says that all of the allegations in the complaint that Ashcroft and Mueller authorized, condoned, or even were aware of their subordinates' discriminatory conduct are "conclusory" and therefore are "not entitled to be assumed true." *Ante*, at 681. As I explain below, this conclusion is unsound, but on the majority's understanding of Rule 8(a)(2) pleading standards, even if the majority accepted Ashcroft and Mueller's concession and asked whether the complaint sufficiently alleges knowledge and deliberate indifference, it presumably would still conclude that the complaint fails to plead sufficient facts and must be dismissed.[2]

II

Given petitioners' concession, the complaint satisfies Rule 8(a)(2). Ashcroft and Mueller admit they are liable for their subordinates' conduct if they "had actual knowledge of the assertedly discriminatory nature of the classification of sus-

[2] If I am mistaken, and the majority's rejection of the concession is somehow outcome determinative, then its approach is even more unfair to Iqbal than previously explained, see *supra*, at 692, for Iqbal had no reason to argue the (apparently dispositive) supervisory liability standard in light of the concession.

pects as being 'of high interest' and they were deliberately indifferent to that discrimination." Brief for Petitioners 50. Iqbal alleges that after the September 11 attacks the FBI "arrested and detained thousands of Arab Muslim men," Complaint ¶ 47, App. to Pet. for Cert. 164a, that many of these men were designated by high-ranking FBI officials as being "'of high interest,'" *id.*, ¶¶ 48, 50, at 164a, and that in many cases, including Iqbal's, this designation was made "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity," *id.*, ¶ 49, at 164a. The complaint further alleges that Ashcroft was the "principal architect of the policies and practices challenged," *id.*, ¶ 10, at 157a, and that Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged," *id.*, ¶ 11, at 157a. According to the complaint, Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶ 96, at 172a–173a. The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Mueller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Ashcroft and Mueller argue that these allegations fail to satisfy the "plausibility standard" of *Twombly.* They contend that Iqbal's claims are implausible because such high-ranking officials "tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command." Brief for Petitioners 28. But this response bespeaks a fundamental misunderstanding of the en-

quiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. See 550 U. S., at 555 (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"); *id.*, at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable"); see also *Neitzke* v. *Williams*, 490 U. S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"). The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.

Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly*'s words, a plaintiff must "allege facts" that, taken as true, are "suggestive of illegal conduct." 550 U. S., at 564, n. 8. In *Twombly*, we were faced with allegations of a conspiracy to violate § 1 of the Sherman Act through parallel conduct. The difficulty was that the conduct alleged was "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.*, at 554. We held that in that sort of circumstance, "[a]n allegation of parallel conduct is . . . much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted). Here, by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent

with legal conduct. The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller's own admission, are sufficient to make them liable for the illegal action. Iqbal's complaint therefore contains "enough facts to state a claim to relief that is plausible on its face." *Id.*, at 570.

I do not understand the majority to disagree with this understanding of "plausibility" under *Twombly.* Rather, the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint: that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11," Complaint ¶ 47, App. to Pet. for Cert. 164a, and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001," *id.*, ¶ 69, at 168a. See *ante,* at 681. I think the majority is right in saying that these allegations suggest only that Ashcroft and Mueller "sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," *ante,* at 683, and that this produced "a disparate, incidental impact on Arab Muslims," *ante,* at 682. And I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.

But these allegations do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. See Complaint ¶ 10, App. to Pet. for Cert. 157a (Ashcroft was the "principal architect" of the discriminatory policy);

id., ¶ 11, at 157a (Mueller was "instrumental" in adopting and executing the discriminatory policy); *id.*, ¶ 96, at 172a–173a (Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest").

The majority says that these are "bare assertions" that, "much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" and therefore are "not entitled to be assumed true." *Ante*, at 681 (quoting *Twombly*, *supra*, at 555). The fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI's International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI's New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin. See Complaint ¶¶ 47–53, *supra*, at 164a–165a. Viewed in light of these subsidiary allegations, the allegations singled out by the majority as "conclusory" are no such thing. Iqbal's claim is not that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" him to a discriminatory practice that is left undefined; his allegation is that "they knew of, condoned, and willfully and maliciously agreed to subject" him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller " 'fair notice of what the . . . claim is and the grounds upon which it

rests.'" *Twombly*, 550 U. S., at 555 (quoting *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957) (omission in original)).

That aside, the majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. For example, the majority takes as true the statement that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." Complaint ¶ 69, *supra*, at 168a; see *ante*, at 681. This statement makes two points: (1) after September 11, the FBI held certain detainees in highly restrictive conditions, and (2) Ashcroft and Mueller discussed and approved these conditions. If, as the majority says, these allegations are not conclusory, then I cannot see why the majority deems it merely conclusory when Iqbal alleges that (1) after September 11, the FBI designated Arab Muslim detainees as being of "'high interest'" "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity," Complaint ¶¶ 48–50, App. to Pet. for Cert. 164a, and (2) Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to that discrimination, *id.*, ¶ 96, at 172a. By my lights, there is no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to their subordinates' discrimination.

I respectfully dissent.

JUSTICE BREYER, dissenting.

I agree with JUSTICE SOUTER and join his dissent. I write separately to point out that, like the Court, I believe it important to prevent unwarranted litigation from interfering with "the proper execution of the work of the Government." *Ante*, at 685. But I cannot find in that need adequate justification for the Court's interpretation of *Bell*

Atlantic Corp. v. *Twombly*, 550 U. S. 544 (2007), and Federal Rule of Civil Procedure 8. The law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and "mindful of the need to vindicate the purpose of the qualified immunity defense," can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. See *Iqbal* v. *Hasty*, 490 F. 3d 143, 158 (2007). A district court, for example, can begin discovery with lower level Government defendants before determining whether a case can be made to allow discovery related to higher level Government officials. See *ibid.* Neither the briefs nor the Court's opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us. For this reason, as well as for the independently sufficient reasons set forth in JUSTICE SOUTER's opinion, I would affirm the Second Circuit.

Syllabus

AT&T CORP. *v.* HULTEEN ET AL.

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

No. 07–543. Argued December 10, 2008—Decided May 18, 2009

Petitioner and its former operating companies (collectively, AT&T) long based pension calculations on a seniority system that relied on years of service minus uncredited leave time, giving less retirement credit for pregnancy absences than for medical leave generally. In response to the ruling in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, that such differential treatment of pregnancy leave was not sex-based discrimination prohibited by Title VII of the Civil Rights Act of 1964, Congress added the Pregnancy Discrimination Act (PDA) to Title VII in 1978 to make it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions," *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 684. On the PDA's effective date, AT&T replaced its old plan with the Anticipated Disability Plan, which provided the same service credit for pregnancy leave as for other disabilities prospectively, but did not make any retroactive adjustments for the pre-PDA personnel policies. Each of the individual respondents therefore received less service credit for her pre-PDA pregnancy leave than she would have for general disability leave, resulting in a reduction in her total employment term and, consequently, smaller AT&T pensions. They, along with their union, also a respondent, filed Equal Employment Opportunity Commission charges alleging discrimination based on sex and pregnancy in violation of Title VII. The EEOC issued each respondent (collectively, Hulteen) a determination letter finding reasonable cause to believe AT&T had discriminated and a right-to-sue letter. Hulteen filed suit in the District Court, which held itself bound by a Ninth Circuit precedent finding a Title VII violation where post-PDA retirement eligibility calculations incorporated pre-PDA accrual rules that differentiated based on pregnancy. The Circuit affirmed.

Held: An employer does not necessarily violate the PDA when it pays pension benefits calculated in part under an accrual rule, applied only pre-PDA, that gave less retirement credit for pregnancy than for medical leave generally. Because AT&T's pension payments accord with a bona fide seniority system's terms, they are insulated from challenge under Title VII § 703(h). Pp. 707–716.

Syllabus

(a) AT&T's benefit calculation rule is protected by § 703(h), which provides: "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of . . . sex." In *Teamsters* v. *United States*, 431 U. S. 324, 356, the Court held that a pre-Title VII seniority system that disproportionately advantaged white, as against minority, employees nevertheless exemplified a bona fide system without any discriminatory terms under § 703(h), where the discrimination resulted from the employer's hiring practices and job assignments. Because AT&T's system must also be viewed as bona fide, *i. e.*, as a system having no discriminatory terms, § 703(h) controls the result here, just as it did in *Teamsters*. This Court held in *Gilbert* that an accrual rule limiting the seniority credit for time taken for pregnancy leave did not unlawfully discriminate on the basis of sex. As a matter of law, at that time, "an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all." 429 U. S., at 136. The only way to conclude that § 703(h) does not protect AT&T's system would be to read the PDA as applying retroactively to recharacterize AT&T's acts as having been illegal when done. This is not a serious possibility. Generally, there is "a presumption against retroactivity [unless] Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 272–273. There is no such clear intent here. Section 706(e)(2)—which details when "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose"—has no application because *Gilbert* unquestionably held that the feature of AT&T's seniority system at issue here was not discriminatory when adopted, let alone intentionally so. Nor can it be argued that because AT&T could have chosen to give post-PDA credit to pre-PDA pregnancy leave when Hulteen retired, its failure to do so was facially discriminatory at that time. If a choice to rely on a favorable statute turned every past differentiation into contemporary discrimination, § 703(h) would never apply. Finally, *Bazemore* v. *Friday*, 478 U. S. 385—in which a pre-Title VII compensation plan giving black employees less pay than whites was held to violate Title VII on its effective date—is inapplicable because the *Bazemore* plan did not involve a seniority system subject to § 703(h) and the employer there failed to eliminate the discriminatory practice when Title VII became law. Pp. 707–715.

(b) A recent § 706(e) amendment making it "an unlawful employment practice . . . when an individual is affected by application of a discrimina-

Syllabus

tory compensation decision or other practice, including each time . . . benefits [are] paid, resulting . . . from such a decision," § 3, 123 Stat. 5–6, does not help Hulteen. AT&T's pre-PDA decision not to award Hulteen service credit for pregnancy leave was not discriminatory, with the consequence that Hulteen has not been "affected by application of a discriminatory compensation decision or other practice." Pp. 715–716.

498 F. 3d 1001, reversed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 716. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post,* p. 717.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Joseph R. Guerra, Virginia A. Seitz,* and *Edward R. Barillari.*

Lisa S. Blatt argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were former *Solicitor General Garre, Acting Assistant Attorney General Becker, Assistant Attorney General Katsas, Dennis J. Dimsey,* and *Dirk C. Phillips.*

Kevin K. Russell argued the cause for respondents. With him on the brief were *Judith E. Kurtz, Mary K. O'Melveny, Noreen Farrell, Debra Smith, Amy Howe, Henry S. Hewitt, Blythe Mickelson,* and *Pamela S. Karlan.**

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*Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Rae T. Vann* and *Ann Elizabeth Reesman;* and for the ERISA Industry Committee by *Caroline M. Brown* and *John M. Vine.*

Briefs of *amici curiae* urging affirmance were filed for AARP by *Jay E. Sushelsky* and *Melvin Radowitz;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Eleanor Smith, Audrey Wiggins, Sarah Crawford,* and *Kathryn Kolbert;* for the National Employment Lawyers Association et al. by *Charlotte Fishman* and *Victoria W. Ni;* for the National Women's Law Center et al. by *Melissa Hart, Marcia D. Greenberger, Jocelyn Samuels,* and *Dina R. Lassow;* and for Caitlin Borgmann et al. by *Suzanne Novak.*

JUSTICE SOUTER delivered the opinion of the Court.

The question is whether an employer necessarily violates the Pregnancy Discrimination Act (PDA), 42 U. S. C. § 2000e(k), when it pays pension benefits calculated in part under an accrual rule, applied only prior to the PDA, that gave less retirement credit for pregnancy leave than for medical leave generally. We hold there is no necessary violation; and the benefit calculation rule in this case is part of a bona fide seniority system under § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(h), which insulates it from challenge.

I

Since 1914, AT&T Corporation (then American Telephone & Telegraph Company) and its Bell System Operating Companies, including Pacific Telephone and Telegraph Company (hereinafter, collectively, AT&T),[1] have provided pensions and other benefits based on a seniority system that relies upon an employee's term of employment, understood

[1] In 1982, a consent decree and modified final judgment (MFJ) were entered to resolve the Government's antitrust suit against American Telephone & Telegraph Company. The MFJ resulted in the breakup of American Telephone & Telegraph and the divestiture of the local Bell System Operating Companies, including Pacific Telephone and Telegraph Company (PT&T). Many employees of the former Bell System Operating Companies became employees of the new AT&T Corporation. The Plan of Reorganization, approved by the United States District Court for the District of Columbia, *United States* v. *Western Elec. Co.*, 569 F. Supp. 1057, aff'd *sub nom. California* v. *United States*, 464 U. S. 1013 (1983), provided that "all employees will carry with them all pre-divestiture Bell System service regardless of the organizational unit or corporation by which they are employed immediately after divestiture." App. 54. Respondents in this case were employed at PT&T. After the divestiture of the Bell Operating Companies in 1984, these women became employees of AT&T Corporation and their service calculations, as computed by PT&T under its accrual rules, were carried over to AT&T Corporation.

as the period of service at the company minus uncredited leave time.[2]

In the 1960s and early to mid-1970s, AT&T employees on "disability" leave got full service credit for the entire periods of absence, but those who took "personal" leaves of absence received maximum service credit of 30 days. Leave for pregnancy was treated as personal, not disability. AT&T altered this practice in 1977 by adopting its Maternity Payment Plan (MPP), entitling pregnant employees to disability benefits and service credit for up to six weeks of leave. If the absence went beyond six weeks, however, it was treated as personal leave, with no further benefits or credit, whereas employees out on disability unrelated to pregnancy continued to receive full service credit for the duration of absence. This differential treatment of pregnancy leave, under both the pre-1977 plan and the MPP, was lawful: in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), this Court concluded that a disability-benefits plan excluding disabilities related to pregnancy was not sex-based discrimination within the meaning of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

In 1978, Congress amended Title VII by passing the PDA, 92 Stat. 2076, 42 U. S. C. § 2000e(k), which superseded *Gilbert* so as to make it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 684 (1983). On April 29, 1979, the effective date of the PDA, AT&T adopted its Anticipated Disability Plan which replaced the MPP and provided service credit for pregnancy leave on the same basis as leave taken for other temporary disabilities. AT&T did not, however,

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[2] AT&T's calculation of a term of employment is a more complicated endeavor, requiring the creation and maintenance of an individual "start date" for each employee, which is adjusted based on the relevant leave policy.

make any retroactive adjustments to the service credit calculations of women who had been subject to the pre-PDA personnel policies.

Four of those women are named respondents in this case. Each of them received less service credit for pregnancy leave than she would have accrued on the same leave for disability: seven months less for Noreen Hulteen; about six months for Eleanora Collet; and about two for Elizabeth Snyder and Linda Porter. Respondents Hulteen, Collet, and Snyder have retired from AT&T; respondent Porter has yet to. If her total term of employment had not been decreased due to her pregnancy leave, each would be entitled to a greater pension benefit.

Eventually, each of the individual respondents and respondent Communications Workers of America (CWA), the collective-bargaining representative for the majority of AT&T's nonmanagement employees, filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of sex and pregnancy in violation of Title VII. In 1998, the EEOC issued a Letter of Determination finding reasonable cause to believe that AT&T had discriminated against respondent Hulteen and "a class of other similarly-situated female employees whose adjusted [commencement of service] date has been used to determine eligibility for a service or disability pension, the amount of pension benefits, and eligibility for certain other benefits and programs, including early retirement offerings." App. 54–55. The EEOC issued a notice of right to sue to each named respondent and the CWA (collectively, Hulteen), and Hulteen filed suit in the United States District Court for the Northern District of California.

On dueling motions for summary judgment, the District Court held itself bound by a prior Ninth Circuit decision, *Pallas* v. *Pacific Bell*, 940 F. 2d 1324 (1991), which found a Title VII violation where post-PDA retirement eligibility calculations incorporated pre-PDA accrual rules that differ-

entiated on the basis of pregnancy. See App. to Pet. for Cert. 121a–122a. The Circuit, en banc, affirmed and held that *Pallas*'s conclusion that "calculation of service credit excluding time spent on pregnancy leave violates Title VII was, and is, correct." 498 F. 3d 1001, 1003 (2007).

The Ninth Circuit's decision directly conflicts with the holdings of the Sixth and Seventh Circuits that reliance on a pre-PDA differential accrual rule to determine pension benefits does not constitute a current violation of Title VII. See *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F. 3d 814 (CA7 2000) (finding no actionable Title VII violation given the existence of a bona fide seniority system); *Leffman* v. *Sprint Corp.*, 481 F. 3d 428 (CA6 2007) (characterizing claim as challenging the continuing effects of past discrimination rather than alleging a current Title VII violation). We granted certiorari in order to resolve this split, 554 U. S. 916 (2008), and now reverse the judgment of the Ninth Circuit.

II

Title VII makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U. S. C. § 2000e–2(a)(1). Generally, a claim under Title VII must be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred," § 2000e–5(e)(1). In this case, Hulteen has identified the challenged practice as applying the terms of AT&T's seniority system to calculate and pay pension benefits to women who took pregnancy leaves before April 29, 1979. She says the claim is timely because the old service credit differential for pregnancy leave was carried forward through the system's calculations so as to produce an effect in the amount of the benefit when payments began.

There is no question that the payment of pension benefits in this case is a function of a seniority system, given the fact

that calculating benefits under the pension plan depends in part on an employee's term of employment. As we have said, "[a] 'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Assn.* v. *Bryant*, 444 U. S. 598, 605–606 (1980) (footnote omitted). Hulteen is also undoubtedly correct that AT&T's personnel policies affecting the calculation of any employee's start date should be considered "ancillary rules" and elements of the system, necessary for it to operate at all, being rules that "define which passages of time will 'count' towards the accrual of seniority and which will not." *Id.*, at 607.

But contrary to Hulteen's position, establishing the continuity of a seniority system whose results depend in part on obsolete rules entailing disadvantage to once-pregnant employees does not resolve this case. Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect to such rules that operated before the PDA. "[S]eniority systems are afforded special treatment under Title VII," *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 81 (1977), reflecting Congress's understanding that their stability is valuable in its own right. Hence, § 703(h):

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U. S. C. § 2000e–2(h).

Benefit differentials produced by a bona fide seniority-based pension plan are permitted unless they are "the result of an intention to discriminate." *Ibid.*[3]

In *Teamsters* v. *United States*, 431 U. S. 324 (1977), advantages of a seniority system flowed disproportionately to white, as against minority, employees, because of an employer's prior discrimination in job assignments. We recognized that this "disproportionate distribution of advantages does in a very real sense operate to freeze the status quo of prior

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[3] Section 701(k) of Title VII provides that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section [703(h)] of this title shall be interpreted to permit otherwise." 42 U. S. C. § 2000e(k). Hulteen contends that, in light of this language, § 703(h) does not apply at all to claims of fringe-benefit discrimination under the PDA. We cannot agree. Hulteen's reading would result in the odd scenario that pregnancy discrimination, alone among all categories of discrimination (race, color, religion, other sex-based claims, and national origin), would receive dispensation from the general application of subsection (h).

A better explanation is that § 701(k) refers only to the final sentence of § 703(h), which reads that "[i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29." 42 U. S. C. § 2000e–2(h). This final sentence of subsection (h), referred to as the Bennett Amendment, served to reconcile the Equal Pay Act of 1963, 77 Stat. 56, 29 U. S. C. § 206(d), with Title VII. See *County of Washington* v. *Gunther*, 452 U. S. 161, 194 (1981) (Rehnquist, J., dissenting). In *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), this Court had concluded that the amendment permitted wage discrimination based on pregnancy. *Id.*, at 144–145. By adding the language, "nothing in section [703(h)] of this title shall be interpreted to permit otherwise," to the PDA, 42 U. S. C. § 2000e(k), Congress wanted to ensure that, in addition to replacing *Gilbert* with a rule that discrimination on the basis of pregnancy is sex discrimination, it foreclosed the possibility that this Court's interpretation of the Bennett Amendment could be construed, going forward, to permit wage discrimination based on pregnancy.

discriminatory employment practices[, b]ut both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them." *Id.*, at 350 (internal quotation marks omitted). "[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Id.*, at 352. The seniority system in *Teamsters* exemplified a bona fide system without any discriminatory terms (the discrimination having occurred in executive action hiring employees and assigning jobs), so that the Court could conclude that the system "did not have its genesis in . . . discrimination, and . . . has been maintained free from any illegal purpose." *Id.*, at 356.

AT&T's system must also be viewed as bona fide, that is, as a system that has no discriminatory terms, with the consequence that subsection (h) controls the result here, just as in *Teamsters.* It is true that in this case the pre-April 29, 1979, rule of differential treatment was an element of the seniority system itself; but it did not taint the system under the terms of subsection (h), because this Court held in *Gilbert* that an accrual rule limiting the seniority credit for time taken for pregnancy leave did not unlawfully discriminate on the basis of sex. As a matter of law, at that time, "an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all." 429 U. S., at 136.[4] Although the PDA would have

[4] *Gilbert* recognized that differential treatment could still represent intentionally discriminatory treatment if pretextual, 429 U. S., at 136, and that a forbidden discriminatory effect could result if a disability-benefits plan produced overall preferential treatment for one sex, *id.*, at 138. Neither theory is advanced here.

In *Nashville Gas Co.* v. *Satty*, 434 U. S. 136 (1977), we reaffirmed our holding in *Gilbert* that Title VII "did not require that greater economic benefits be paid to one sex or the other 'because of their differing roles in "the scheme of human existence."'" *Id.*, at 142 (quoting *Gilbert*, *supra*, at 139, n. 17). But we noted that *Gilbert*'s holding did not extend to "per-

made it discriminatory to continue the accrual policies of the old rule, AT&T amended that rule as of the effective date of the Act, April 29, 1979; the new one, treating pregnancy and other temporary disabilities the same way, remains a part of AT&T's seniority system today.

This account of litigation, legislation, and the evolution of the system's terms is the answer to Hulteen's argument that *Teamsters* supports her position. She correctly points out that a "seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption," 431 U. S., at 346, n. 28, and she would characterize AT&T's seniority system as intentionally discriminatory, on the theory that the accrual rule for pregnancy leave was facially discriminatory from the start. She claims further support from *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187 (1991), in which we said that "explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination," and that such facial discrimination is intentional discrimination even if not based on any underlying malevolence. *Id.*, at 199. Hulteen accordingly claims that the superseded differential affecting current benefits was, and remains, "discriminatory in precisely the way the PDA prohibits," Brief for Respondents 18.

But *Automobile Workers* is not on point. The policy in that case, prohibiting women from working in jobs with lead exposure unless they could show themselves incapable of childbearing, was put in place after the PDA became law and under its terms was facially discriminatory. In this case, however, AT&T's intent when it adopted the pregnancy leave rule (before the PDA) was to give differential treat-

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mit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Satty, supra,* at 142. Cancellation of benefits previously accrued, therefore, was considered facially violative at the time, but such a situation is not presented here.

ment that as a matter of law, as *Gilbert* held, was not gender-based discrimination. Because AT&T's differential accrual rule was therefore a permissible differentiation given the law at the time, there was nothing in the seniority system at odds with the subsection (h) bona fide requirement. The consequence is that subsection (h) is as applicable here as it was in *Teamsters*, and the calculations of credited service that determine pensions are the results of a permissibly different standard under subsection (h) today.[5]

The only way to conclude here that the subsection would not support the application of AT&T's system would be to read the PDA as applying retroactively to recharacterize the acts as having been illegal when done, contra *Gilbert*.[6] But this is not a serious possibility. As we have said:

> "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the coun-

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[5] Although certain Courts of Appeals had previously concluded that treating pregnancy leave less favorably than other disability leave constituted sex discrimination under Title VII, this Court in *Gilbert* clearly rejected that conclusion, 429 U. S., at 147 (Brennan, J., dissenting); see also *id.*, at 162 (STEVENS, J., dissenting). *Gilbert* declared the meaning and scope of sex discrimination under Title VII and held that previous views to the contrary were wrong as a matter of law. And "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 312–313 (1994); see also *id.*, at 313, n. 12. It is therefore to no avail to argue that the pregnancy leave cap was unlawful before *Gilbert* and that the PDA returned the law to its prior state.

[6] In so saying, we assume that § 701(k) has no application, as explained in footnote 3, *supra*. Cf. *post*, at 720–721 (GINSBURG, J., dissenting).

> tervailing benefits." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 272–273 (1994).

There is no such clear intent here, indeed, no indication at all that Congress had retroactive application in mind; the evidence points the other way. Congress provided for the PDA to take effect on the date of enactment, except in its application to certain benefit programs, as to which effectiveness was held back 180 days. Act of Oct. 31, 1978, § 2(b), 92 Stat. 2076, note following 42 U. S. C. § 2000e(k) (1976 ed., Supp. III). The House Report adverted to these benefit schemes:

> "As the *Gilbert* decision permits employers to exclude pregnancy-related coverage from employee benefit plans, [the bill] provides for [a] transition period of 180 days to allow employees *[sic]* to comply with the explicit provisions of this amendment. It is the committee's intention to provide for an orderly and equitable transition, with the least disruption for employers and employees, consistent with the purposes of the bill." H. R. Rep. No. 95–948, p. 8 (1978).

This is the language of prospective intent, not retrospective revision.

Hulteen argues that she nonetheless has a challenge to AT&T's current payment of pension benefits under § 706(e)(2) of Title VII, believing (again mistakenly) that this subsection affects the validity of any arrangement predating the PDA that would be facially discriminatory if instituted today. Brief for Respondents 27–29. Section 706(e)(2) provides that

> "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when

> the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U. S. C. § 2000e–5(e)(2).

But, as the text makes clear, this subsection determines the moments at which a seniority system violates Title VII only if it is a system "adopted for an intentionally discriminatory purpose in violation of this subchapter." As discussed above, the Court has unquestionably held that the feature of AT&T's seniority system at issue was not discriminatory when adopted, let alone intentionally so in violation of this subchapter. That leaves § 706(e)(2) without any application here.

It is equally unsound for Hulteen to argue that when she retired AT&T could have chosen to give post-PDA credit to pre-PDA pregnancy leave, making its failure to do so facially discriminatory at that time.[7] If a choice to rely on a favorable statute turned every past differentiation into contemporary discrimination, subsection (h) would never apply.

Hulteen's remaining argument (as of the time the case was submitted to us) is that our decision in *Bazemore* v. *Friday*, 478 U. S. 385 (1986) *(per curiam)*, is on her side. In *Bazemore*, black employees of the North Carolina Agricultural Extension Service, who received less pay than comparable whites under a differential compensation plan extending back to pre-Title VII segregation, brought suit in 1971 claiming that pay disparities persisted. *Id.*, at 389–391 (Brennan, J., concurring in part). We concluded that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective,

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[7] To the extent Hulteen means to claim, as a factual matter, that the accrual rule was merely advisory, requiring a fresh choice to apply it in the benefit context, she points to nothing in the record supporting such a proposition.

became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Id.*, at 395.

Bazemore has nothing to say here. To begin with, it did not involve a seniority system subject to subsection (h); rather, the employer in *Bazemore* had a racially based pay structure under which black employees were paid less than white employees. Further, after Title VII became law, the employer failed to eliminate the discriminatory practice, even though the new statute had turned what once was legally permissible into something unlawful. *Bazemore* would be on point only if, after the PDA, AT&T continued to apply an unfavorable credit differential for pregnancy leave simply because it had begun to do that before the PDA. AT&T's system, by contrast, provides future benefits based on past, completed events, that were entirely lawful at the time they occurred.

III

We have accepted supplemental briefing after the argument on the possible effect on this case of the recent amendment to § 706(e) of Title VII, adopted in response to *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007), and dealing specifically with discrimination in compensation:

> "For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111–2, § 3, 123 Stat. 5–6.

Hulteen argues that payment of the pension benefits at issue in this case marks the moment at which she "is affected by application of a discriminatory compensation decision or other practice," and she reads the statute as providing that such a "decision or other practice" may not be applied to her disadvantage.

But the answer to this claim is essentially the same as the answer to Hulteen's argument that § 706(e)(2) helps her, *supra*, at 713–714. For the reasons already discussed, AT&T's pre-PDA decision not to award Hulteen service credit for pregnancy leave was not discriminatory, with the consequence that Hulteen has not been "affected by application of a discriminatory compensation decision or other practice." § 3, 123 Stat. 6.

IV

Bona fide seniority systems allow, among other things, for predictable financial consequences, both for the employer who pays the bill and for the employee who gets the benefit. Cf. *Central Laborers' Pension Fund* v. *Heinz*, 541 U. S. 739, 743 (2004) (noting that the central feature of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1001 *et seq.*, is its "object of protecting employees' justified expectations of receiving the benefits their employers promise them"). As § 703(h) demonstrates, Congress recognized the salience of these reliance interests and, where not based upon or resulting from an intention to discriminate, gave them protection. Because the seniority system run by AT&T is bona fide, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE STEVENS, concurring.

Today my appraisal of the Court's decision in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), is the same as that expressed more than 30 years ago in my dissent. I therefore agree with much of what JUSTICE GINSBURG has to say

in this case. Nevertheless, I must accept *Gilbert*'s interpretation of Title VII as having been the governing law until Congress enacted the Pregnancy Discrimination Act. Because this case involves rules that were in force only prior to that Act, I join the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

In *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), this Court held that a classification harmful to women based on pregnancy did not qualify as discrimination "because of . . . sex" prohibited by Title VII of the Civil Rights Act of 1964. 42 U. S. C. §2000e–2(a)(1). Exclusion of pregnancy from an employer's disability benefits plan, the Court ruled, "is not a gender-based discrimination at all." 429 U. S., at 136. See also *id.*, at 138 (describing G. E.'s plan as "facially nondiscriminatory" and without "any gender-based discriminatory effect").[1] In dissent, JUSTICE STEVENS wondered how the Court could come to that conclusion, for "it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.*, at 162.

Prior to *Gilbert*, all Federal Courts of Appeals presented with the question had determined that pregnancy discrimination violated Title VII.[2] Guidelines issued in 1972 by the

[1] The Court's opinion in *Gilbert* extended to Title VII reasoning earlier advanced in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974). In that case, the Court upheld against an equal protection challenge California's disability insurance system, which excluded coverage for disabilities occasioned by normal pregnancy. California's system, the Court noted, did not divide workers according to their sex; instead, it "divide[d] potential recipients into two groups—pregnant women and nonpregnant persons." *Id.*, at 496–497, n. 20.

[2] See *Communications Workers of America* v. *AT&T Co., Long Lines Dept.*, 513 F. 2d 1024 (CA2 1975); *Wetzel* v. *Liberty Mut. Ins. Co.*, 511 F. 2d 199 (CA3 1975), vacated on other grounds and remanded, 424 U. S. 737 (1976); *Gilbert* v. *General Elec. Co.*, 519 F. 2d 661 (CA4 1975), rev'd, 429 U. S. 125 (1976); *Satty* v. *Nashville Gas Co.*, 522 F. 2d 850 (CA6 1975), aff'd in part, vacated in part, and remanded, 434 U. S. 136 (1977); *Holthaus* v.

Equal Employment Opportunity Commission (EEOC or Commission) declared that disadvantageous classifications of employees based on pregnancy-related conditions are "in prima facie violation of title VII." 37 Fed. Reg. 6837. In terms closely resembling the EEOC's current Guideline, see 29 CFR § 1604.10 (2008), the Commission counseled:

> "Written and unwritten employment policies and practices involving . . . the accrual of seniority and other benefits and privileges . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 37 Fed. Reg. 6837.

The history of women in the paid labor force underpinned and corroborated the views of the lower courts and the EEOC. In generations preceding—and lingering long after—the passage of Title VII, that history demonstrates, societal attitudes about pregnancy and motherhood severely impeded women's employment opportunities. See Molnar, "Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America, 12 Mich. J. Gender & L. 163, 170–176 (2005); S. Kamerman, A. Kahn, & P. Kingston, Maternity Policies and Working Women 32–38 (1983).

Compton & Sons, Inc., 514 F. 2d 651 (CA8 1975); *Berg* v. *Richmond Unified School Dist.*, 528 F. 2d 1208 (CA9 1975); *Hutchison* v. *Lake Oswego School Dist. No. 7*, 519 F. 2d 961 (CA9 1975).

For decisions under state human rights laws to the same effect, see, *e. g.*, *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Bd.*, 41 N. Y. 2d 84, 359 N. E. 2d 393 (1976); *Anderson* v. *Upper Bucks Cty. Area Vocational Technical School*, 30 Pa. Commw. 103, 373 A. 2d 126 (1977); *Quaker Oats Co.* v. *Cedar Rapids Human Rights Comm'n*, 268 N. W. 2d 862 (Iowa 1978); *Massachusetts Elec. Co.* v. *Massachusetts Comm'n Against Discrimination*, 375 Mass. 160, 375 N. E. 2d 1192 (1978); *Minnesota Min. & Mfg. Co.* v. *State*, 289 N. W. 2d 396 (Minn. 1979); *Michigan Dept. of Civil Rights ex rel. Jones* v. *Michigan Dept. of Civil Serv.*, 101 Mich. App. 295, 301 N. W. 2d 12 (1980); *Badih* v. *Myers*, 36 Cal. App. 4th 1289, 43 Cal. Rptr. 2d 229 (1995).

Congress swiftly reacted to the *Gilbert* decision. Less than two years after the Court's ruling, Congress passed the Pregnancy Discrimination Act of 1978 (PDA or Act) to overturn *Gilbert* and make plain the legislators' clear understanding that discrimination based on pregnancy *is* discrimination against women.[3] The Act amended Title VII to require that women affected by pregnancy "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U. S. C. § 2000e(k).

The PDA does not require redress for past discrimination. It does not oblige employers to make women whole for the compensation denied them when, prior to the Act, they were placed on pregnancy leave, often while still ready, willing, and able to work, and with no secure right to return to their jobs after childbirth.[4] But the PDA does protect women, from and after April 1979, when the Act became fully effective, against repetition or continuation of pregnancy-based disadvantageous treatment.

Congress interred *Gilbert* more than 30 years ago, but the Court today allows that wrong decision still to hold sway.

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[3] See, *e. g.*, H. R. Rep. No. 95–948, p. 3 (1978) ("[T]he assumption that women will become pregnant and leave the labor force . . . is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.").

[4] For examples of once prevalent restrictions, see *Turner* v. *Utah Dept. of Employment Security*, 423 U. S. 44 (1975) *(per curiam)* (state statute made pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until six weeks after childbirth); *Cleveland Bd. of Ed.* v. *LaFleur*, 414 U. S. 632, 634–635 (1974) (school board rule forced pregnant public school teachers to take unpaid maternity leave five months before the expected date of childbirth, with no guarantee of reemployment). Cf. *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 736–737 (2003) (sex discrimination, Congress recognized, is rooted, primarily, in stereotypes about "women when they are mothers or mothers-to-be" (internal quotation marks omitted)).

The plaintiffs (now respondents) in this action will receive, for the rest of their lives, lower pension benefits than colleagues who worked for AT&T no longer than they did. They will experience this discrimination not simply because of the adverse action to which they were subjected pre-PDA. Rather, they are harmed today because AT&T has refused fully to heed the PDA's core command: Hereafter, for "*all* employment-related purposes," disadvantageous treatment "on the basis of pregnancy, childbirth, or related medical conditions" must cease. 42 U. S. C. § 2000e(k) (emphasis added). I would hold that AT&T committed a current violation of Title VII when, post-PDA, it did not totally discontinue reliance upon a pension calculation premised on the notion that pregnancy-based classifications display no gender bias.

I

Enacted as an addition to the section defining terms used in Title VII, the PDA provides:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." 42 U. S. C. § 2000e(k).

The text of the Act, this Court has acknowledged, "unambiguously expressed [Congress'] disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983). "Proponents of the [PDA]," the Court observed, "repeatedly emphasized that the Supreme Court had erroneously interpreted congressional intent and that amending legislation was necessary to reestablish the princi-

ples of Title VII law as they had been understood prior to the *Gilbert* decision." *Id.*, at 679. See also *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272, 284–285 (1987) (explaining that "the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*," while "the second clause . . . illustrate[s] how discrimination against pregnancy is to be remedied"). Cf. *Newport News*, 462 U. S., at 694 (Rehnquist, J., dissenting) (criticizing the Court for concluding that the PDA "renders all of *Gilbert* obsolete").

Today's case presents a question of time. As the Court comprehends the PDA, even after the effective date of the Act, lower pension benefits perpetually can be paid to women whose pregnancy leaves predated the PDA. As to those women, the Court reasons, the disadvantageous treatment remains as *Gilbert* declared it to be: "facially nondiscriminatory," and without "any gender-based discriminatory effect," 429 U. S., at 138. See *ante*, at 710.

There is another way to read the PDA, one better attuned to Congress' "unambiguou[s] . . . disapproval of both the holding and the reasoning" in *Gilbert*. *Newport News*, 462 U. S., at 678. On this reading, the Act calls for an immediate end to any pretense that classification on the basis of pregnancy can be "facially nondiscriminatory." While the PDA does not reach back to redress discrimination women encountered before Congress overruled *Gilbert*, the Act instructs employers forthwith to cease and desist: From and after the PDA's effective date, classifications treating pregnancy disadvantageously must be recognized, "for all employment-related purposes," including pension payments, as discriminatory both on their face and in their impact. So comprehended, the PDA requires AT&T to pay Noreen Hulteen and others similarly situated pension benefits untainted by pregnancy-based discrimination.

II

The Court's rejection of plaintiffs' claims to pension benefits undiminished by discrimination "because of [their] sex,"

42 U. S. C. § 2000e–2(h), centers on § 703(h) of Title VII, as construed by this Court in *Teamsters* v. *United States*, 431 U. S. 324 (1977). See *ante*, at 707–711. Section 703(h) permits employers "to apply different standards of compensation . . . pursuant to a bona fide seniority . . . system." 42 U. S. C. § 2000e–2(h). Congress enacted § 703(h), *Teamsters* explained, to "exten[d] a measure of immunity" to seniority systems even when they "operate to 'freeze' the status quo of prior discriminatory employment practices." 431 U. S., at 349–350 (quoting *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971)).

Teamsters involved a seniority system attacked under Title VII as perpetuating race-based discrimination. Minority group members ranked low on the seniority list because, pre-Title VII, they were locked out of the job category in question. But the seniority system itself, the Court reasoned, "did not have its genesis in . . . discrimination," contained no discriminatory terms, and applied "equally to all races and ethnic groups," 431 U. S., at 355–356. Therefore, the Court concluded, § 703(h) sheltered the system despite its adverse impact on minority group members only recently hired for, or allowed to transfer into, more desirable jobs. See *id.*, at 356.

This case differs from *Teamsters* because AT&T's seniority system itself was infected by an overt differential. Cf. *ante*, at 710 ("[R]ule of differential treatment was an element of the seniority system itself . . . ."). One could scarcely maintain that AT&T's scheme was "neutral on [its] face and in intent," discriminating against women only "in effect." Cf. *Teamsters*, 431 U. S., at 349. Surely not a term fairly described as "equally [applicable] to all," *id.*, at 355, AT&T's prescription regarding pregnancy leave would gain no immunity under § 703(h) but for this Court's astonishing declaration in *Gilbert:* "[E]xclusion of pregnancy from a disability-benefits plan providing general coverage," the Court decreed, "[was] not a gender-based discrimination at all." 429 U. S., at 136. See *ante*, at 710 (because of *Gilbert*,

AT&T's disadvantageous treatment of pregnancy leave "did not taint the system under the terms of [§ 703(h)]").

Were the PDA an ordinary instance of legislative revision by Congress in response to this Court's construction of a statutory text, I would not dissent from today's decision. But Congress made plain its view that *Gilbert* was not simply wrong about the character of a classification that treats leave necessitated by pregnancy and childbirth disadvantageously. In disregarding the opinions of other courts, see *supra*, at 717–718, n. 2, of the agency that superintends enforcement of Title VII, see *supra*, at 717–718,[5] and, most fundamentally, the root cause of discrimination against women in the paid labor force, this Court erred egregiously. Congress did not provide a remedy for pregnancy-based discrimination already experienced before the PDA became effective. I am persuaded by the Act's text and legislative history, however, that Congress intended no continuing reduction of women's compensation, pension benefits included, attributable to their placement on pregnancy leave.

III

A few further considerations influence my dissenting view. Seeking equal treatment only from and after the PDA's effective date, plaintiffs present modest claims. As the Court observes, they seek service credit, for pension benefit purposes, for the periods of their pregnancy leaves. For the named plaintiffs, whose claims are typical, the uncounted leave days are these: "seven months . . . for Noreen Hulteen;

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[5] The Equal Employment Opportunity Commission's (EEOC) current compliance manual counsels: "While the denial of service credit to women on maternity leave was not unlawful when [the charging party] took her leave . . . , the employer's decision to incorporate that denial of service credit in calculating seniority [post-PDA] is discriminatory." 2 EEOC Compliance Manual § 3, Pt. III(B), p. 627:0023 (effective Oct. 3, 2000). EEOC compliance manuals, this Court has recognized, "reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Federal Express Corp.* v. *Holowecki*, 552 U. S. 389, 399 (2008) (quoting *Bragdon* v. *Abbott*, 524 U. S. 624, 642 (1998)).

about six months for Eleanora Collet; and about two for Elizabeth Snyder and Linda Porter." *Ante*, at 706. See also 498 F. 3d 1001, 1004 (CA9 2007) (en banc) (case below). Their demands can be met without disturbing settled expectations of other workers, the core concern underlying the shelter § 703(h) provides for seniority systems. See *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 766, 773, and n. 33 (1976) ("'benefit' seniority," unlike "'competitive status' seniority," does not conflict with economic interests of other employees).

Furthermore, as Judge Rymer explained in her opinion dissenting from the Ninth Circuit's initial panel opinion, 441 F. 3d 653, 665–666 (2006), the relief plaintiffs request is not retroactive in character. Plaintiffs request no backpay or other compensation for past injury. They seek pension benefits, now and in the future, equal to the benefits received by others employed for the same length of time. The actionable conduct of which they complain is AT&T's denial of equal benefits to plaintiffs "in the post-PDA world." *Id.*, at 667.

Nor does it appear that equal benefits for plaintiffs during their retirement years would expose AT&T to an excessive or unmanageable cost. The plaintiffs' class is not large; it comprises only women whose pregnancy leaves predated April 29, 1979 and whose employment continued long enough for their pensions to vest. The periods of service involved are short—several weeks or some months, not years. And the cost of equal treatment would be spread out over many years, as eligible women retire.

IV

Certain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens. This Court so recognized in *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721 (2003). *Hibbs* rejected challenges, under the Eleventh and

Fourteenth Amendments, to the Family and Medical Leave Act of 1993, 107 Stat. 6, 29 U. S. C. § 2601 *et seq.*, as applied to state employees. The Court's opinion featured Congress' recognition that,

> "[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be." Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986) (quoted in *Hibbs*, 538 U. S., at 736).[6]

Several of our own decisions, the opinion in *Hibbs* acknowledged, 538 U. S., at 729, exemplified the once "prevailing ideology." As prime illustrations, the Court cited *Bradwell* v. *State*, 16 Wall. 130 (1873);[7] *Muller* v. *Oregon*, 208 U. S. 412 (1908);[8] *Goesaert* v. *Cleary*, 335 U. S. 464 (1948);[9] and

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[6] See also H. R. Rep. No. 95–948, pp. 6–7 ("Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant.").

[7] *Bradwell* upheld a State's exclusion of women from the practice of law. In an exorbitant concurring opinion, Justice Bradley wrote that "the female sex [is] evidently unfi[t] . . . for many of the occupations of civil life." 16 Wall., at 141. He elaborated: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Ibid.*

[8] *Muller* upheld a State's hours-of-work limitation applicable to women only. "[T]o preserve the strength and vigor of the race," the Court observed, "the physical well-being of woman becomes an object of public interest and care." 208 U. S., at 421. Cf. *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187, 211 (1991) ("Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities.").

[9] *Goesaert* upheld a state law prohibiting women from working as bartenders (unless the woman's husband or father owned the tavern).

Hoyt v. *Florida*, 368 U. S. 57 (1961).[10] The *Hibbs* opinion contrasted *Muller*, *Goesaert*, and *Hoyt* with more recent opinions: Commencing in 1971, the Court had shown increasing awareness that traditional sex-based classifications confined or depressed women's opportunities. 538 U. S., at 728–730. Representative of the jurisprudential change, *Hibbs* cited *Reed* v. *Reed*, 404 U. S. 71 (1971);[11] *Frontiero* v. *Richardson*, 411 U. S. 677 (1973);[12] *Craig* v. *Boren*, 429 U. S. 190 (1976);[13] and *United States* v. *Virginia*, 518 U. S. 515 (1996).[14]

Gilbert is aberrational not simply because it placed outside Title VII disadvantageous treatment of pregnancy rooted in "stereotype-based beliefs about the allocation of family duties," *Hibbs*, 538 U. S., at 730; *Gilbert* also advanced the strange notion that a benefits classification excluding some women ("pregnant women") is not sex based because other women are among the favored class ("nonpregnant persons").[15] The very first Title VII sex-discrimination case heard by the Court, *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) *(per curiam)*, however, rejected similar reasoning. At issue in *Phillips* was an employer's refusal to

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[10] *Hoyt* sustained a state law exempting all women from the obligation to serve on juries.

[11] *Reed* invalidated a state law that preferred males to females for appointment as estate administrators.

[12] *Frontiero* extended to married female members of the uniformed services spousal benefits granted by statute automatically only to male members.

[13] *Craig* held that young men were entitled to purchase 3.2% beer at the same age as young women.

[14] Virginia, the Court held, could not maintain the Virginia Military Institute as an all-male college without offering women a genuinely equal educational opportunity. For a fuller account of the Court's decisions on the constitutionality of gender-based classifications, see *Virginia*, 518 U. S., at 531–534.

[15] The terms "pregnant women" and "nonpregnant persons" first appeared in *Geduldig*, 417 U. S., at 496–497, n. 20. See *supra*, at 717, n. 1. *Gilbert* repeated the terms, quoting the footnote in *Geduldig*, 429 U. S., at 135.

hire mothers of pre-school-age children. *Phillips* yielded a *per curiam* opinion recognizing that Title VII applies to classifications disadvantageous to some, but not most, women. See, *e. g.*, *Phillips* v. *Martin Marietta Corp.*, 416 F. 2d 1257, 1262 (CA5 1969) (Brown, C. J., dissenting from denial of en banc review) ("A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done."); *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (CA7) (refusal to employ married women violates Title VII), cert. denied, 404 U. S. 991 (1971).[16]

Grasping the connection *Gilbert* failed to make, a District Court opinion pre-*Gilbert*, *Wetzel* v. *Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (WD Pa. 1974), published this deft observation. In response to an employer's argument that its disadvantageous maternity leave and pregnancy disability income protection policies were not based on sex, the court commented: "[I]t might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; 'If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind.'" *Id.*, at 1157.

Congress put the Court back on track in 1978 when it amended Title VII to repudiate *Gilbert*'s holding and reasoning. See *Newport News*, 462 U. S., at 678; *California Fed.*,

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[16] See also the EEOC's Guideline, initially published in 1965, and now codified in 29 CFR § 1604.4 (2008):

"The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex." 30 Fed. Reg. 14928 (1965).

479 U. S., at 284–285; *supra*, at 720–721.[17] Congress' swift and strong repudiation of *Gilbert*, the Court today holds, does not warrant any redress for the plaintiffs in this case. They must continue to experience the impact of their employer's discriminatory—but, for a short time, *Gilbert*-blessed—plan. That outcome is far from inevitable. It is at least reasonable to read the PDA to say, from and after the effective date of the Act, no woman's pension payments are to be diminished by the pretense that pregnancy-based discrimination displays no gender bias.

I would construe the Act to embrace plaintiffs' complaint, and would explicitly overrule *Gilbert* so that the decision can generate no more mischief.

* * *

For the reasons stated, I would affirm the Ninth Circuit's judgment.

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[17] For critical commentary on *Gilbert* and its forerunner, *Geduldig* v. *Aiello*, see, *e. g.*, Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. L. Rev. 1532, 1551–1566 (1974); Eskridge, America's Statutory "constitution," 41 U. C. D. L. Rev. 1, 39–40, and n. 175 (2007); Karst, The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 54, n. 304 (1977); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 983–984, and nn. 107–109 (1984); Roelofs, Sex Discrimination and Insurance Planning: The Rights of Pregnant Men and Women Under *General Electric Co.* v. *Gilbert*, 22 St. Louis U. L. J. 101, 120–123 (1978); Schwartz, Equalizing Pregnancy: The Birth of a Super-Statute 33–57 (2005), http://lsr.nellco.org/yale/ylsspps/papers/41 (as visited May 14, 2009, and in Clerk of Court's case file); Siegel, Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 268–272 (1992); Siegel, You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in *Hibbs*, 58 Stan. L. Rev. 1871, 1873, 1878, 1891–1893 (2006); Taub & Williams, Will Equality Require More Than Assimilation, Accommodation or Separation From the Existing Social Structure? 37 Rutgers L. Rev. 825, 832–836 (1985).

Syllabus

HAYWOOD *v.* DROWN ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 07–10374. Argued December 3, 2008—Decided May 26, 2009

Believing that damages suits filed by prisoners against state correction officers were largely frivolous and vexatious, New York passed Correction Law § 24, which divested state courts of general jurisdiction of their jurisdiction over such suits, including those filed under 42 U. S. C. § 1983, and replaced those claims with the State's preferred alternative. Thereunder, a prisoner will have his claim against a correction officer dismissed for want of jurisdiction and will be left to pursue a damages claim against the State in the Court of Claims, a court of limited jurisdiction in which the prisoner will not be entitled to attorney's fees, punitive damages, or injunctive relief. Petitioner filed two § 1983 damages actions against correction employees in state court. Finding that it lacked jurisdiction under Correction Law § 24, the trial court dismissed the actions. Affirming, the State Court of Appeals rejected petitioner's claim that the state statute's jurisdictional limitation violated the Supremacy Clause. It reasoned that because that law treats state and federal damages actions against correction officers equally—*i. e.*, neither can be brought in New York courts—it was a neutral rule of judicial administration and thus a valid excuse for the State's refusal to entertain the federal cause of action.

Held: Correction Law § 24, as applied to § 1983 claims, violates the Supremacy Clause. Pp. 734–742.

(a) Federal and state law "together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are . . . courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin* v. *Houseman*, 93 U. S. 130, 136–137. Both state and federal courts have jurisdiction over § 1983 suits. So strong is the presumption of concurrency that it is defeated only when Congress expressly ousts state courts of jurisdiction, see, *e. g.*, *id.*, at 136; or "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts," *Howlett* v. *Rose*, 496 U. S. 356, 372. As to whether a state law qualifies as such a neutral rule, States retain substantial leeway to establish the contours of their judicial systems, but lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies. Whatever its merits, New York's policy of shielding correction officers from liability when sued for damages arising out of conduct per-

formed in the scope of their employment is contrary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages. "A State may not . . . relieve congestion in its courts by declaring a whole category of federal claims to be frivolous." *Id.*, at 380. Pp. 734–737.

(b) The New York Court of Appeals' holding was based on the misunderstanding that Correction Law § 24's equal treatment of federal and state claims would guarantee that the statute would pass constitutional muster. Although the absence of discrimination is essential to this Court's finding a state law neutral, nondiscrimination alone is not sufficient to guarantee that a state law will be deemed neutral. In addition to this misplaced reliance on equality, respondents mistakenly treat this case as implicating the "great latitude [States enjoy] to establish the structure and jurisdiction of their own courts." *Howlett*, 496 U. S., at 372. However, this Court need not decide whether Congress can compel a State to offer a forum, otherwise unavailable under state law, to hear § 1983 suits, because New York has courts of general jurisdiction that routinely sit to hear analogous § 1983 actions. Pp. 737–742.

9 N. Y. 3d 481, 881 N. E. 2d 180, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined as to Part III, *post*, p. 742.

Jason E. Murtagh argued the cause for petitioner. With him on the briefs was *Nory Miller*.

Barbara D. Underwood, Solicitor General of New York, argued the cause for respondents. With her on the brief were *Andrew M. Cuomo*, Attorney General, *Andrea Oser*, Deputy Solicitor General, *Nancy A. Spiegel*, Senior Assistant Solicitor General, and *Robert M. Goldfarb*, Assistant Solicitor General.*

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*Briefs of *amici curiae* urging reversal were filed for Prisoners' Legal Services of New York et al. by *Karen Murtagh-Monks* and *John Boston;* and for Professors of Constitutional Law and of Federal Jurisdiction by *Daniel F. Kolb*, and by *David L. Shapiro*, *Judith Resnik*, *Lauren Kay Robel*, and *Steven H. Steinglass*, all *pro se*.

JUSTICE STEVENS delivered the opinion of the Court.

In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to 42 U. S. C. § 1983, the statute that creates a remedy for violations of federal rights committed by persons acting under color of state law.[1] While that rule is generally applicable to New York's supreme courts—the State's trial courts of general jurisdiction—New York's Correction Law § 24 divests those courts of jurisdiction over § 1983 suits that seek money damages from correction officers. New York thus prohibits the trial courts that generally exercise jurisdiction over § 1983 suits brought against other state officials from hearing virtually all such suits brought against state correction officers. The question presented is whether that exceptional treatment of a limited category of § 1983 claims is consistent with the Supremacy Clause of the United States Constitution.[2]

I

Petitioner, an inmate in New York's Attica Correctional Facility, commenced two § 1983 actions against several correction employees alleging that they violated his civil rights

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[1] Section 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983, provides in relevant part:

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

[2] The Supremacy Clause, Art. VI, cl. 2, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

in connection with three prisoner disciplinary proceedings and an altercation. Proceeding *pro se*, petitioner filed his claims in State Supreme Court and sought punitive damages and attorney's fees. The trial court dismissed the actions on the ground that, under N. Y. Correct. Law Ann. § 24 (West 1987) (hereinafter Correction Law § 24), it lacked jurisdiction to entertain any suit arising under state or federal law seeking money damages from correction officers for actions taken in the scope of their employment. The intermediate appellate court summarily affirmed the trial court. 35 App. Div. 3d 1290, 826 N. Y. S. 2d 542 (2006).

The New York Court of Appeals, by a 4-to-3 vote, also affirmed the dismissal of petitioner's damages action. The Court of Appeals rejected petitioner's argument that Correction Law § 24's jurisdictional limitation interfered with § 1983 and therefore ran afoul of the Supremacy Clause of the United States Constitution. The majority reasoned that, because Correction Law § 24 treats state and federal damages actions against correction officers equally (that is, neither can be brought in New York courts), the statute should be properly characterized as a "neutral state rule regarding the administration of the courts" and therefore a "valid excuse" for the State's refusal to entertain the federal cause of action. 9 N. Y. 3d 481, 487, 881 N. E. 2d 180, 183, 184 (2007) (quoting *Howlett* v. *Rose*, 496 U. S. 356, 369, 372 (1990); internal quotation marks omitted). The majority understood our Supremacy Clause precedents to set forth the general rule that so long as a State does not refuse to hear a federal claim for the "sole reason that the cause of action arises under federal law," its withdrawal of jurisdiction will be deemed constitutional. 9 N. Y. 3d, at 488, 881 N. E. 2d, at 184. So read, discrimination *vel non* is the focal point of Supremacy Clause analysis.

In dissent, Judge Jones argued that Correction Law § 24 is not a neutral rule of judicial administration. Noting that the State's trial courts handle all other § 1983 damages ac-

tions, he concluded that the State had created courts of competent jurisdiction to entertain § 1983 suits. In his view, "once a state opens its courts to hear section 1983 actions, it may not selectively exclude section 1983 actions by denominating state policies as jurisdictional." *Id.*, at 497, 881 N. E. 2d, at 191.

Recognizing the importance of the question decided by the New York Court of Appeals, we granted certiorari. 554 U. S. 902 (2008). We now reverse.

II

Motivated by the belief that damages suits filed by prisoners against state correction officers were by and large frivolous and vexatious, New York passed Correction Law § 24.[3] The statute employs a two-step process to strip its courts of jurisdiction over such damages claims and to replace those claims with the State's preferred alternative. The provision states in full:

> "1. No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of employment and in the discharge of the duties by such officer or employee.
>
> "2. Any claim for damages arising out of any act done or the failure to perform any act within the scope of

[3] The New York attorney general described Correction Law § 24 as "further[ing] New York's legitimate interest in minimizing the disruptive effect of prisoner damages claims against correction employees, many of which are frivolous and vexatious." Brief in Opposition 10; see also *Arteaga* v. *State*, 72 N. Y. 2d 212, 219, 527 N. E. 2d 1194, 1198 (1988) ("In carrying out their duties relating to security and discipline in the difficult and sometimes highly stressful prison environment, correction employees . . . should not be inhibited because their conduct could be the basis of a damage claim").

> employment and in the discharge of the duties of any officer or employee of the department shall be brought and maintained in the court of claims as a claim against the state."

Thus, under this scheme, a prisoner seeking damages from a correction officer will have his claim dismissed for want of jurisdiction and will be left, instead, to pursue a claim for damages against an entirely different party (the State) in the Court of Claims—a court of limited jurisdiction.[4] See N. Y. Const., Art. VI, § 9; N. Y. Ct. Clms. Law Ann. § 9 (West 1989) (hereinafter Court of Claims Act).

For prisoners seeking redress, pursuing the Court of Claims alternative comes with strict conditions. In addition to facing a different defendant, plaintiffs in that court are not provided with the same relief, or the same procedural protections, made available in § 1983 actions brought in state courts of general jurisdiction. Specifically, under New York law, plaintiffs in the Court of Claims must comply with a 90-day notice requirement, Court of Claims Act § 9; are not entitled to a jury trial, § 12; have no right to attorney's fees, § 27; and may not seek punitive damages or injunctive relief, *Sharapata* v. *Town of Islip*, 56 N. Y. 2d 332, 334, 437 N. E. 2d 1104, 1105 (1982).

We must decide whether Correction Law § 24, as applied to § 1983 claims, violates the Supremacy Clause.

III

This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law "together form one sys-

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[4] Although the State has waived its sovereign immunity from liability by allowing itself to be sued in the Court of Claims, a plaintiff seeking damages against the State in that court cannot use § 1983 as a vehicle for redress because a State is not a "person" under § 1983. See *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 66 (1989).

tem of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin* v. *Houseman*, 93 U. S. 130, 136–137 (1876); see *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 222 (1916); The Federalist No. 82, p. 132 (E. Bourne ed. 1947, Book II) (A. Hamilton) ("[T]he inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited"). Although § 1983, a Reconstruction-era statute, was passed "to interpose the federal courts between the States and the people, as guardians of the people's federal rights," *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972), state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law, see *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 506–507 (1982) (canvassing the legislative debates of the 1871 Congress and noting that "many legislators interpreted [§ 1983] to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief"); *Maine* v. *Thiboutot*, 448 U. S. 1, 3, n. 1 (1980).

So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, see *Bombolis*, 241 U. S., at 221; *Claflin*, 93 U. S., at 136; and second, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts," *Howlett*, 496 U. S., at 372. Focusing on the latter circumstance, we have emphasized that only a neutral jurisdictional rule will be deemed a "valid excuse" for departing from the default assumption that "state courts have inherent authority, and are thus presumptively competent, to adjudi-

cate claims arising under the laws of the United States." *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990).

In determining whether a state law qualifies as a neutral rule of judicial administration, our cases have established that a State cannot employ a jurisdictional rule "to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett*, 496 U. S., at 371. In other words, although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies. "The suggestion that [an] act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist." *Second Employers' Liability Cases*, 223 U. S. 1, 57 (1912).

It is principally on this basis that Correction Law § 24 violates the Supremacy Clause. In passing Correction Law § 24, New York made the judgment that correction officers should not be burdened with suits for damages arising out of conduct performed in the scope of their employment. Because it regards these suits as too numerous or too frivolous (or both), the State's longstanding policy has been to shield this narrow class of defendants from liability when sued for damages.[5] The State's policy, whatever its merits, is con-

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[5] In many respects, Correction Law § 24 operates more as an immunity-from-damages provision than as a jurisdictional rule. Indeed, the original version of the statute gave correction officers qualified immunity, providing that no officer would be "liable for damages if he shall have acted in good faith, with reasonable care and upon probable cause." N. Y. Correct. Law § 6–b (McKinney Supp. 1947). And, more recently, a state legislative proposal seeking to extend Correction Law § 24's scheme to other state employees explained that its purpose was to grant "the same immunity from civil damage actions as all other State employees who work in the prisons." App. 85.

In *Howlett* v. *Rose*, 496 U. S. 356 (1990), we considered the question whether a Florida school board could assert a state-law immunity defense

trary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages. As we have unanimously recognized, "[a] State may not . . . relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make." *Howlett*, 496 U. S., at 380; *Burnett* v. *Grattan*, 468 U. S. 42, 55 (1984) (rejecting as "manifestly inconsistent with the central objective of the Reconstruction–Era civil rights statutes" the judgment "that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing employees ready access to a forum to resolve valid claims"). That New York strongly favors a rule shielding correction officers from personal damages liability and substituting the State as the party responsible for compensating individual victims is irrelevant. The State cannot condition its enforcement of federal law on the demand that those individuals whose conduct federal law seeks to regulate must nevertheless escape liability.

IV

While our cases have uniformly applied the principle that a State cannot simply refuse to entertain a federal claim based on a policy disagreement, we have yet to confront a statute like New York's that registers its dissent by divest-

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in a § 1983 action brought in state court when the defense would not have been available if the action had been brought in federal court. We unanimously held that the State's decision to extend immunity "over and above [that which is] already provided in § 1983 . . . directly violates federal law," and explained that the "elements of, and the defenses to, a federal cause of action are defined by federal law." *Id.*, at 375; *Owen* v. *Independence*, 445 U. S. 622, 647, n. 30 (1980); see also R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1122 (5th ed. 2003) ("Federal law governs the immunity in [§ 1983] actions, even when brought against state officials"). Thus, if Correction Law § 24 were understood as offering an immunity defense, *Howlett* would compel the conclusion that it violates the Supremacy Clause.

ing its courts of jurisdiction over a disfavored federal claim in addition to an identical state claim. The New York Court of Appeals' holding was based on the misunderstanding that this equal treatment of federal and state claims rendered Correction Law § 24 constitutional. 9 N. Y. 3d, at 489, 881 N. E. 2d, at 185 ("Put simply, because Correction Law § 24 does not treat section 1983 claims differently than it treats related state law causes of action, the Supremacy Clause is not offended"). To the extent our cases have created this misperception, we now make clear that equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action.

Respondents correctly observe that, in the handful of cases in which this Court has found a valid excuse, the state rule at issue treated state and federal claims equally. In *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 (1929), we upheld a state law that granted state courts discretion to decline jurisdiction over state and federal claims alike when neither party was a resident of the State. Later, in *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), a city court dismissed an action brought under the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.*, for want of jurisdiction because the cause of action arose outside the court's territorial jurisdiction. We upheld the dismissal on the ground that the State's venue laws were not being applied in a way that discriminated against the federal claim. 324 U. S., at 123. In a third case, *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1 (1950), we held that a State's application of the *forum non conveniens* doctrine to bar adjudication of a FELA case brought by nonresidents was constitutionally sound as long as the policy was enforced impartially. *Id.*, at 4. And our most recent decision finding a valid excuse, *Johnson* v. *Fankell*, 520 U. S. 911 (1997), rested largely on the fact that Idaho's rule limiting interlocutory jurisdiction did not discriminate against § 1983 actions. See *id.*, at 918.

Although the absence of discrimination is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear. As we made clear in *Howlett*, "[t]he fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U. S., at 381. Ensuring equality of treatment is thus the beginning, not the end, of the Supremacy Clause analysis.

In addition to giving too much weight to equality of treatment, respondents mistakenly treat this case as implicating the "great latitude [States enjoy] to establish the structure and jurisdiction of their own courts." *Id.*, at 372. Although Correction Law § 24 denies state courts authority to entertain damages actions against correction officers, this case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983. The State of New York has made this inquiry unnecessary by creating courts of general jurisdiction that routinely sit to hear analogous § 1983 actions. New York's constitution vests the state supreme courts with general original jurisdiction, N. Y. Const., Art. VI, § 7(a), and the "inviolate authority to hear and resolve all causes in law and equity," *Pollicina* v. *Misericordia Hospital Medical Center*, 82 N. Y. 2d 332, 339, 624 N. E. 2d 974, 977 (1993). For instance, if petitioner had attempted to sue a police officer for damages under § 1983, the suit would be properly adjudicated by a state supreme court. Similarly, if petitioner had sought declaratory or injunctive relief against a correction officer, that suit would be heard in a state supreme court. It is only a particular species of

suits—those seeking damages relief against correction officers—that the State deems inappropriate for its trial courts.[6]

We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.[7] A State's authority to organize its courts,

[6] While we have looked to a State's "common-law tort analogues" in deciding whether a state procedural rule is neutral, see *Felder* v. *Casey*, 487 U. S. 131, 146, n. 3 (1988), we have never equated "analogous claims" with "identical claims." Instead, we have searched for a similar claim under state law to determine whether a State has established courts of adequate and appropriate jurisdiction capable of hearing a § 1983 suit. See *Testa* v. *Katt*, 330 U. S. 386, 388, 394 (1947); *Martinez* v. *California*, 444 U. S. 277, 283–284, n. 7 (1980) ("[W]here the same *type* of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim" (emphasis added)). Section 1983 damages claims against other state officials and equitable claims against correction officers are both sufficiently analogous to petitioner's § 1983 claims.

[7] The dissent's contrary view is based on its belief that "States have unfettered authority to determine whether their local courts may entertain a federal cause of action." *Post*, at 749 (opinion of THOMAS, J.). But this theory of the Supremacy Clause was raised and squarely rejected in *Howlett*. Respondents in that case "argued that a federal court has no power to compel a state court to entertain a claim over which the state court has no jurisdiction as a matter of state law." 496 U. S., at 381; see also Brief for National Association of Counties et al. as *Amici Curiae* in *Howlett* v. *Rose*, O. T. 1989, No. 89–5383, pp. 11–13 ("[S]tate courts are under no obligation to disregard even-handed jurisdictional limitations that exclude both state and federal claims"). We declared that this argument had "no merit" and explained that it ignored other provisions of the Constitution, including the Full Faith and Credit Clause and the Privileges and Immunities Clause, which compel States to open their courts to causes of action over which they would normally lack jurisdiction. See 496 U. S., at 381–382; see also *Hughes* v. *Fetter*, 341 U. S. 609, 611 (1951) (interpreting the Full Faith and Credit Clause and concluding that a State cannot "escape [its] constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent"); *Angel* v. *Bullington*, 330 U. S. 183, 188 (1947) (noting that the Constitution may "fetter the freedom of a State to deny access to its courts howsoever much it may

while considerable, remains subject to the strictures of the Constitution. See, *e. g.*, *McKnett* v. *St. Louis & San Francisco R. Co.*, 292 U. S. 230, 233 (1934). We have never treated a State's invocation of "jurisdiction" as a trump that ends the Supremacy Clause inquiry, see *Howlett*, 496 U. S., at 382–383, and we decline to do so in this case. Because New York's supreme courts generally have personal jurisdiction over the parties in § 1983 suits brought by prisoners against correction officers and because they hear the lion's share of all other § 1983 actions, we find little concerning "power over the person and competence over the subject matter" in Correction Law § 24. *Id.*, at 381; see *id.*, at 378–379 (conducting a similar analysis and concluding that the Florida courts of general jurisdiction were "fully competent to provide the remedies [§ 1983] requires").[8]

Accordingly, the dissent's fear that "no state jurisdictional rule will be upheld as constitutional" is entirely unfounded. *Post*, at 769–770, n. 10. Our holding addresses only the unique scheme adopted by the State of New York—a law designed to shield a particular class of defendants (correction

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regard such withdrawal of jurisdiction 'the adjective law of the State', or the exercise of its right to regulate 'the practice and procedure' of its courts"). We saw no reason to treat the Supremacy Clause differently. *Howlett*, 496 U. S., at 382–383. Thus, to the extent the dissent resurrects this argument, we again reject it.

[8] The dissent's proposed solution would create a blind spot in the Supremacy Clause. If New York had decided to employ a procedural rule to burden the enforcement of federal law, the dissent would find the scheme unconstitutional. Yet simply because New York has decided to impose an even greater burden on a federal cause of action by selectively withdrawing the jurisdiction of its courts, the dissent detects no constitutional violation. Thus, in the dissent's conception of the Supremacy Clause, a State could express its disagreement with (and even open hostility to) a federal cause of action, declare a desire to thwart its enforcement, and achieve that goal by removing the disfavored category of claims from its courts' jurisdiction. If this view were adopted, the lesson of our precedents would be that other States with unconstitutionally burdensome procedural rules did not go far enough "to avoid the obligation to enforce federal law." *Howlett*, 496 U. S., at 381.

officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners). Based on the belief that damages suits against correction officers are frivolous and vexatious, see *supra*, at 733, n. 3, Correction Law § 24 is effectively an immunity statute cloaked in jurisdictional garb. Finding this scheme unconstitutional merely confirms that the Supremacy Clause cannot be evaded by formalism.[9]

V

The judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO join as to Part III, dissenting.

The Court holds that New York Correction Law Annotated § 24, which divests New York's state courts of subject-matter jurisdiction over suits seeking money damages from correction officers, violates the Supremacy Clause of the Constitution, Art. VI, cl. 2, because it requires the dismissal of federal actions brought in state court under 42 U. S. C. § 1983. I disagree. Because neither the Constitution nor our precedent requires New York to open its courts to § 1983 federal actions, I respectfully dissent.

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[9] A contrary conclusion would permit a State to withhold a forum for the adjudication of any federal cause of action with which it disagreed as long as the policy took the form of a jurisdictional rule. That outcome, in turn, would provide a roadmap for States wishing to circumvent our prior decisions. See *id.*, at 383 (rejecting a similar argument that would have allowed "the State of Wisconsin [to] overrule our decision in *Felder* . . . by simply amending its notice-of-claim statute to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice").

I

Although the majority decides this case on the basis of the Supremacy Clause, see *ante*, at 734–742, the proper starting point is Article III of the Constitution. Article III, § 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The history of the drafting and ratification of this Article establishes that it leaves untouched the States' plenary authority to decide whether their local courts will have subject-matter jurisdiction over federal causes of action.

The text of Article III reflects the Framers' agreement that the National Government needed a Supreme Court. There was sharp disagreement at the Philadelphia Convention, however, over the need for lower federal courts. Several of the Framers, most notably James Madison, favored a strong central government that included lower federal tribunals. Under the Virginia Plan, the Constitution would have established a "National Judiciary . . . to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature." 1 Records of the Federal Convention of 1787, p. 21 (M. Farrand ed. 1911) (hereinafter Farrand). A revised version of the proposal, which stated that the National Judiciary would "'consist of One supreme tribunal, and of one or more inferior tribunals,'" was approved on June 4, 1787. *Id.*, at 95.

The following day, however, John Rutledge raised an objection to "establishing any national tribunal except a single supreme one." *Id.*, at 119. He proposed striking the language providing for the creation of lower federal courts because state courts were "most proper" for deciding "all cases in the first instance." *Ibid.* According to Rutledge, "the right of appeal to the supreme national tribunal [was] sufficient to secure the national rights [and] uniformity of Judgm[en]ts," and the lower federal courts were thus an "unnecessary encroachment" on the sovereign prerogative of the

States to adjudicate federal claims. *Id.*, at 124. Madison nonetheless defended the Virginia Plan. He countered that "inferior [federal] tribunals . . . dispersed throughout the Republic" were necessary to meet the needs of the newly formed government: "An effective Judiciary establishment commensurate to the legislative authority [is] essential. A Government without a proper Executive [and] Judiciary would be the mere trunk of a body without arms or legs to act or move." *Ibid.* But despite Madison's objections, Rutledge's motion prevailed. See *id.*, at 125.

Madison and James Wilson soon thereafter proposed alternative language that "'empowered [Congress] to institute inferior tribunals.'" *Ibid.* This version moderated the original Virginia Plan because of the "distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish [inferior federal courts]." *Ibid.* Over continued objections that such courts were an unnecessary expense and an affront to the States, the scaled-back version of the Virginia Plan passed. *Ibid.*

On June 15, 1787, however, the New Jersey Plan was introduced. Although it did not directly challenge the decision to permit Congress to "institute" inferior federal courts, the plan, among other things, required state courts to adjudicate federal claims. *Id.*, at 125, 243. In particular, the plan provided that, except for cases of impeachment (over which the Supreme Court would have original jurisdiction), "all punishments, fines, forfeitures [and] penalties . . . shall be adjudged by the Common law Judiciar[ies] of the State in which any offence contrary to the true intent [and] meaning of [federal law] shall have been committed or perpetrated, with liberty of commencing in the first instance all suits [and] prosecutions for that purpose in the superior Common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law [and] fact in rendering judgment,

to an appeal to the Judiciary of the U[nited] States." *Id.*, at 243, 244.

The introduction of the New Jersey Plan reignited the debate over the need for lower federal courts. In light of the plan's provision for mandatory state-court jurisdiction over federal claims, Pierce Butler "could see no necessity for such tribunals." 2 *id.*, at 45. Luther Martin added that lower federal courts would "create jealousies [and] oppositions in the State tribunals, with the jurisdiction of which they will interfere." *Id.*, at 45–46. But Nathaniel Ghorum responded that inferior federal tribunals were "essential to render the authority of the Nat[ional] Legislature effectual." *Id.*, at 46. Edmund Randolph bluntly argued that "the Courts of the States can not be trusted with the administration of the National laws." *Ibid.* George Mason suggested that, at the very least, "many circumstances might arise not now to be foreseen, which might render such a power absolutely necessary." *Ibid.* Roger Sherman also "was willing to give the power to the Legislature," even though he "wished them to make use of the State Tribunals whenever it could be done . . . with safety to the general interest." *Ibid.*

At the conclusion of this debate, the New Jersey Plan, including its component requiring state-court consideration of federal claims, was defeated and the Madison-Wilson proposal was delivered to the Committee of Detail, see *id.*, at 133. The Committee amended the proposal's language to its current form in Article III, which gives Congress the power to "ordain and establish" inferior federal courts. See *id.*, at 168. The delegates to the Constitutional Convention unanimously adopted this revised version, see *id.*, at 315, and it was ultimately ratified by the States.

This so-called Madisonian Compromise bridged the divide "between those who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there should be no federal courts at all except for a Supreme Court with, *inter alia*, appellate ju-

risdiction to review state court judgments." R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 348 (4th ed. 1996). In so doing, the compromise left to the wisdom of Congress the creation of lower federal courts: "So far as the inferior Federal Courts were concerned, it was entirely discretionary with Congress to what extent it would vest Federal judicial power in them. It could grant to them as much or as little as it chose of those classes of jurisdiction, enumerated in Article III as belonging to the judicial power of the United States. It could, if it chose, leave to the State Courts all or any of these classes." Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 547 (1925) (footnote omitted).

The assumption that state courts would continue to exercise concurrent jurisdiction over federal claims was essential to this compromise. See The Federalist No. 82, pp. 130, 132 (E. Bourne ed. 1947, Book II) (A. Hamilton) ("[T]he inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited").[1] In light of that historical understanding, this Court has held

[1] Alexander Hamilton's recognition of "concurrent jurisdiction" should not be mistaken for a suggestion that the Constitution *requires* state courts to hear federal claims. See *ante*, at 735. He merely understood that the States would be "divested of no part of their primitive jurisdiction" and state courts "in every case in which they were not expressly excluded by the future acts of the national legislature . . . [would] of course take cognizance of the causes to which those acts may give birth." The Federalist No. 82, at 132. Hamilton thus assumed that state courts would continue to entertain federal claims consistent with their "primitive jurisdiction" under state law. *Ibid.* But he remained skeptical that state courts could be forced to entertain federal causes of action when state law deprived them of jurisdiction over such claims. See Hamilton, The Examination No. 6 (Jan. 2, 1802), in 25 Papers of Alexander Hamilton 484, 487–488 (H. Syrett ed. 1977) ("[I]t is not to be forgotten, that the right to employ the agency of the State Courts for executing the laws of the Union, is liable to question, and has, in fact, been seriously questioned").

that, absent an Act of Congress providing for exclusive jurisdiction in the lower federal courts, the "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin* v. *Levitt*, 493 U. S. 455, 458–459 (1990); see also *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511, 517–518 (1898) ("'[I]n judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts, and that without an express provision to the contrary the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter'" (quoting 1 J. Kent, Commentaries on American Law 374–375 (1826) (hereinafter Kent))). As a result, "if exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." *Claflin* v. *Houseman*, 93 U. S. 130, 136 (1876).

The Constitution's implicit preservation of state authority to entertain federal claims, however, did not impose a duty on state courts to do so. As discussed above, there was at least one proposal to expressly require state courts to take original jurisdiction over federal claims (subject to appeal in federal court) that was introduced in an attempt to forestall the creation of lower federal courts. See *supra*, at 744–745. But in light of the failure of this proposal—which was offered before the adoption of the Madisonian Compromise—the assertions by its supporters that state courts would ordinarily entertain federal causes of action cannot reasonably be viewed as an assurance that the States would never alter the subject-matter jurisdiction of their courts. The Framers' decision to empower Congress to create federal courts that could either supplement or displace state-court review of fed-

eral claims, as well as the exclusion of any affirmative command requiring the States to consider federal claims in the text of Article III, confirms this understanding. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 848 (1995) (THOMAS, J., dissenting) ("Where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it").[2]

The earliest decisions addressing this question, written by then-serving and future Supreme Court Justices, confirm that state courts remain "tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States." *Osborn* v. *Bank of United States*, 9 Wheat. 738, 821 (1824); see also *Stearns* v. *United States*, 22 F. Cas. 1188, 1192 (No. 13,341) (DC Vt. 1835) (Thompson, J.) (Article III does not give Congress authority to "compel a state court to entertain jurisdiction in any case; they are not inferior

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[2] See also Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 144 (1995) (hereinafter Collins) ("It is . . . extremely difficult to argue from the debatable assumption that state courts would be under an obligation to take all Article III judicial business in the first instance—as a quid pro quo for the Constitution's noninclusion of any reference to lower federal courts—to the conclusion that such a duty still existed when the second half of that bargain was decisively rejected (in the Madisonian Compromise, no less)"); Pfander, Rethinking the Supreme Court's Original Jurisidiction in State-Party Cases, 82 Cal. L. Rev. 555, 596 (1994) ("The framers may well have assumed that the federal system would simply take the state courts as it found them; state courts could exercise a concurrent jurisdiction over any federal claims that fit comfortably within their pre-existing jurisdiction—what Hamilton in *The Federalist* called their primitive jurisdiction—so long as the federal claims were not, by virtue of congressional decree, subject to the exclusive jurisdiction of the federal courts. It seems unlikely, however, that the framers would have chosen to compel the state courts to entertain federal claims against their will and in violation of their own jurisdictional limits" (footnotes omitted)).

courts in the sense of the constitution; they are not ordained by congress. State courts are left to consult their own duty from their own state authority and organization"). "The states, in providing their own judicial tribunals, have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure." *Mitchell* v. *Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (No. 9,662) (CCD Me. 1843) (Story, J.). In short, there was "a very clear intimation given by the judges of the Supreme Court, that the state courts were not bound in consequence of any act of congress, to assume and exercise jurisdiction in such cases. It was merely permitted to them to do so as far, as was compatible with their state obligations." Kent 375; see also *id.*, at 377 (explaining that the Constitution "permits state courts which are competent for the purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in the given cases").

Under our federal system, therefore, the States have unfettered authority to determine whether their local courts may entertain a federal cause of action. Once a State exercises its sovereign prerogative to deprive its courts of subject-matter jurisdiction over a federal cause of action, it is the end of the matter as far as the Constitution is concerned.

The present case can be resolved under this principle alone. New York Correction Law Annotated § 24, ¶ 1 (West 1987) (NYCLA) provides that "[n]o civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee." The majority and petitioner agree that this statute erects a jurisdictional bar that prevents the state courts from entertaining petitioner's claim for damages under § 1983. See *ante*, at 734 (agreeing

that "a prisoner seeking damages from a correction officer will have his claim dismissed for want of jurisdiction"); Brief for Petitioner 21 ("Every New York court must immediately dismiss such suits for lack of jurisdiction, regardless of merit"). Because New York's decision to withdraw jurisdiction over § 1983 damages actions—or indeed, over any claims—does not offend the Constitution, the judgment below should be affirmed.

II

The Court has evaded Article III's limitations by finding that the Supremacy Clause constrains the States' authority to define the subject-matter jurisdiction of their own courts. See *ante*, at 734–738. In particular, the Court has held that "the Federal Constitution prohibits state courts of general jurisdiction from refusing" to entertain a federal claim "solely because the suit is brought under a federal law" as a "state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis & San Francisco R. Co.*, 292 U. S. 230, 233–234 (1934). There is no textual or historical support for the Court's incorporation of this antidiscrimination principle into the Supremacy Clause.

A

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The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under this provision, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are . . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State." *Claflin*, 93 U. S., at 136–137; see also *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991); *Robb* v. *Con-*

nolly, 111 U. S. 624, 637 (1884). Thus, a valid federal law is substantively superior to a state law; "if a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co.* v. *Wickham*, 382 U. S. 111, 120 (1965). As a textual matter, however, the Supremacy Clause does not address whether a state court must entertain a federal cause of action; it provides only a rule of decision that the state court must follow if it adjudicates the claim. See R. Berger, Congress v. The Supreme Court 245 (1969) (The Supremacy Clause only "'enacts what the law shall be'. . . . [I]t defines the governing 'supreme law,' and *if* a State court *has* jurisdiction, it commands that that law shall govern").

The Supremacy Clause's path to adoption at the Convention confirms this focus. Its precursor was introduced as part of the New Jersey Plan. See 1 Farrand 245 ("[A]ll Acts of . . . Cong[ress] made by virtue [and] in pursuance of the powers hereby . . . vested in them . . . shall be the supreme law of the respective States so far forth as those Acts . . . shall relate to the said States or their Citizens"); *ibid.* ("[T]he Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States . . . notwithstanding"). But, as explained above, see *supra*, at 744–745, the New Jersey Plan also included an entirely separate provision that addressed state-court jurisdiction, which would have required all federal questions to "b[e] determined in the first instance in the courts of the respective states." 3 Farrand 287. These two provisions of the New Jersey Plan worked in tandem to require state courts to entertain federal claims and to decide the substantive dispute in favor of federal law if a conflict between the two arose.

After the adoption of the Madisonian Compromise and the defeat of the New Jersey Plan, the Framers returned to the question of federal supremacy. A proposal was introduced granting Congress the power to "'negative all laws passed

by the several States (contravening in the opinion of [Congress] the articles of Union, or any treaties subsisting under the authority of [Congress]).'" 2 *id.*, at 27. James Madison believed the proposal "essential to the efficacy [and] security of the [Federal] Gov[ernmen]t." *Ibid.* But others at the Convention, including Roger Sherman, "thought it unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived." *Ibid.* In the end, Madison's proposal was defeated. *Id.*, at 28. But as a substitute for that rejected proposal, Luther Martin resurrected the Supremacy Clause provision from the New Jersey Plan, and it was unanimously approved. See *id.*, at 28–29.[3]

This historical record makes clear that the Supremacy Clause's exclusive function is to disable state laws that are substantively inconsistent with federal law—not to require state courts to hear federal claims over which the courts lack jurisdiction. This was necessarily the case when the Clause was first introduced as part of the New Jersey Plan, as it included a separate provision to confront the jurisdictional question. Had that plan prevailed and been ratified by the States, construing the Supremacy Clause to address state-court jurisdiction would have rendered the separate jurisdictional component of the New Jersey Plan mere surplusage. See *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); see also *Kelo* v. *New London*, 545 U. S. 469, 507 (2005) (THOMAS, J., dissenting).

[3] As proposed by Luther Martin, the Clause provided as follows: "'[T]hat the Legislative acts of the [United States] made by virtue [and] in pursuance of the articles of Union, and all treaties made [and] ratified under the authority of the [United States] shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—[and] that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.'" 2 Farrand 28–29.

The Supremacy Clause's exclusive focus on substantive state law is also evident from the context in which it was revived. First, the Clause was not adopted until after the New Jersey Plan's rejection, as part of the entirely separate debate over Madison's proposal to grant Congress the power to "negative" the laws of the States. By then, the Framers had already adopted Article III, thereby ending the fight over state-court jurisdiction. The question before the Convention thus was not which courts (state or federal) were best suited to adjudicate federal claims, but which branch of Government (Congress or the courts) would be most effective in vindicating the substantive superiority of federal law. The Supremacy Clause was directly responsive to that question.

Second, the timing of the Clause's adoption suggests that the Framers viewed it as achieving the same end as Madison's congressional "negative" proposal. Although Madison believed that Congress could most effectively countermand inconsistent state laws,[4] the Framers decided that the Judi-

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[4] Madison did not believe that federal courts were up to the task. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 3 *id.*, at 131, 134 ("It may be said that the Judicial authority, under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal [against] a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which, in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible"). He had even less faith in state courts. See 2 *id.*, at 27–28 ("Confidence can (not) be put in the State Tribunals as guardians of the National authority and interests"). In light of Madison's mistrust of state courts, any suggestion that he drafted Article III to require state courts to entertain federal claims, or that he advocated for the inclusion in the Constitution of a provision guaranteeing the supremacy of federal law as a means of accomplishing that same goal,

ciary could adequately perform that function. There is no evidence that the Framers envisioned the Supremacy Clause as having a substantively broader sweep than the proposal it replaced. And, there can be no question that Madison's congressional "negative" proposal was entirely unconcerned with the dispute over whether state courts should be required to exercise jurisdiction over federal claims. Indeed, Madison's proposal did not require the States to become enmeshed in any federal business at all; it merely provided that state laws could be directly nullified if Congress found them to be inconsistent with the Constitution or laws of the United States. The role of the Supremacy Clause is no different. It does not require state courts to entertain federal causes of action. Rather, it only requires that in reaching the merits of such claims, state courts must decide the legal question in favor of the "[l]aw of the Land." Art. VI, cl. 2.

For this reason, Representative Fisher Ames explained during the debate over the First Judiciary Act that "[t]he law of the United States is a rule to [state-court judges], but no authority for them. It controlled their decisions, but could not enlarge their powers." 1 Annals of Congress 808 (1789) (reprint 2003). And because the Constitution requires from state judges only an oath of "Allegiance, and not an Oath of Office," the Federal Government "[c]annot compel them to act—or to become our Officers." Notes of William Patterson from Speech on Judiciary Act (June 23, 1789), in 9 Documentary History of the First Federal Congress 1789–1791, p. 477 (K. Bowling & H. Veit eds. 1988); 1 Annals of Congress, at 805 (remarks of Rep. Sedgwick, Debate of Aug. 29, 1789) (arguing that inferior federal courts should be established because state courts "might refuse or neglect to attend to the national business"); 10 *id.*, at 892 (remarks of Rep. Harper) (explaining that Congress "cannot enforce on the State courts, as a matter of duty, a performance of the

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would be doubtful. Madison appears to have preferred that the state courts hear as little federal business as possible.

acts we confide to them" but arguing that there was "no cause to complain" "until they refuse to exercise" the jurisdiction granted over federal claims).[5]

The supremacy of federal law, therefore, is not impugned by a State's decision to strip its local courts of subject-matter jurisdiction to hear certain federal claims. Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause" (internal quotation marks omitted)). Although the line between subject-matter jurisdiction over a claim and the merits of

[5] The majority contends that the Full Faith and Credit Clause and the Privileges and Immunities Clause support its view of the Supremacy Clause because each "compel[s] States to open their courts to causes of action over which they would normally lack jurisdiction." *Ante*, at 740, n. 7 (citing *Howlett* v. *Rose*, 496 U. S. 356, 381–382 (1990)). But the majority has it backwards. The Full Faith and Credit Clause and the Privileges and Immunities Clause include a textual prohibition on discrimination that the Supremacy Clause lacks. See Art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State"); Art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"). The Framers' decision to address state-to-state discrimination in these two Clauses without taking similar steps with respect to federal-state relations governed by the Supremacy Clause aligns with reasons given for abandoning the Articles of Confederation, see The Federalist No. 42, p. 292 (E. Bourne ed. 1947, Book I) (J. Madison) (describing the Full Faith and Credit Clause as "an evident and valuable improvement on the clause relating to this subject in the articles of Confederation"), and the principle of dual sovereignty that the Constitution preserves, see *Texas* v. *White*, 7 Wall. 700, 725 (1869). Accordingly, contrary to the majority's supposition, there are in fact strong "reason[s] to treat the Supremacy Clause differently," *ante*, at 741, n. 7, from the Full Faith and Credit and Privileges and Immunities Clauses.

that claim can at times prove difficult to draw, see *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 513–515 (2006); see also *Bell* v. *Hood*, 327 U. S. 678, 682 (1946), the distinction is crucial in the Supremacy Clause context. If the state court does not reach the merits of the dispute for lack of statutory or constitutional jurisdiction, the preeminence of federal law remains undiminished.

Accordingly, the superiority of federal law as a substantive matter does not trigger an obligation on States to keep their courts jurisdictionally neutral with respect to federal- and state-law claims. "The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but not in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States." *Brown* v. *Gerdes*, 321 U. S. 178, 193 (1944) (Frankfurter, J., concurring).

2

The Court was originally faithful to this conception of federal supremacy. In *Claflin*, the Court concluded that because the federal statute under consideration did not deprive the state court of jurisdiction, the state court was competent to resolve the claim. See 93 U. S., at 136–137 ("[R]ights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction"). But the Court was careful to also explain that the Constitution did not impose an obligation on the States to accept jurisdiction over such claims. See *id.*, at 137 (explaining that there "is no reason why the State courts should not be open for the prosecution of rights

growing out of the laws of the United States, to which their jurisdiction is competent, and not denied"). The Constitution instead left the States with the choice—but not the obligation—to entertain federal actions. See *id.*, at 139 ("[W]here no direction is given [from Congress] on the subject, it was assumed, in our early judicial history, that the State courts retained their usual jurisdiction concurrently with the Federal Courts invested with jurisdiction in like cases").

Then in *Second Employers' Liability Cases*, 223 U. S. 1 (1912), the Court applied the rule set forth in *Claflin* and correctly rejected a Connecticut court's refusal to enforce the 1908 Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.* FELA neither provided for exclusive federal jurisdiction nor attempted to require state courts to entertain claims brought under it. See 223 U. S., at 54–55. Therefore, the statute was enforceable "as of right, in the courts of the States *when their jurisdiction, as prescribed by local laws, is adequate to the occasion.*" *Id.*, at 55 (emphasis added). Connecticut had not deprived its courts of subject-matter jurisdiction over FELA claims; thus, the state court's refusal to hear the claim was "not because the ordinary jurisdiction of the Superior Courts, as defined by the constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case." *Ibid.* Rather, the state court took the position that "it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act and in others the different standards recognized by the laws of the State." *Id.*, at 55–56.

The Court's reversal of such a decision is compatible with the original understanding of Article III and the Supremacy Clause. Because there was no question that the state court had subject-matter jurisdiction under state law to adjudicate the federal claim, *id.*, at 57, the Court correctly observed

that the state court's refusal to decide the case amounted to a policy dispute with federal law: "When Congress, in the exertion of the power confided to it by the Constitution, adopted that [federal] act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Ibid.* It was for this specific reason, then, that the Court rejected Connecticut's refusal to adjudicate the federal claim. As the Court correctly noted, the "existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Id.*, at 58.

But nothing in *Second Employers'* suggested that the Supremacy Clause could pre-empt a state law that deprived the local court of subject-matter jurisdiction over the federal claim. Instead, the *Second Employers'* Court took exactly the opposite position on this question: "[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts . . . but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion." *Id.*, at 56–57.

The Court again confronted this issue in *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 (1929). There, the Court considered whether a New York court was required to hear a claim brought under FELA. Unlike the Connecticut court in *Second Employers'*, however, the New York court did not have jurisdiction under state law to entertain the federal cause of action. 279 U. S., at 386–387. As a result, this Court upheld the state-court ruling that dismissed the claim. The Court explained that FELA did "not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the

United States is concerned. It may very well be that if the Supreme Court of New York [was] given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." *Id.*, at 387–388. In other words, because the New York court lacked subject-matter jurisdiction under state law, it was not "otherwise competent" to adjudicate the federal claim.

In sum, *Claflin*, *Second Employers'*, and *Douglas* together establish that a state court's inability to entertain a federal claim because of a lack of state-law jurisdiction is an "otherwise valid excuse" that in no way denies the superiority of federal substantive law. It simply disables the state court from adjudicating a claim brought under that federal law.

3

It was not until five years after *Douglas* that the Court used the Supremacy Clause to strike down a state jurisdictional statute for its failure to permit state-court adjudication of federal claims. See *McKnett*, 292 U. S. 230. The Court started by correctly noting that it "was settled" in *Second Employers'* "that a state court whose ordinary jurisdiction as prescribed by local laws is appropriate to the occasion, may not refuse to entertain suits under [FELA]." 292 U. S., at 233. Yet, even though the Alabama court *lacked* such jurisdiction over the relevant federal claim pursuant to a state statute, the *McKnett* Court held that the state court had improperly dismissed the federal claim. *Id.*, at 231–234.

According to the Court, "[w]hile Congress has not attempted to compel states to provide courts for the enforcement of [FELA], the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the

source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws." *Id.*, at 233–234.

For all the reasons identified above, *McKnett* cannot be reconciled with the decisions of this Court that preceded it. Unlike the Connecticut court in *Second Employers'*, the Alabama Supreme Court did not indulge its own bias against adjudication of federal claims in state court by refusing to hear a federal claim over which it had subject-matter jurisdiction. Rather, like the New York court decision affirmed in *Douglas*, the Alabama court's dismissal merely respected a jurisdictional barrier to adjudication of the federal claim imposed by state law. The fact that Alabama courts were competent to hear similar state-law claims should have been immaterial. Alabama had exercised its sovereign right to establish the subject-matter jurisdiction of its courts. Under *Claflin* and its progeny, that legislative judgment should have been upheld.

Despite *McKnett*'s infidelity to the Constitution and more than a century of Supreme Court jurisprudence, the Court's later decisions have repeated *McKnett*'s declaration that state jurisdictional statutes must be policed for antifederal discrimination. See, *e. g.*, *Testa* v. *Katt*, 330 U. S. 386, 394 (1947) ("It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. . . . Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim"); *Howlett* v. *Rose*, 496 U. S. 356, 375 (1990) ("[W]hether the question is framed in pre-emption terms, as petitioner would have it, or in the obligation to assume jurisdiction over a 'federal' cause of action, . . . the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause"). The outcome in these cases, however, can be reconciled with first principles

notwithstanding the Court's stated reliance on *McKnett*'s flawed interpretation of the Supremacy Clause.[6]

In *Testa*, the Court struck down the Rhode Island Supreme Court's refusal to entertain a claim under the federal Emergency Price Control Act. There was no dispute that "the Rhode Island courts [had] jurisdiction adequate and appropriate under established local law to adjudicate this action." 330 U. S., at 394, and n. 13. The Rhode Island court nevertheless declined to exercise that jurisdiction under its decision in *Robinson* v. *Norato*, 71 R. I. 256, 258, 43 A. 2d 467, 468 (1945), which had relied on a "universally acknowledged" doctrine "of private international law" as a basis for refusing to adjudicate federal "penal" claims. Because the Rhode Island Supreme Court had invoked this common-law doctrine despite the existence of state-law statutory jurisdiction over the federal claims, this Court correctly ruled that the state court's "policy against enforcement . . . of statutes of other states and the United States which it deems penal, [could not] be accepted as a 'valid excuse.'" 330 U. S., at 392–393.

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[6] Other decisions also have articulated this antidiscrimination principle. See, *e. g.*, *Johnson* v. *Fankell*, 520 U. S. 911 (1997); *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1 (1950); *Herb* v. *Pitcairn*, 324 U. S. 117 (1945); *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 (1942). The outcomes in these cases nonetheless preserved state-court jurisdictional autonomy. In *Johnson* and *Herb*, the Court sustained the state-court dismissals of the federal claims as nondiscriminatory. See *Johnson*, *supra*, at 918–920; *Herb*, *supra*, at 123. In *Mayfield*, the Court never decided whether the state court had jurisdiction over the relevant federal claim; rather, it remanded the case to the Missouri Supreme Court based on the state court's possibly erroneous interpretation of federal law at issue in that case. See 340 U. S., at 4–5. Finally, in *Miles*, the Court struck down a Tennessee decision that enjoined a citizen of that State from pursuing a FELA action in Missouri state court "on grounds of inequity." 315 U. S., at 702. The Court correctly held that, so long as jurisdiction existed under Missouri law, the Tennessee court could not rely on its own notions of "inequity" to thwart the vindication of a federal right in state court. *Ibid.*

Testa thus represents a routine application of the rule of law set forth in *Second Employers':* As long as jurisdiction over a federal claim exists as a matter of state law, state-court judges cannot *sua sponte* refuse to enforce federal law because they disagree with Congress' decision to allow for adjudication of certain federal claims in state court. See 330 U. S., at 393 ("[A] state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers' " (quoting *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 222 (1916))).[7]

In *Howlett*, the Court likewise correctly struck down a Florida Supreme Court decision affirming the dismissal of a § 1983 suit on state-law sovereign immunity grounds. See 496 U. S., at 361, 375–381. The Florida court had interpreted the State's statutory "waiver of sovereign immunity" not to extend to federal claims brought in state court. *Id.*, at 361 (citing Fla. Stat. § 768.28 (1989)). According to the state court, absent a statutory waiver, Florida's pre-existing common-law sovereign immunity rule provided a "blanket

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[7] Despite suggestions to the contrary, see *ante*, at 734–735; *Howlett*, 496 U. S. 356, the Court's decision in *Bombolis*, 241 U. S. 211, which held that the Seventh Amendment does not require a unanimous jury verdict when federal civil claims are adjudicated in state court, provides no support for the antidiscrimination principle. As quoted above, the Court (in dicta) accurately summarized the holding of *Second Employers'*. See 241 U. S., at 222. The Court also reiterated that before a state court owes a duty to enforce federal law, it must have subject-matter jurisdiction over the claim under state law. See *id.*, at 221 ("[L]awful rights of the citizen, whether arising from a legitimate exercise of state or national power . . . are concurrently subject to be enforced in the courts of the State or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, State or nation, creating them"); *id.*, at 222 (explaining that state courts are "charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them").

immunity on [state] governmental entities from federal civil rights actions under § 1983" brought in Florida courts. 496 U. S., at 364. Based on this rule, the Florida Supreme Court affirmed the dismissal with prejudice of the § 1983 suit against the state officials. See *id.*, at 359; see also *Howlett* v. *Rose*, 537 So. 2d 706, 708 (Fla. App. 1989) (concluding that Florida's "common law immunity" rule barred "the use of its courts for suits against the state in those state courts").

No antidiscrimination rule was required to strike down the Florida Supreme Court's decision. Even though several Florida courts had concluded that the defense of sovereign immunity was jurisdictional, see 496 U. S., at 361, n. 5, "[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction,'" *id.*, at 382–383. That is, state courts cannot evade their obligation to enforce federal law by simply characterizing a statute or common-law rule as "jurisdictional"; the state law must in fact operate in a jurisdictional manner. No matter where the line between subject-matter jurisdiction and the merits is drawn, see *supra*, at 755–756, Florida's "common law immunity" rule crossed it.

First, because the Florida Supreme Court had dismissed the § 1983 lawsuit with prejudice, its decision was on the merits. Cf. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 505 (2001) ("'[W]ith prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits'" (quoting 9 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 2373, p. 396, n. 4 (1981))). Second, Florida's sovereign immunity rule violated the Supremacy Clause by operating as a state-law defense to a federal law. See *Martinez* v. *California*, 444 U. S. 277, 284, n. 8 (1980) ("'[P]ermitt[ing] a state immunity defense to have controlling effect'" over a federal claim violates the Supremacy Clause). Resolving a federal claim with preclusive effect based on a state-law defense is far different from simply closing the door of the state courthouse to that federal claim. The first changes federal law by denying relief on the merits;

the second merely dictates the forum in which the federal claim will be heard.

In the end, of course, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 491–492 (1939) (Frankfurter, J., concurring). And contrary to *McKnett*, the Constitution does not require state courts to give equal billing to state and federal claims. To read the Supremacy Clause to include an antidiscrimination principle undermines the compromise that shaped Article III and contradicts the original understanding of the Constitution. There is no justification for preserving such a principle. But even if the Court chooses to adhere to the antidiscrimination rule as part of the Supremacy Clause inquiry, the rule's infidelity to the text, structure, and history of the Constitution counsels against extending the principle any further than our precedent requires. Cf. *United States* v. *Lopez*, 514 U. S. 549, 584–585 (1995) (THOMAS, J., concurring); see *infra*, at 768–775.

B

Although the Supremacy Clause does not, on its own force, pre-empt state jurisdictional statutes of any kind, it may still pre-empt state law once Congress has acted. Federal law must prevail when Congress validly enacts a statute that expressly supersedes state law, see *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 62–63 (2002); *United States* v. *Locke*, 529 U. S. 89, 109 (2000), or when the state law conflicts with a federal statute, see *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U. S. 214 (1998); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963). NYCLA § 24 does not fall prey to either category of pre-emption.[8]

[8] Because 42 U. S. C. § 1983 does not pre-empt NYCLA § 24, there is no need to reach the more difficult question of whether Congress has the delegated authority under the Constitution to require state courts to entertain a federal cause of action. Compare *Printz* v. *United States*, 521

First, federal law does not expressly require New York courts to accept jurisdiction over § 1983 suits. Under § 1983, any state official who denies "any citizen of the United States or other person within the jurisdiction thereof . . . any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The statute addresses who may sue and be sued for violations of federal law. But it includes no substantive command requiring New York to provide a state judicial forum to a § 1983 plaintiff. See *Felder* v. *Casey*, 487 U. S. 131, 158 (1988) (O'Connor, J., dissenting) ("Section 1983 . . . creates no substantive law. . . . Its purpose, as we have repeatedly said, 'was to interpose the *federal courts* between the States and the people, as guardians of the people's federal rights'" (quoting *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 503 (1982))). Like FELA, therefore, § 1983 does not "enlarge or regulate the jurisdiction of state courts." *Second Employers'*, 223 U. S., at 56.[9]

U. S. 898, 907 (1997) (suggesting that Congress' authority in this regard was "perhaps implicit in one of the provisions of the Constitution [Article III, § 1], and was explicit in another [Article VI, cl. 2]"); Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 2032 (1993) ("As a matter of original understanding, the Founding Generation understood that state courts could be commandeered to enforce federal law"), with *Prigg* v. *Pennsylvania*, 16 Pet. 539, 615 (1842) (concluding that state courts could not "be compelled to enforce" the 1793 Fugitive Slave Act); Collins 45 (concluding as an original matter that "states did not have to accept unwanted federal civil and criminal judicial business, and that Congress could not compel them to do so").

[9] The history surrounding § 1983's enactment also supports this conclusion. See *Felder* v. *Casey*, 487 U. S. 131, 158 (1988) (O'Connor, J., dissenting) ("[T]he original version of § 1983 provided that the federal courts would have exclusive jurisdiction of actions arising under it. This fact is conclusive proof that the Congress which enacted § 1983 over 100 years ago, could not possibly have meant thereby to alter the operation of state courts in any way . . . . Abandoning the rule of exclusive federal jurisdiction over § 1983 actions, and thus restoring the tradition of concurrent

Second, NYCLA § 24 does not conflict with § 1983. See *Wyeth* v. *Levine*, 555 U. S. 555, 589–590 (2009) (THOMAS, J., concurring in judgment) (explaining that the Court has alternatively described the standard for conflict pre-emption as "physical impossibility" and "direct conflict" (internal quotation marks omitted)). As explained above, Congress did not grant § 1983 plaintiffs a "right" to bring their claims in state court or "guarantee" that the state forum would remain open to their suits. See *id.*, at 593. Moreover, Congress has created inferior federal courts that have the power to adjudicate all § 1983 actions. And this Court has expressly determined that § 1983 plaintiffs do not have to exhaust state-court remedies before proceeding in federal court. See *Patsy*, *supra*, at 516.

Therefore, even if every state court closed its doors to § 1983 plaintiffs, the plaintiffs could proceed with their claims in the federal forum. See, *e. g.*, *Felder*, *supra*, at 160 (O'Connor, J., dissenting) ("Every plaintiff has the option of proceeding in federal court, and the Wisconsin statute has not the slightest effect on that right"). And because the dismissal of § 1983 claims from state court pursuant to NYCLA § 24 is for lack of subject-matter jurisdiction, see *supra*, at 749–750, it has no preclusive effect on claims refiled in federal court, see *Allen* v. *McCurry*, 449 U. S. 90, 94, 105 (1980) (requiring "a final judgment on the merits" before a § 1983 claim would be barred in federal court under the doctrine of claim preclusion), and thus does not alter the substance of the federal claim. Any contention that NYCLA § 24 conflicts with § 1983 therefore would be misplaced.

The Court nevertheless has relied on an expansive brand of "conflict" pre-emption to strike down state-court procedural rules that are perceived to "burde[n] the exercise of the federal right" in state court. *Felder*, 487 U. S., at 141. In such cases, the Court has asked if the state-law rule, when

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jurisdiction . . . did not leave behind a pre-emptive grin without a statutory cat" (internal quotation marks and citations omitted)).

applied "to § 1983 actions brought in state courts [is] consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"? See *id.*, at 138 (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)). There has been no suggestion in this case, however, that NYCLA § 24 is a procedural rule that must be satisfied in order to bring the § 1983 action in state court. See *supra*, at 749–750; *infra*, at 768; see also *ante*, at 742, n. 9. As explained above, petitioner's claim was not procedurally deficient; the state court simply lacked the power to adjudicate the claim. See *supra*, at 749–750. Thus, the *Felder* line of cases is inapplicable to this case.

But even if there were such a claim made in this case, the Supremacy Clause supplies this Court with no authority to pre-empt a state procedural law merely because it "burdens the exercise" of a federal right in state court. "Under the Supremacy Clause, state law is pre-empted only by federal law 'made in Pursuance' of the Constitution, Art. VI, cl. 2—not by extratextual considerations of the purposes underlying congressional inaction," such as a desire to ensure that federal law is not burdened by state-law procedural obligations. *Wyeth*, 555 U. S., at 603 (THOMAS, J., concurring in judgment). A sweeping approach to pre-emption based on perceived congressional purposes "leads to the illegitimate—and thus, unconstitutional—invalidation of state laws." *Id.*, at 604. I cannot agree with the approach employed in *Felder* "that pre-empts state laws merely because they 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives' of federal law . . . as perceived by this Court." 555 U. S., at 604.

III

Even accepting the entirety of the Court's precedent in this area of the law, however, I still could not join the majori-

ty's resolution of this case as it mischaracterizes and broadens this Court's decisions. The majority concedes not only that NYCLA § 24 is jurisdictional, but that the statute is neutral with respect to federal and state claims. Nevertheless, it concludes that the statute violates the Supremacy Clause because it finds that "equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action." *Ante*, at 738. This conclusion is incorrect in light of Court precedent for several reasons.

A

The majority mischaracterizes this Court's precedent when it asserts that jurisdictional neutrality is "the beginning, not the end, of the Supremacy Clause analysis." *Ante*, at 739. As explained above, see *supra*, at 751–764, "subject to only one limitation, each State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, [and] define the conditions for the exercise of their jurisdiction and the modes of their proceeding, to the same extent as Congress is empowered to establish a system of inferior federal courts within the limits of federal judicial power." *Brown*, 321 U. S., at 188 (Frankfurter, J., concurring). That "one limitation" is the neutrality principle that the Court has found in the Supremacy Clause. See *id.*, at 189 ("The only limitation upon the freedom of a State to define the jurisdiction of its own courts is that . . . [it] must treat litigants under the Federal act as other litigants are treated" (internal quotation marks omitted)); *Herb* v. *Pitcairn*, 324 U. S. 117, 123 (1945) ("The freedom of the state courts so to decide is, of course, subject to the qualification that the cause of action must not be discriminated against because it is a federal one"). Here, it is conceded that New York has deprived its courts of subject-matter jurisdiction over a particular class of claims on terms that treat federal and state actions equally. See *ante*, at 731, 737–738. That

is all this Court's precedent requires. See *supra,* at 750, 760.

The majority's assertion that jurisdictional neutrality is not the touchstone because "[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear," *ante,* at 739, reflects a misunderstanding of the law. A jurisdictional statute simply deprives the relevant court of the power to decide the case altogether. See 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2713, p. 239 (3d ed. 1998) ("If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action"); Restatement (Second) of Judgments § 11, p. 108 (1980) (defining subject-matter jurisdiction as a court's "authority to adjudicate the type of controversy involved in the action"). Such a statute necessarily operates without prejudice to the adjudication of the matter in a competent forum. See *supra,* at 755–756. Jurisdictional statutes therefore by definition are incapable of undermining federal law. NYCLA § 24 no more undermines § 1983 than the amount-in-controversy requirement for federal diversity jurisdiction undermines state law. See 28 U. S. C. § 1332. The relevant law (state or federal) remains fully operative in both circumstances. The sole consequence of the jurisdictional barrier is that the law cannot be enforced in one particular judicial forum.[10]

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[10] If by asserting that state law is not permitted to "undermine federal law," *ante,* at 739, the majority instead is arguing that NYCLA § 24 is a procedural rule that too heavily "burdens the exercise of the federal right" in state court, see *Felder,* 487 U. S., at 141, its argument is equally misplaced. First, the majority concedes that NYCLA § 24 is not a state procedural rule. See *ante,* at 741, n. 8. Second, applying the reasoning of *Felder* to a jurisdictional statute like NYCLA § 24 would overrule all of the Court's decisions upholding state laws that decline jurisdiction over federal claims, and would virtually ensure that in future cases, no state jurisdictional rule will be upheld as constitutional. By simply rendering a federal claim noncognizable in state court, a statute depriving a state court of subject-matter jurisdiction (even under the terms and conditions

As a result, the majority's focus on New York's reasons for enacting this jurisdictional statute is entirely misplaced. See *ante*, at 736–737. The States "remain independent and autonomous within their proper sphere of authority." *Printz* v. *United States*, 521 U. S. 898, 928 (1997). New York has the organic authority, therefore, to tailor the jurisdiction of state courts to meet its policy goals. See *Fay* v. *Noia*, 372 U. S. 391, 466–467 (1963) (Harlan, J., dissenting) ("The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its borders").

It may be true that it was "Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages." *Ante*, at 737. But Congress has not enforced that judgment by statutorily requiring the States to open their courts to *all* § 1983 claims. See n. 8, *supra*. And this Court has "never held that state courts must entertain § 1983 suits." *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582, 587, n. 4 (1995). Our decisions have held only that the States cannot use jurisdictional statutes to discriminate against federal claims. Because NYCLA § 24 does not violate this command, any policy-driven reasons for depriving

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permitted by this Court's precedent) will always violate *Felder*'s command that a state rule must not undermine the "remedial objectives" of a federal claim, see 487 U. S., at 138. The jurisdictional statute also will unavoidably implicate *Felder*'s concern that a state rule should not inevitably produce a different outcome depending on whether a claim is asserted in state or federal court, see *ibid.* A state jurisdictional statute necessarily will result in a different outcome in state court, where it will cause dismissal of the federal claim, than in federal court, where that claim will be heard. It is for this reason that the Court has been careful to keep its examination of state jurisdictional statutes and state procedural rules in different categories.

jurisdiction over a "federal claim in addition to an identical state claim," *ante*, at 738, are irrelevant for purposes of the Supremacy Clause.

This Court's decision in *Howlett* is not to the contrary. Despite the majority's assertion, *Howlett* does not stand for the proposition "that a State cannot employ a jurisdictional rule 'to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.' " *Ante*, at 736 (quoting *Howlett*, 496 U. S., at 371). As an initial matter, the majority lifts the above quotation—which was merely part of a passage explaining that a "State may not discriminate against federal causes of action," *id.*, at 372—entirely out of context. *Howlett*'s reiteration of *McKnett*'s neutrality command, which is all the selected quotation reflects, see 496 U. S., at 372–373, offers no refuge to the majority in light of its concession that NYCLA § 24 affords "equal treatment" to "federal and state claims." *Ante*, at 738.

Howlett instead stands for the unremarkable proposition that States may not add immunity defenses to § 1983. See *ante*, at 736–737, n. 5 (explaining that *Howlett* held that "a Florida school board could [not] assert a state-law immunity defense in a § 1983 action brought in state court" because "the 'elements of, and the defenses to, a federal cause of action are defined by federal law' " (quoting 496 U. S., at 375)). A state law is not jurisdictional just because the legislature has "denominated" it as such. *Id.*, at 381. As the majority observes, the State's "invocation of 'jurisdiction' " cannot "trump" the "Supremacy Clause inquiry," *ante*, at 741. The majority, therefore, is correct that a state court's decision "to nullify a federal right or cause of action [that it] believe[s] is inconsistent with [its] local policies" cannot evade the Supremacy Clause by hiding behind a jurisdictional label, *ante*, at 736, because "the Supremacy Clause cannot be evaded by formalism," *ante*, at 742. Rather, a state statute must in fact *operate* jurisdictionally: It must deprive the

court of the power to hear the claim and it must not preclude relitigation of the action in a proper forum. See *supra*, at 769–771. *Howlett* proved the point by striking down a state-law immunity rule that bore the jurisdictional label but operated as a defense on the merits and provided for the dismissal of the state-court action with prejudice. See 496 U. S., at 359; *supra*, at 763–764.

But the majority's axiomatic refrain about jurisdictional labels is entirely unresponsive to the issue before the Court—*i. e.*, whether NYCLA § 24 operates jurisdictionally. Unlike the Florida immunity rule in *Howlett*, NYCLA § 24 is not a defense to a federal claim and the dismissal it authorizes is without prejudice. See 9 N. Y. 3d 481, 490, 881 N. E. 2d 180, 186 (2007) (explaining that "the Legislature did nothing more than exercise its prerogative to establish the subject matter jurisdiction of state courts" and that "litigants like plaintiff can use the federal courts to pursue section 1983 claims" against correction officers). For this reason, NYCLA § 24 is not merely "denominated" as jurisdictional—it actually is jurisdictional. The New York courts, therefore, have not declared a "category" of § 1983 claims to be "'frivolous'" or to have "'no merit'" in order to "'relieve congestion'" in the state court system. See *ante*, at 737 (quoting *Howlett*, *supra*, at 380). These courts have simply recognized that they lack the power to adjudicate this category of claims regardless of their merit.

The majority's failure to grapple with the clear differences between the immunity rule at issue in *Howlett* and NYCLA § 24 proves that its decision is untethered from precedent. And more broadly, the majority's failure to account for the important role of claim preclusion in evaluating whether a statute is jurisdictional undermines the important line drawn by this Court's decisions between subject-matter jurisdiction and the merits. See *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U. S. 373, 382 (1985) ("With respect to matters that were not decided in the state

proceedings . . . claim preclusion generally does not apply where '[t]he plaintiff was unable to . . . seek a remedy because of the limitations on the subject matter jurisdiction of the courts'" (quoting Restatement (Second) of Judgments § 26(1)(c) (1982))); see also *Arbaugh*, 546 U. S., at 514–516; *Steel Co.*, 523 U. S., at 94.

The majority's principal response is that NYCLA § 24 "is effectively an immunity statute cloaked in jurisdictional garb." *Ante*, at 742. But this curious rejoinder resurrects an argument that the majority abandons earlier in its own opinion. See *ante*, at 736–737, n. 5. The majority needs to choose. Either it should definitively commit to making the impossible case that a statute denying state courts the power to entertain a claim without prejudice to its reassertion in federal court is an immunity defense in disguise, or it should clearly explain why some other aspect of *Howlett* controls the outcome of this case. This Court has required Congress to speak clearly when it intends to "upset the usual constitutional balance of federal and state powers." *Gregory*, 501 U. S., at 460. It should require no less of itself.

At bottom, the majority's warning that upholding New York's law "would permit a State to withhold a forum for the adjudication of any federal cause of action with which it disagreed as long as the policy took the form of a jurisdictional rule" is without any basis in fact. *Ante*, at 742, n. 9. This Court's jurisdictional neutrality command already guards against antifederal discrimination. A decision upholding NYCLA § 24, which fully adheres to that rule, would not "circumvent our prior decisions." *Ibid.* It simply would adhere to them.[11]

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[11] The majority also suggests that allowing jurisdictional neutrality to be the test "would create a blind spot in the Supremacy Clause" because a procedural rule that too heavily burdens a federal cause of action would be struck down as unconstitutional while "a State could express its disagreement with (and even open hostility to) a federal cause of action, declare a desire to thwart its enforcement, and achieve that goal by remov-

B

The majority also incorrectly concludes that NYCLA § 24 is not a neutral jurisdictional statute because it applies to a "narrow class of defendants," *ante*, at 736, and because New York courts "hear the lion's share of all other § 1983 actions," *ante*, at 741. A statute's jurisdictional status does not turn on its narrowness or on its breadth. See *Arbaugh*, *supra*, at 515, n. 11. Rather, as explained above, a statute's jurisdictional status turns on the grounds on which the state-law dismissal rests and the consequences that follow from such rulings. No matter how narrow the majority perceives NYCLA § 24 to be, it easily qualifies as jurisdictional under this established standard. Accordingly, it is immaterial that New York has chosen to allow its courts of general jurisdiction to entertain § 1983 actions against certain categories of

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ing the disfavored category of claims from its courts' jurisdiction." *Ante*, at 741, n. 8. This is incorrect for at least two reasons. First, as explained above, a State may permissibly register its hostility to federal law only by subjecting analogous state-law claims to equally disfavored treatment. See *supra*, at 760–762. Hostility to federal law is thus irrelevant under this Court's precedent—the Supremacy Clause is concerned only with whether there is antifederal discrimination. Second, the majority obscures important differences between procedural rules, like the notice-of-claim rule at issue in *Felder*, and neutral jurisdictional statutes like NYCLA § 24. Unlike a neutral jurisdictional statute, which merely prevents a state court from entertaining a federal claim, failure to comply with a state procedural rule will result in dismissal of a federal claim with prejudice. See *Felder*, 487 U. S., at 151 (explaining that the State's "outcome-determinative law must give way when a party asserts a federal right in state court"). Contrary to the majority's assertion, therefore, it is not that state courts with "unconstitutionally burdensome procedural rules did not go far enough"—it is instead that they went too far by placing an insurmountable procedural hurdle in the plaintiff's path that led to a judgment against him on the merits. *Ante*, at 741, n. 8. As a result, the Court's assessment of whether a state procedural rule too heavily burdens a federal right does not have any bearing on the Court's continued adherence to the neutrality principle as the sole determinant in evaluating state-law jurisdictional statutes.

defendants but not others (such as correction officers), or to entertain § 1983 actions against particular defendants for only certain types of relief.

Building on its assumption that a statute's jurisdictional status turns on its scope, the majority further holds that "having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy." *Ante*, at 740. But whether two claims are "analogous" is relevant only for purposes of determining whether a state jurisdictional statute discriminates against federal law. This inquiry necessarily requires an evaluation of the similarities between *federal*- and *state*-law claims to assess whether state-court jurisdiction is being denied to a federal claim simply because of its federal character.

In contrast, the majority limits its analysis to state-law claims, finding discrimination based solely on the fact that state law provides jurisdiction in state court for claims against state officials who serve in "analogous" roles to the correction officers. See *ante*, at 739. The majority's inquiry is not probative of antifederal discrimination, which is the concern that first led this Court in *McKnett* to find a Supremacy Clause limitation on state-court jurisdictional autonomy. Consequently, there is no support for the majority's assertion that New York's decision to treat police officers differently from correction officers for purposes of civil litigation somehow violates the Constitution. See *ante*, at 739–740.

Worse still, the majority concludes that § 1983 claims for damages against "other state officials" are "sufficiently analogous to petitioner's § 1983 claims" to trigger a Supremacy Clause violation. *Ante*, at 740, n. 6. Under this reasoning, if a State grants its trial courts jurisdiction to hear § 1983 claims for damages against *any* state official, the State's decision to deny those courts the power to entertain some nar-

rower species of § 1983 claims—even on jurisdictionally neutral terms—*a fortiori* violates the Supremacy Clause. The majority's assurance that its holding is applicable only to New York's "unique scheme" thus rings hollow. *Ante*, at 741. The majority is forcing States into an all-or-nothing choice that neither the Constitution nor this Court's decisions require. See *FERC* v. *Mississippi*, 456 U. S. 742, 774, n. 4 (1982) (Powell, J., concurring in part and dissenting in part) ("It would not be open to us to insist on adjudication in a state court of a federal claim arising beyond the jurisdiction of the local court" (internal quotation marks omitted)).

Indeed, the majority's novel approach breaks the promise that the States still enjoy "'great latitude . . . to establish the structure and jurisdiction of their own courts.'" *Ante*, at 739 (quoting *Howlett*, 496 U. S., at 372). It cannot be that New York has forsaken the right to withdraw a particular class of claims from its courts' purview simply because it has created courts of general jurisdiction that would otherwise have the power to hear suits for damages against correction officers. The Supremacy Clause does not fossilize the jurisdiction of state courts in their original form. Under this Court's precedent, States remain free to alter the structure of their judicial system even if that means certain federal causes of action will no longer be heard in state court, so long as States do so on nondiscriminatory terms. See *Printz*, 521 U. S., at 906, n. 1 (explaining that "the States obviously regulate the 'ordinary jurisdiction' of their courts"); *Johnson* v. *Fankell*, 520 U. S. 911, 922, n. 13 (1997) ("We have made it quite clear that it is a matter for each State to decide how to structure its judicial system"). Today's decision thus represents a dramatic and unwarranted expansion of this Court's precedent.

IV

"[I]n order to protect the delicate balance of power mandated by the Constitution, the Supremacy Clause must operate only in accordance with its terms." *Wyeth*, 555 U. S.,

at 585 (THOMAS, J., concurring in judgment). By imposing on state courts a duty to accept subject-matter jurisdiction over federal § 1983 actions, the Court has stretched the Supremacy Clause beyond all reasonable bounds and upended a compromise struck by the Framers in Article III of the Constitution. Furthermore, by declaring unconstitutional even those laws that divest state courts of jurisdiction over federal claims on a nondiscriminatory basis, the majority has silently overturned this Court's unbroken line of decisions upholding state statutes that are materially indistinguishable from the New York law under review. And it has transformed a single exception to the rule of state judicial autonomy into a virtually ironclad obligation to entertain federal business. I respectfully dissent.

Syllabus

MONTEJO *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 07–1529. Argued January 13, 2009—Decided May 26, 2009

At a preliminary hearing required by Louisiana law, petitioner Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under *Miranda* v. *Arizona*, 384 U. S. 436, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim's widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. Affirming, the State Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan* v. *Jackson*, 475 U. S. 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The court reasoned that *Jackson*'s prophylactic protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

Held:

1. *Michigan* v. *Jackson* should be and now is overruled. Pp. 783–797.

(a) The State Supreme Court's interpretation of *Jackson* would lead to practical problems. Requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption, as the court below did, might work in States that require an indigent defendant formally to request counsel before an appointment is made, but not in more than half the States, which appoint counsel without request from the defendant. Pp. 783–785.

(b) On the other hand, Montejo's solution is untenable as a theoretical and doctrinal matter. Eliminating the invocation requirement entirely would depart fundamentally from the rationale of *Jackson*, whose presumption was created by analogy to a similar prophylactic rule established in *Edwards* v. *Arizona*, 451 U. S. 477, to protect the Fifth Amendment-based *Miranda* right. Both *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about the right to counsel once they have invoked it, but a defendant who never asked for counsel has not yet made up his mind in the first instance. Pp. 786–792.

Syllabus

(c) *Stare decisis* does not require the Court to expand significantly the holding of a prior decision in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved "unworkable" is a traditional ground for overruling it. *Payne* v. *Tennessee*, 501 U. S. 808, 827. Beyond workability, the relevant factors include the precedent's antiquity, the reliance interests at stake, and whether the decision was well reasoned. *Pearson* v. *Callahan*, 555 U. S. 223, 234–235. The first two cut in favor of abandoning *Jackson:* The opinion is only two decades old, and eliminating it would not upset expectations, since any criminal defendant learned enough to order his affairs based on *Jackson*'s rule would also be perfectly capable of interacting with the police on his own. As for the strength of *Jackson*'s reasoning, when this Court creates a prophylactic rule to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. *Jackson*'s marginal benefits are dwarfed by its substantial costs. Even without *Jackson*, few badgering-induced waivers, if any, would be admitted at trial because the Court has taken substantial other, overlapping measures to exclude them. Under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. 384 U. S., at 474. Under *Edwards*, once such a defendant "has invoked his *[Miranda]* right," interrogation must stop. 451 U. S., at 484. And under *Minnick* v. *Mississippi*, 498 U. S. 146, no subsequent interrogation may take place until counsel is present. *Id.*, at 153. These three layers of prophylaxis are sufficient. On the other side of the equation, the principal cost of applying *Jackson*'s rule is that crimes can go unsolved and criminals unpunished when uncoerced confessions are excluded and when officers are deterred from even trying to obtain confessions. The Court concludes that the *Jackson* rule does not "pay its way," *United States* v. *Leon*, 468 U. S. 897, 907–908, n. 6, and thus the case should be overruled. Pp. 792–797.

2. Montejo should nonetheless be given an opportunity to contend that his letter of apology should have been suppressed under the *Edwards* rule. He understandably did not pursue an *Edwards* objection, because *Jackson* offered broader protections, but the decision here changes the legal landscape. Pp. 797–799.

06–1807 (La.), 974 So. 2d 1238, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 799. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, and in which BREYER, J., joined, except for footnote 5, *post*, p. 801. BREYER, J., filed a dissenting opinion, *post*, p. 815.

Donald B. Verrilli, Jr., argued the cause for petitioner. With him on the briefs were *Ian Heath Gershengorn*, *Katherine A. Fallow*, *Matthew S. Hellman*, *William M. Hohengarten*, *Jelpi P. Picou*, and *G. Ben Cohen*.

Kathryn Landry argued the cause for respondent. With her on the briefs were *James D. "Buddy" Caldwell*, *S. Kyle Duncan*, *Walter P. Reed*, *Houston C. Gascon III*, and *Scott C. Gardner*.*

JUSTICE SCALIA delivered the opinion of the Court.

We consider in this case the scope and continued viability of the rule announced by this Court in *Michigan* v. *Jackson*, 475 U. S. 625 (1986), forbidding police to initiate interroga-

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*Briefs of *amici curiae* urging reversal were filed for the Louisiana Public Defenders Association by *G. Paul Marx;* for the National Association of Criminal Defense Lawyers et al. by *Jonathan L. Marcus, Barbara Bergman, Steven Shapiro, Robin Dahlberg,* and *David S. Udell;* and for the National Legal Aid and Defender Association et al. by *Catharine F. Easterly* and *Sandra K. Levick*.

Solicitor General Kagan, then-*Acting Assistant Attorney General Glavin*, *Deputy Solicitor General Dreeben*, *Nicole A. Saharsky*, and *Joel M. Gershowitz* filed a brief for the United States as *amicus curiae*.

Briefs of *amici curiae* were filed for the State of New Mexico et al. by *Gary K. King*, Attorney General of New Mexico, and *M. Victoria Wilson*, Assistant Attorney General, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Steve Six* of Kansas, *Douglas F. Gansler* of Maryland, *Kelly A. Ayotte* of New Hampshire, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; and for the Criminal Justice Institute of Harvard Law School by *Stephen Singer*.

A supplemental brief urging reversal was filed for Larry D. Thompson et al. by *Robert N. Weiner*, *Andrew T. Karron*, and *John A. Freedman*.

A supplemental brief was filed for the Public Defender Service for the District of Columbia et al. by *Sandra K. Levick*, *Catharine F. Easterly*, and *David L. McColgin*.

tion of a criminal defendant once he has requested counsel at an arraignment or similar proceeding.

I

Petitioner Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his own home one day earlier. Suspicion quickly focused on Jerry Moore, a disgruntled former employee of Ferrari's dry cleaning business. Police sought to question Montejo, who was a known associate of Moore.

Montejo waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and was interrogated at the sheriff's office by police detectives through the late afternoon and evening of September 6 and the early morning of September 7. During the interrogation, Montejo repeatedly changed his account of the crime, at first claiming that he had only driven Moore to the victim's home, and ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. These police interrogations were videotaped.

On September 10, Montejo was brought before a judge for what is known in Louisiana as a "72-hour hearing"—a preliminary hearing required under state law.[1] Although the proceedings were not transcribed, the minute record indicates what transpired: "The defendant being charged with First Degree Murder, Court ordered N[o] Bond set in this matter. Further, Court ordered the Office of Indigent Defender be appointed to represent the defendant." App. to Pet. for Cert. 63a.

Later that same day, two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon (which Montejo

[1] "The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel." La. Code Crim. Proc. Ann., Art. 230.1(A) (West Supp. 2009).

had earlier indicated he had thrown into a lake). After some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim's widow. Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence.

At trial, the letter of apology was admitted over defense objection. The jury convicted Montejo of first-degree murder, and he was sentenced to death.

The Louisiana Supreme Court affirmed the conviction and sentence. 06–1807 (1/16/08), 974 So. 2d 1238 (2008). As relevant here, the court rejected Montejo's argument that under the rule of *Jackson*, *supra*, the letter should have been suppressed. 974 So. 2d, at 1261. *Jackson* held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U. S., at 636.

Citing a decision of the United States Court of Appeals for the Fifth Circuit, *Montoya* v. *Collins*, 955 F. 2d 279 (1992), the Louisiana Supreme Court reasoned that the prophylactic protection of *Jackson* is not triggered unless and until the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel. 974 So. 2d, at 1260–1261, and n. 68. Because Montejo simply stood mute at his 72-hour hearing while the judge ordered the appointment of counsel, he had made no such request or assertion. So the proper inquiry, the court ruled, was only whether he had knowingly, intelligently, and voluntarily waived his right to have counsel present during the interaction with the police. *Id.*, at 1261. And because Montejo had been read his *Miranda* rights and agreed to waive them,

the Court answered that question in the affirmative, 974 So. 2d, at 1262, and upheld the conviction.

We granted certiorari. 554 U. S. 944 (2008).

II

Montejo and his *amici* raise a number of pragmatic objections to the Louisiana Supreme Court's interpretation of *Jackson*. We agree that the approach taken below would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States. Neither would be acceptable.

Under the rule adopted by the Louisiana Supreme Court, a criminal defendant must request counsel, or otherwise "assert" his Sixth Amendment right at the preliminary hearing, before the *Jackson* protections are triggered. If he does so, the police may not initiate further interrogation in the absence of counsel. But if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.

This rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it. That is how the system works in Michigan, for example, Mich. Ct. Rule 6.005(A) (2009), whose scheme produced the factual background for this Court's decision in *Michigan* v. *Jackson*. Jackson, like all other represented indigent defendants in the State, had requested counsel in accordance with the applicable state law.

But many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency, *e. g.,* Kan. Stat. Ann. §22–4503(c) (2007); and in

a number of others, appointment can be made either upon the defendant's request or *sua sponte* by the court, *e. g.*, Del. Code Ann., Tit. 29, § 4602(a) (2003). See App. to Brief for National Legal Aid & Defender Assn. et al. as *Amici Curiae* 1a–21a. Nothing in our *Jackson* opinion indicates whether we were then aware that not all States require that a defendant affirmatively request counsel before one is appointed; and of course we had no occasion there to decide how the rule we announced would apply to these other States.

The Louisiana Supreme Court's answer to that unresolved question is troublesome. The central distinction it draws—between defendants who "assert" their right to counsel and those who do not—is exceedingly hazy when applied to States that appoint counsel absent request from the defendant. How to categorize a defendant who merely asks, prior to appointment, whether he will be appointed counsel? Or who inquires, after the fact, whether he has been? What treatment for one who thanks the court after the appointment is made? And if the court asks a defendant whether he would object to appointment, will a quick shake of his head count as an assertion of his right?

To the extent that the Louisiana Supreme Court's rule also permits a defendant to trigger *Jackson* through the "acceptance" of counsel, that notion is even more mysterious: How does one affirmatively accept counsel appointed by court order? An indigent defendant has no right to choose his counsel, *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 151 (2006), so it is hard to imagine what his "acceptance" would look like, beyond the passive silence that Montejo exhibited.

In practice, judicial application of the Louisiana rule in States that do not require a defendant to make a request for counsel could take either of two paths. Courts might ask on a case-by-case basis whether a defendant has somehow invoked his right to counsel, looking to his conduct at the preliminary hearing—his statements and gestures—and the to-

tality of the circumstances. Or, courts might simply determine as a categorical matter that defendants in these States—over half of those in the Union—simply have no opportunity to assert their right to counsel at the hearing and are therefore out of luck.

Neither approach is desirable. The former would be particularly impractical in light of the fact that, as *amici* describe, preliminary hearings are often rushed, and are frequently not recorded or transcribed. Brief for National Legal Aid & Defender Assn. et al. 25–30. The sheer volume of indigent defendants, see *id.*, at 29, would render the monitoring of each particular defendant's reaction to the appointment of counsel almost impossible. And sometimes the defendant is not even present. *E. g.*, La. Code Crim. Proc. Ann., Art. 230.1(A) (West Supp. 2009) (allowing court to appoint counsel if defendant is "unable to appear"). Police who did not attend the hearing would have no way to know whether they could approach a particular defendant; and for a court to adjudicate that question *ex post* would be a fact-intensive and burdensome task, even if monitoring were possible and transcription available. Because "clarity of . . . command" and "certainty of . . . application" are crucial in rules that govern law enforcement, *Minnick* v. *Mississippi*, 498 U. S. 146, 151 (1990), this would be an unfortunate way to proceed. See also *Moran* v. *Burbine*, 475 U. S. 412, 425–426 (1986).

The second possible course fares no better, for it would achieve clarity and certainty only at the expense of introducing arbitrary distinctions: Defendants in States that automatically appoint counsel would have no opportunity to invoke their rights and trigger *Jackson*, while those in other States, effectively instructed by the court to request counsel, would be lucky winners. That sort of hollow formalism is out of place in a doctrine that purports to serve as a practical safeguard for defendants' rights.

III

But if the Louisiana Supreme Court's application of *Jackson* is unsound as a practical matter, then Montejo's solution is untenable as a theoretical and doctrinal matter. Under his approach, once a defendant is *represented* by counsel, police may not initiate any further interrogation. Such a rule would be entirely untethered from the original rationale of *Jackson*.

A

It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. *United States* v. *Wade*, 388 U. S. 218, 227–228 (1967); *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932). Interrogation by the State is such a stage. *Massiah* v. *United States*, 377 U. S. 201, 204–205 (1964); see also *United States* v. *Henry*, 447 U. S. 264, 274 (1980).

Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. *Patterson* v. *Illinois*, 487 U. S. 285, 292, n. 4 (1988); *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. *Michigan* v. *Harvey*, 494 U. S. 344, 352–353 (1990). And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment:

> "As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda*

> . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Patterson, supra,* at 296.

The *only* question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances. 475 U. S., at 630, 633. We created such a presumption in *Jackson* by analogy to a similar prophylactic rule established to protect the Fifth Amendment-based *Miranda* right to have counsel present at any custodial interrogation. *Edwards* v. *Arizona,* 451 U. S. 477 (1981), decided that once "an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available," unless he initiates the contact. *Id.,* at 484–485.

The *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Harvey, supra,* at 350. It does this by presuming his postassertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil* v. *Wisconsin,* 501 U. S. 171, 177 (1991). This prophylactic rule thus "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence." *Texas* v. *Cobb,* 532 U. S. 162, 175 (2001) (KENNEDY, J., concurring).

Jackson represented a "wholesale importation of the *Edwards* rule into the Sixth Amendment." *Cobb, supra,* at 175. The *Jackson* Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," 475 U. S., at 633, despite doubt that defendants "actually inten[d] their request for counsel to encompass representation during any further questioning," *id.,* at 632–

633, because doubts must be "resolved in favor of protecting the constitutional claim," *id.*, at 633. Citing *Edwards*, the Court held that any subsequent waiver would thus be "insufficient to justify police-initiated interrogation." 475 U. S., at 635. In other words, we presume such waivers involuntary "based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily" in subsequent interactions with police. *Harvey*, *supra*, at 350.

In his dissent, JUSTICE STEVENS presents us with a revisionist view of *Jackson*. The defendants' *request* for counsel, he contends, was important only because it proved that counsel *had been appointed*. Such a non sequitur (nowhere alluded to in the case) hardly needs rebuttal. Proceeding from this fanciful premise, he claims that the decision actually established "a rule designed to safeguard a defendant's right to rely on the assistance of counsel," *post*, at 807 (hereinafter dissent), not one "designed to prevent police badgering," *ibid.* To safeguard the right to assistance of counsel from *what?* From a knowing and voluntary waiver by the defendant himself? Unless the dissent seeks to prevent a defendant altogether from waiving his Sixth Amendment rights, *i. e.*, to "imprison a man in his privileges and call it the Constitution," *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942)—a view with zero support in reason, history, or case law—the answer must be: from police pressure, *i. e.*, badgering. The antibadgering rationale is the only way to make sense of *Jackson*'s repeated citations of *Edwards*, and the only way to reconcile the opinion with our waiver jurisprudence.[2]

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[2] The dissent responds that *Jackson* also ensures that the defendant's counsel receives notice of any interrogation, *post*, at 806, n. 2. But notice to what end? Surely not in order to protect some constitutional right to receive counsel's advice regarding waiver of the right to have counsel present. Contrary to the dissent's intimations, neither the advice nor the presence of counsel is needed in order to effectuate a knowing waiver of

B

With this understanding of what *Jackson* stands for and whence it came, it should be clear that Montejo's interpretation of that decision—that no *represented* defendant can ever be approached by the State and asked to consent to interrogation—is off the mark. When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. There is no "*initial* election" to exercise the right, *Patterson*, 487 U. S., at 291, that must be preserved through a prophylactic rule against later waivers. No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

The dissent's argument to the contrary rests on a flawed *a fortiori:* "If a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer." *Post*, at 804. The question in *Jackson*, however, was not whether respondents were entitled to counsel (they unquestionably were), but "whether respondents validly waived their right to counsel," 475 U. S., at 630; and even if it is reasonable to presume from a defendant's *request* for counsel that any subsequent waiver of the right was coerced, no such

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the Sixth Amendment right. Our cases make clear that the *Miranda* waivers typically suffice; indeed, even an *unrepresented* defendant can waive his right to counsel. See *supra*, at 786.

presumption can seriously be entertained when a lawyer was merely "secured" on the defendant's behalf, by the State itself, as a matter of course. Of course, reading the dissent's analysis, one would have no idea that Montejo executed any waiver at all.

In practice, Montejo's rule would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches, at least in those States that appoint counsel promptly without request from the defendant. As the dissent in *Jackson* pointed out, with no expressed disagreement from the majority, the opinion "most assuredly [did] *not* hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant." 475 U. S., at 640 (opinion of Rehnquist, J.). That would have constituted a "shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society." *Ibid.*

Montejo's rule appears to have its theoretical roots in codes of legal ethics, not the Sixth Amendment. The American Bar Association's Model Rules of Professional Conduct (which nearly all States have adopted into law in whole or in part) mandate that "a lawyer shall not communicate about the subject of [a] representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Model Rule 4.2 (2008). But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers. Montejo's proposed rule is both broader and narrower than the Model Rule. Broader, because Montejo would apply it to all agents of the State, including the detectives who interrogated him, while the ethical rule governs only lawyers. And narrower, because he agrees that if a defendant initiates contact with the police, they may talk

freely—whereas a lawyer could be sanctioned for interviewing a represented party even if that party "initiates" the communication and consents to the interview. Model Rule 4.2, Comment 3.

Montejo contends that our decisions support his interpretation of the *Jackson* rule. We think not. Many of the cases he cites concern the substantive scope of the Sixth Amendment—*e. g.*, whether a particular interaction with the State constitutes a "critical" stage at which counsel is entitled to be present—*not* the validity of a Sixth Amendment waiver. See *Maine* v. *Moulton*, 474 U. S. 159 (1985); *Henry*, 447 U. S. 264; *Massiah*, 377 U. S. 201; see also *Moran*, 475 U. S. 412. Since everyone agrees that absent a valid waiver, Montejo was entitled to a lawyer during the interrogation, those cases do not advance his argument.

Montejo also points to descriptions of the *Jackson* holding in two later cases. In one, we noted that "analysis of the waiver issue changes" once a defendant "obtains or even requests counsel." *Harvey*, 494 U. S., at 352. But elsewhere in the same opinion, we explained that *Jackson* applies "after a defendant requests assistance of counsel," 494 U. S., at 349; "when a suspect charged with a crime requests counsel outside the context of interrogation," *id.*, at 350; and to "suspects who assert their right to counsel," *ibid.* The accuracy of the "obtains" language is thus questionable. Anyway, since *Harvey* held that evidence obtained in violation of the *Jackson* rule *could* be admitted to impeach the defendant's trial testimony, 494 U. S., at 346, the Court's varying descriptions of when the rule was violated were dicta. The dictum from the other decision, *Patterson*, *supra*, at 290, n. 3, is no more probative.[3]

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[3] In the cited passage, the Court noted that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson*, 487 U. S., at 290, n. 3. To support that proposition, the Court cited *Maine* v. *Moulton*, 474 U. S. 159 (1985), which was not a case about waiver. The

The upshot is that even on *Jackson*'s own terms, it would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.

IV

So on the one hand, requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption is consistent with the theory of that decision, but (as Montejo and his *amici* argue, see Part II, *supra*) would be unworkable in more than half the States of the Union. On the other hand, eliminating the invocation requirement would render the rule easy to apply but depart fundamentally from the *Jackson* rationale.

We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved "unworkable" is a traditional ground for overruling it. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Accordingly, we called for supplemental briefing addressed to the question whether *Michigan* v. *Jackson* should be overruled.

Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake,

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passage went on to observe that "the analysis changes markedly once an accused even *requests* the assistance of counsel," 487 U. S., at 290, n. 3 (emphasis in original), this time citing *Jackson*. Montejo infers from the "even *requests*" that having counsel is *more* conclusive of the invalidity of uncounseled waiver than the mere requesting of counsel. But the *Patterson* footnote did not suggest that the analysis "changes" in both these scenarios (having a lawyer, versus requesting one) with specific reference to the validity of waivers under the Sixth Amendment. The citation of *Moulton* (a nonwaiver case) for the first scenario suggests just the opposite.

and of course whether the decision was well reasoned. *Pearson* v. *Callahan*, 555 U. S. 223, 234–235 (2009). The first two cut in favor of abandoning *Jackson:* The opinion is only two decades old, and eliminating it would not upset expectations. Any criminal defendant learned enough to order his affairs based on the rule announced in *Jackson* would also be perfectly capable of interacting with the police on his own. Of course it is likely true that police and prosecutors have been trained to comply with *Jackson*, see generally Supplemental Brief for Larry D. Thompson et al. as *Amici Curiae*, but that is hardly a basis for retaining it as a constitutional requirement. If a State *wishes* to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so.[4]

Which brings us to the strength of *Jackson*'s reasoning. When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. "The value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost." *Minnick*, 498 U. S., at 161 (SCALIA, J., dissenting). We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran*, *supra*, at 426).

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[4] The dissent posits a different reliance interest: "the public's interest in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State," *post*, at 809. We suspect the public would be surprised to learn that a criminal can freely sign away his right to a lawyer, confess his crimes, and then ask the courts to *assume* that the confession was coerced—on the ground that he had, at some earlier point in time, made a *pro forma* statement requesting that counsel be appointed on his behalf.

What does the *Jackson* rule actually achieve by way of preventing unconstitutional conduct? Recall that the purpose of the rule is to preclude the State from badgering defendants into waiving their previously asserted rights. See *Harvey*, 494 U. S., at 350; see also *McNeil*, 501 U. S., at 177. The effect of this badgering might be to coerce a waiver, which would render the subsequent interrogation a violation of the Sixth Amendment. See *Massiah*, 377 U. S., at 204. Even though involuntary waivers are invalid even apart from *Jackson*, see *Patterson*, 487 U. S., at 292, n. 4, mistakes are of course possible when courts conduct case-by-case voluntariness review. A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.

But without *Jackson*, how many would be? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U. S., at 474. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. 451 U. S., at 484. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney." 498 U. S., at 153.

These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but

"badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, *Cobb*, 532 U. S., at 175 (KENNEDY, J., concurring), it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.

It is true, as Montejo points out in his supplemental brief, that the doctrine established by *Miranda* and *Edwards* is designed to protect Fifth Amendment, not Sixth Amendment, rights. But that is irrelevant. What matters is that these cases, like *Jackson*, protect the right to have counsel during custodial interrogation—which right happens to be guaranteed (once the adversary judicial process has begun) by *two* sources of law. Since the right under both sources is waived using the same procedure, *Patterson*, *supra*, at 296, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver.

Montejo also correctly observes that the *Miranda-Edwards* regime is narrower than *Jackson* in one respect: The former applies only in the context of custodial interrogation. If the defendant is not in custody then those decisions do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State (like pretrial lineups). However, those uncovered situations are the *least* likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering. And noninterrogative interactions with the State do not involve the "inherently compelling pressures," *Miranda*, *supra*, at 467, that one might reasonably fear could lead to involuntary waivers.

Jackson was policy driven, and if that policy is being adequately served through other means, there is no reason to

retain its rule. *Miranda* and the cases that elaborate upon it already guarantee not simply noncoercion in the traditional sense, but what Justice Harlan referred to as "voluntariness with a vengeance," 384 U. S., at 505 (dissenting opinion). There is no need to take *Jackson*'s further step of requiring voluntariness on stilts.

On the other side of the equation are the costs of adding the bright-line *Jackson* rule on top of *Edwards* and other extant protections. The principal cost of applying any exclusionary rule "is, of course, letting guilty and possibly dangerous criminals go free . . . ." *Herring* v. *United States*, 555 U. S. 135, 141 (2009). *Jackson* not only "operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless," *Cobb*, *supra*, at 174–175 (KENNEDY, J., concurring), but also deters law enforcement officers from even trying to obtain voluntary confessions. The "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil*, *supra*, at 181. Without these confessions, crimes go unsolved and criminals unpunished. These are not negligible costs, and in our view the *Jackson* Court gave them too short shrift.[5]

Notwithstanding this calculus, Montejo and his *amici* urge the retention of *Jackson*. Their principal objection to its elimination is that the *Edwards* regime which remains will not provide an administrable rule. But this Court has praised *Edwards* precisely because it provides "'clear and unequivocal' guidelines to the law enforcement profession," *Arizona* v. *Roberson*, 486 U. S. 675, 682 (1988). Our cases

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[5] The dissent claims that, in fact, few confessions have been suppressed by federal courts applying *Jackson*. *Post*, at 808–809. If so, that is because, as the dissent boasts, "generations of police officers have been trained to refrain from approaching represented defendants," *post*, at 809, n. 4. Anyway, if the rule truly does not hinder law enforcement or make much practical difference, see *post*, at 807–809, and nn. 3–4, then there is no reason to be particularly exercised about its demise.

make clear which sorts of statements trigger its protections, see *Davis* v. *United States*, 512 U. S. 452, 459 (1994), and once triggered, the rule operates as a bright line. Montejo expresses concern that courts will have to determine whether statements made at preliminary hearings constitute *Edwards* invocations—thus implicating all the practical problems of the Louisiana rule we discussed above, see Part II, *supra*. That concern is misguided. "We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' . . . ." *McNeil*, 501 U. S., at 182, n. 3. What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.

In sum, when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not "pay its way," *United States* v. *Leon*, 468 U. S. 897, 907–908, n. 6 (1984). *Michigan* v. *Jackson* should be and now is overruled.

V

Although our holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson*, we think that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*. If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. *Davis*, *supra*, at 459. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an "unequivocal election of the right," *Cobb*, 532 U. S., at 176 (KENNEDY, J., concurring).

Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections. Our decision today, overruling *Jackson*, changes the legal landscape and does so in part based on the protections already provided by *Edwards*. Thus we think that a remand is appropriate so that Montejo can pursue this alternative avenue for relief. Montejo may also seek on remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e. g.*, his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer, cf. *Moran*, 475 U. S., at 428–429. These matters have heightened importance in light of our opinion today.

We do not venture to resolve these issues ourselves, not only because we are a court of final review, "not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), but also because the relevant facts remain unclear. Montejo and the police gave inconsistent testimony about exactly what took place on the afternoon of September 10, 2002, and the Louisiana Supreme Court did not make an explicit credibility determination. Moreover, Montejo's testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence. These matters are best left for resolution on remand.

We do reject, however, the dissent's revisionist legal analysis of the "knowing and voluntary" issue. *Post*, at 810–814. In determining whether a Sixth Amendment waiver was knowing and voluntary, there is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that, as we held in *Patterson*, the *Miranda* warnings adequately inform him "of his right to have counsel present during the questioning," and make him "aware of the consequences of a decision by him

to waive his Sixth Amendment rights," 487 U. S., at 293. Somewhat surprisingly for an opinion that extols the virtues of *stare decisis*, the dissent complains that our "treatment of the waiver question rests entirely on the dubious decision in *Patterson*," *post*, at 812. The Court in *Patterson* did not consider the result dubious, nor does the Court today.

* * *

This case is an exemplar of Justice Jackson's oft quoted warning that this Court "is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *City of Jeannette*, 319 U. S. 157, 181 (1943) (opinion concurring in result). We today remove *Michigan* v. *Jackson*'s fourth story of prophylaxis.

The judgment of the Louisiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, concurring.

Earlier this Term, in *Arizona* v. *Gant*, *ante*, p. 332, the Court overruled *New York* v. *Belton*, 453 U. S. 454 (1981), even though that case had been on the books for 28 years, had not been undermined by subsequent decisions, had been recently reaffirmed and extended, had proved to be eminently workable (indeed, had been adopted for precisely that reason), and had engendered substantial law enforcement reliance. See *Gant*, *ante*, at 358 (ALITO, J., dissenting). The Court took this step even though we were not asked to overrule *Belton*, and this new rule is almost certain to lead to a host of problems. See *Gant*, *ante*, at 363–365 (ALITO, J., dissenting); *Megginson* v. *United States*, *post*, p. 1230; *Grooms* v. *United States*, *post*, p. 1231 (same).

JUSTICE SCALIA, who cast the deciding vote to overrule *Belton*, dismissed *stare decisis* concerns with the following observation: "[I]t seems to me ample reason that the precedent was badly reasoned and produces erroneous . . . results." *Gant*, *ante*, at 353 (concurring opinion). This narrow view of *stare decisis* provides the only principle on which the decision in *Gant* can be justified.

In light of *Gant*, the discussion of *stare decisis* in JUSTICE STEVENS' dissent* is surprising. His dissent in the case at hand criticizes the Court for "[a]cting on its own" in reconsidering *Michigan* v. *Jackson*, 475 U. S. 625 (1986). *Post*, at 804 (hereinafter dissent). But the same was true in *Gant*, and in this case, the Court gave the parties and interested *amici* the opportunity to submit supplemental briefs on the issue, a step not taken in *Gant*.

The dissent faults the Court for "cast[ing] aside the reliance interests of law enforcement," *post*, at 809, but in *Gant*, there were real and important law enforcement interests at stake, see *ante*, at 358–360 (ALITO, J., dissenting). Even the Court conceded that the *Belton* rule had "been widely taught in police academies and that law enforcement officers ha[d] relied on the rule in conducting vehicle searches during the past 28 years." *Ante*, at 349. And whatever else might be said about *Belton*, it surely provided a bright-line rule.

A month ago, none of this counted for much, but today the dissent writes:

> "*Jackson*'s bright-line rule has provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether confessions will be admissible in court, and assisted judges in determining whether a defendant's Sixth Amendment rights have been violated by police interrogation." *Post*, at 808.

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*One of the dissenters in the present case, JUSTICE BREYER, also dissented in *Gant* and would have followed *Belton* on *stare decisis* grounds. See *ante*, at 354–355. Thus, he would not overrule either *Belton* or *Michigan* v. *Jackson*, 475 U. S. 625 (1986).

It is striking that precisely the same points were true in *Gant:*

> "[*Belton*'s] bright-line rule ha[d] provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether [evidence obtained in a vehicle search] w[ould] be admissible in court, and assisted judges in determining whether a defendant's [Fourth] Amendment rights ha[d] been violated by police interrogation." *Post,* at 808.

The dissent, finally, invokes *Jackson*'s antiquity, stating that "the 23-year existence of a simple bright-line rule" should weigh in favor of its retention. *Post*, at 810. But in *Gant*, the Court had no compunction about casting aside a 28-year-old bright-line rule. I can only assume that the dissent thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young nor too old, and that *Jackson*, *supra*, at 23, is in its prime, whereas *Belton*, *supra*, at 28, had turned brownish and vinegary.

I agree with the dissent that *stare decisis* should promote "'the evenhanded . . . development of legal principles,'" *post,* at 807 (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991)). The treatment of *stare decisis* in *Gant* fully supports the decision in the present case.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins except for footnote 5, dissenting.

Today the Court properly concludes that the Louisiana Supreme Court's parsimonious reading of our decision in *Michigan* v. *Jackson*, 475 U. S. 625 (1986), is indefensible. Yet the Court does not reverse. Rather, on its own initiative and without any evidence that the longstanding Sixth Amendment protections established in *Jackson* have caused any harm to the workings of the criminal justice system, the

Court rejects *Jackson* outright on the ground that it is "untenable as a theoretical and doctrinal matter." *Ante*, at 786. That conclusion rests on a misinterpretation of *Jackson*'s rationale and a gross undervaluation of the rule of *stare decisis*. The police interrogation in this case clearly violated petitioner's Sixth Amendment right to counsel.

I

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The right to counsel attaches during "the initiation of adversary judicial criminal proceedings," *Rothgery* v. *Gillespie County*, 554 U. S. 191, 198 (2008) (internal quotation marks omitted), and it guarantees the assistance of counsel not only during in-court proceedings but during all critical stages, including postarraignment interviews with law enforcement officers, see *Patterson* v. *Illinois*, 487 U. S. 285, 290 (1988).

In *Jackson*, this Court considered whether the Sixth Amendment bars police from interrogating defendants who have requested the appointment of counsel at arraignment. Applying the presumption that such a request constitutes an invocation of the right to counsel "at every critical stage of the prosecution," 475 U. S., at 633, we held that "a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment" cannot be subject to uncounseled interrogation unless he initiates "exchanges or conversations with the police," *id.*, at 626.

In this case, petitioner Jesse Montejo contends that police violated his Sixth Amendment right to counsel by interrogating him following his "72-hour hearing" outside the presence of, and without prior notice to, his lawyer. Brief for Petitioner 7. The Louisiana Supreme Court rejected Montejo's claim. Relying on the fact that the defendants in *Jackson* had "requested" counsel at arraignment, the state court held that *Jackson*'s protections did not apply to Mon-

tejo because his counsel was appointed automatically; Montejo had not explicitly requested counsel or affirmatively accepted the counsel appointed to represent him before he submitted to police interrogation. 06–1807, pp. 28–29 (1/16/08), 974 So. 2d 1238, 1261.

I agree with the majority's conclusion that the Louisiana Supreme Court's decision, if allowed to stand, "would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States," *ante*, at 783. Neither option is tolerable, and neither is compelled by *Jackson* itself.

Our decision in *Jackson* involved two consolidated cases, both arising in the State of Michigan. Under Michigan law in effect at that time, when a defendant appeared for arraignment the court was required to inform him that counsel would be provided if he was financially needy *and he requested representation.* Mich. Gen. Ct. Rule 785.4(1) (1976). It was undisputed that the *Jackson* defendants made such a "request" at their arraignment: one by completing an affidavit of indigency, and the other by responding affirmatively to a question posed to him by the court. See App. in *Michigan* v. *Jackson,* O. T. 1984, No. 84–1531, p. 168; App. in *Michigan* v. *Bladel,* O. T. 1984, No. 84–1539, pp. 3a–4a. In neither case, however, was it clear that counsel had actually been appointed at the arraignment. Thus, the defendants' requests for counsel were significant as a matter of state law because they served as evidence that the appointment of counsel had been effectuated even in the absence of proof that defense counsel had actual notice of the appointments.

Unlike Michigan, Louisiana does not require a defendant to make a request in order to receive court-appointed counsel. Consequently, there is no reason to place constitutional significance on the fact that Montejo neither voiced a request for counsel nor affirmatively embraced that appointment *post hoc.* Certainly our decision in *Jackson* did not mandate such an odd rule. See *ante*, at 784 (acknowledging that we

had no occasion to decide in *Jackson* how its rule would apply in States that do not make appointment of counsel contingent on affirmative request). If a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer. Indeed, we have already recognized as much. See *Michigan* v. *Harvey*, 494 U. S. 344, 352 (1990) (acknowledging that "once a defendant obtains or even requests counsel," *Jackson* alters the waiver analysis); *Patterson*, 487 U. S., at 290, n. 3 (noting "as a matter of some significance" to the constitutional analysis that defendant had "not retained, or *accepted by appointment*, a lawyer to represent him at the time he was questioned by authorities" (emphasis added)).[1] Once an attorney-client relationship has been established through the appointment or retention of counsel, as a matter of federal law the method by which the relationship was created is irrelevant: The existence of a valid attorney-client relationship provides a defendant with the full constitutional protection afforded by the Sixth Amendment.

II

Today the Court correctly concludes that the Louisiana Supreme Court's holding is "troublesome," *ante*, at 784, "impractical," *ante*, at 785, and "unsound," *ante*, at 786. Instead of reversing the decision of the state court by simply answering the question on which we granted certiorari in a unanimous opinion, however, the majority has decided to change the law. Acting on its own initiative, the majority overrules *Jackson* to correct a "theoretical and doctrinal"

[1] In *Patterson* v. *Illinois*, we further explained, "[o]nce an accused has a lawyer," "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." 487 U. S., at 290, n. 3 (citing *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985)). "Indeed," we emphasized, "the analysis changes markedly once an accused even *requests* the assistance of counsel." 487 U. S., at 290, n. 3.

problem of its own imagining, see *ante*, at 786. A more careful reading of *Jackson* and the Sixth Amendment cases upon which it relied reveals that the rule announced in *Jackson* protects a fundamental right that the Court now dishonors.

The majority's decision to overrule *Jackson* rests on its assumption that *Jackson*'s protective rule was intended to "prevent police from badgering defendants into changing their minds about their rights," *ante*, at 789; see also *ante*, at 794, just as the rule adopted in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), was designed to prevent police from coercing unindicted suspects into revoking their requests for counsel at interrogation. Operating on that limited understanding of the purpose behind *Jackson*'s protective rule, the Court concludes that *Jackson* provides no safeguard not already secured by this Court's Fifth Amendment jurisprudence. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966) (requiring defendants to be admonished of their right to counsel prior to custodial interrogation); *Edwards*, 451 U. S. 477 (prohibiting police-initiated interrogation following defendant's invocation of the right to counsel).

The majority's analysis flagrantly misrepresents *Jackson*'s underlying rationale and the constitutional interests the decision sought to protect. While it is true that the rule adopted in *Jackson* was patterned after the rule in *Edwards*, 451 U. S., at 484–485, the *Jackson* opinion does not even mention the antibadgering considerations that provide the basis for the Court's decision today. Instead, *Jackson* relied primarily on cases discussing the broad protections guaranteed by the Sixth Amendment right to counsel—not its Fifth Amendment counterpart. *Jackson* emphasized that the purpose of the Sixth Amendment is to " 'protec[t] the unaided layman at critical confrontations with his adversary,' " 475 U. S., at 631 (quoting *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984)), by giving him " 'the right to rely on counsel as a "medium" between him[self] and the State,' " 475 U. S., at 632

(quoting *Maine* v. *Moulton,* 474 U. S. 159, 176 (1985)). Underscoring that the commencement of criminal proceedings is a decisive event that transforms a suspect into an accused within the meaning of the Sixth Amendment, we concluded that arraigned defendants are entitled to "at least as much protection" during interrogation as the Fifth Amendment affords unindicted suspects. See, *e. g.,* 475 U. S., at 632 ("[T]he *difference* between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances" (emphasis added)). Thus, although the rules adopted in *Edwards* and *Jackson* are similar, *Jackson* did not rely on the reasoning of *Edwards* but remained firmly rooted in the unique protections afforded to the attorney-client relationship by the Sixth Amendment.[2]

Once *Jackson* is placed in its proper Sixth Amendment context, the majority's justifications for overruling the decision crumble. Ordinarily, this Court is hesitant to disturb past precedent and will do so only when a rule has proven "outdated, ill-founded, unworkable, or otherwise legitimately

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[2] The majority insists that protection from police badgering is the only purpose the *Jackson* rule can plausibly serve. After all, it asks, from what other evil would the rule guard? See *ante,* at 788. There are two obvious answers. First, most narrowly, it protects the defendant from any police-initiated interrogation without notice to his counsel, not just from "badgering" which is not necessarily a part of police questioning. Second, and of prime importance, it assures that any waiver of counsel will be valid. The assistance offered by counsel protects a defendant from surrendering his rights with an insufficient appreciation of what those rights are and how the decision to respond to interrogation might advance or compromise his exercise of those rights throughout the course of criminal proceedings. A lawyer can provide her client with advice regarding the legal and practical options available to him; the potential consequences, both good and bad, of choosing to discuss his case with police; the likely effect of such a conversation on the resolution of the charges against him; and an informed assessment of the best course of action under the circumstances. Such assistance goes far beyond mere protection against police badgering.

vulnerable to serious reconsideration." *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986). While *stare decisis* is not "an inexorable command," we adhere to it as "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991).

Paying lipservice to the rule of *stare decisis*, the majority acknowledges that the Court must consider many factors before taking the dramatic step of overruling a past decision. See *ante*, at 792–793. Specifically, the majority focuses on four considerations: the reasoning of the decision, the workability of the rule, the reliance interests at stake, and the antiquity of the precedent. The Court exaggerates the considerations favoring reversal, however, and gives short shrift to the valid considerations favoring retention of the *Jackson* rule.

First, and most central to the Court's decision to overrule *Jackson*, is its assertion that *Jackson*'s "'reasoning'"—which the Court defines as "the weighing of the [protective] rule's benefits against its costs," *ante*, at 793—does not justify continued application of the rule it created. The balancing test the Court performs, however, depends entirely on its misunderstanding of *Jackson* as a rule designed to prevent police badgering, rather than a rule designed to safeguard a defendant's right to rely on the assistance of counsel.[3]

[3] Even accepting the majority's improper framing of *Jackson*'s foundation, the Court fails to show that the costs of the rule are more than negligible or differ from any other protection afforded by the right to counsel. The majority assumes, without citing any empirical or even anecdotal support, that any marginal benefits of the *Jackson* rule are "dwarfed by its substantial costs," which it describes as harm to "'society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Ante*, at 793 (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)). That assumption is highly dubious, particularly in light of the fact that several *amici* with interest in law enforcement have conceded

Next, in order to reach the conclusion that the *Jackson* rule is unworkable, the Court reframes the relevant inquiry, asking not whether the *Jackson* rule as applied for the past quarter century has proved easily administrable, but instead whether the Louisiana Supreme Court's cramped interpretation of that rule is practically workable. The answer to that question, of course, is no. When framed more broadly, however, the evidence is overwhelming that *Jackson*'s simple, bright-line rule has done more to advance effective law enforcement than to undermine it.

In a supplemental brief submitted by lawyers and judges with extensive experience in law enforcement and prosecution, *amici* Larry D. Thompson et al. argue persuasively that *Jackson*'s bright-line rule has provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether confessions will be admissible in court, and assisted judges in determining whether a defendant's Sixth Amendment rights have been violated by police interrogation. See generally Thompson Supplemental Brief 6. While *amici* acknowledge that "*Jackson* reduces opportunities to interrogate defendants" and "may require exclusion of evidence that could support a criminal conviction," they maintain that "it is a rare case where this rule lets a guilty defendant go free." *Ibid.* Notably, these representations are not contradicted by the State of Louisiana or other *amici*, including the United States. See United States Brief 12 (conceding that the *Jackson* rule has not "resulted in the suppression of significant numbers of statements in federal prosecutions in the past").[4] In short, there is substantial

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that the application of *Jackson*'s protective rule rarely impedes prosecution. See Supplemental Brief for Larry D. Thompson et al. as *Amici Curiae* 6 (hereinafter Thompson Supplemental Brief); Brief for United States as *Amicus Curiae* 12 (hereinafter United States Brief).

[4] Further supporting the workability of the *Jackson* rule is the fact that it aligns with the professional standards and norms that already govern

evidence suggesting that *Jackson*'s rule is not only workable, but also desirable from the perspective of law enforcement.

Turning to the reliance interests at stake in the case, the Court rejects the interests of criminal defendants with the flippant observation that any who are knowledgeable enough to rely on *Jackson* are too savvy to need its protections, and casts aside the reliance interests of law enforcement on the ground that police and prosecutors remain free to employ the *Jackson* rule if it suits them. See *ante*, at 793. Again as a result of its mistaken understanding of the purpose behind *Jackson*'s protective rule, the Court fails to identify the real reliance interest at issue in this case: the public's interest in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State. That interest lies at the heart of the Sixth Amendment's guarantee, and is surely worthy of greater consideration than it is given by today's decision.

Finally, although the Court acknowledges that "antiquity" is a factor that counsels in favor of retaining precedent, it

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the behavior of police and prosecutors. Rules of Professional Conduct endorsed by the American Bar Association (ABA) and by every state bar association in the country prohibit prosecutors from making direct contact with represented defendants in all but the most limited of circumstances, see App. to Supplemental Brief for Public Defender Service for the District of Columbia et al. as *Amici Curiae* 1a–15a (setting forth state rules governing contact with represented persons); ABA Model Rule of Professional Conduct 4.2 (2008); 28 U. S. C. § 530B(a) (making state rules of professional conduct applicable to federal attorneys), and generations of police officers have been trained to refrain from approaching represented defendants, both because *Jackson* requires it and because, absent direction from prosecutors, officers are reticent to interrogate represented defendants, see United States Brief 11–12; see also Thompson Supplemental Brief 13 (citing Federal Bureau of Investigation, Legal Handbook for Special Agents § 7–4.1(7) (2003)). Indeed, the United States concedes that a decision to overrule the case "likely w[ill] not significantly alter the manner in which federal law enforcement agents investigate indicted defendants." United States Brief 11–12.

concludes that the fact *Jackson* is "only two decades old" cuts "in favor of abandoning" the rule it established. *Ante*, at 792–793. I would have thought that the 23-year existence of a simple bright-line rule would be a factor that cuts in the other direction.

Despite the fact that the rule established in *Jackson* remains relevant, well grounded in constitutional precedent, and easily administrable, the Court today rejects it *sua sponte*. Such a decision can only diminish the public's confidence in the reliability and fairness of our system of justice.[5]

III

Even if *Jackson* had never been decided, it would be clear that Montejo's Sixth Amendment rights were violated. Today's decision eliminates the rule that "any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid" once a defendant has invoked his right to counsel. *Harvey*, 494 U. S., at 349 (citing *Jackson*, 475 U. S., at 636). Nevertheless, under the undisputed facts of this case, there is no sound basis for concluding that Montejo made a knowing and valid waiver of his Sixth Amendment right to counsel before acquiescing in police interrogation fol-

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[5] In his concurrence, JUSTICE ALITO assumes that my consideration of the rule of *stare decisis* in this case is at odds with the Court's recent rejection of his reliance on that doctrine in his dissent in *Arizona* v. *Gant*, *ante*, p. 355. While I agree that the reasoning in his dissent supports my position in this case, I do not agree with his characterization of our opinion in *Gant*. Contrary to his representation, the Court did not overrule our precedent in *New York* v. *Belton*, 453 U. S. 454 (1981). Rather, we affirmed the narrow interpretation of *Belton*'s holding adopted by the Arizona Supreme Court, rejecting the broader interpretation adopted by other lower courts that had been roundly criticized by judges and scholars alike. By contrast, in this case the Court flatly overrules *Jackson*—a rule that has drawn virtually no criticism—on its own initiative. The two cases are hardly comparable. If they were, and if JUSTICE ALITO meant what he said in *Gant*, I would expect him to join this opinion.

lowing his 72-hour hearing. Because police questioned Montejo without notice to, and outside the presence of, his lawyer, the interrogation violated Montejo's right to counsel even under pre-*Jackson* precedent.

Our pre-*Jackson* case law makes clear that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Moulton*, 474 U. S., at 176. The Sixth Amendment entitles indicted defendants to have counsel notified of and present during critical confrontations with the State throughout the pretrial process. Given the realities of modern criminal prosecution, the critical proceedings at which counsel's assistance is required more and more often occur outside the courtroom in pretrial proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U. S. 218, 224 (1967).

In *Wade*, for instance, we held that because a post-indictment lineup conducted for identification purposes is a critical stage of the criminal proceedings, a defendant and his counsel are constitutionally entitled to notice of the impending lineup. Accordingly, counsel's presence is a "requisite to conduct of the lineup, absent an intelligent waiver." *Id.*, at 237 (internal quotation marks omitted). The same reasoning applies to police decisions to interrogate represented defendants. For if the Sixth Amendment entitles an accused to such robust protection during a lineup, surely it entitles him to such protection during a custodial interrogation, when the stakes are as high or higher. Cf. *Spano* v. *New York*, 360 U. S. 315, 326 (1959) (Douglas, J., concurring) ("[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?").

The Court avoids confronting the serious Sixth Amendment concerns raised by the police interrogation in this case by assuming that Montejo validly waived his Sixth Amendment rights before submitting to interrogation.[6] It does so by summarily concluding that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver," *ante*, at 795; thus, because Montejo was given *Miranda* warnings prior to interrogation, his waiver was presumptively valid. Ironically, while the Court faults *Jackson* for blurring the line between this Court's Fifth and Sixth Amendment jurisprudence, it commits the same error by assuming that the *Miranda* warnings given in this case, designed purely to safeguard the Fifth Amendment right against self-incrimination, were somehow adequate to protect Montejo's more robust Sixth Amendment right to counsel.

The majority's cursory treatment of the waiver question rests entirely on the dubious decision in *Patterson*, in which we addressed whether, by providing *Miranda* warnings, police had adequately advised an indicted but unrepresented defendant of his Sixth Amendment right to counsel. The majority held that "[a]s a general matter . . . an accused who is admonished with the warnings prescribed . . . in *Miranda*, . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights." 487 U. S., at 296. The Court recognized, however, that "because the Sixth Amendment's protection of the attorney-client relationship . . . extends beyond *Mi-*

[6] The majority leaves open the possibility that, on remand, Montejo may argue that his waiver was invalid because police falsely told him he had not been appointed counsel. See *ante*, at 798. While such police deception would obviously invalidate any otherwise valid waiver of Montejo's Sixth Amendment rights, Montejo has a strong argument that, given his status as a *represented* criminal defendant, the *Miranda* warnings given to him by police were insufficient to permit him to make a knowing waiver of his Sixth Amendment rights even absent police deception.

randa's protection of the Fifth Amendment right to counsel, . . . there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." *Id.*, at 297, n. 9. This is such a case.

As I observed in *Patterson*, the conclusion that *Miranda* warnings ordinarily provide a sufficient basis for a knowing waiver of the right to counsel rests on the questionable assumption that those warnings make clear to defendants the assistance a lawyer can render during postindictment interrogation. See 487 U. S., at 307 (dissenting opinion). Because *Miranda* warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police, I remain convinced that the warnings prescribed in *Miranda*,[7] while sufficient to apprise a defendant of his Fifth Amendment right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution. The inadequacy of those warnings is even more obvious in the case of a *represented* defendant. While it can be argued that informing an indicted but unrepresented defendant of his right to counsel at least alerts him to the fact that he is entitled to obtain something he does not already possess, providing that same warning to a defendant who has *already* secured counsel is more likely to confound than enlighten.[8] By glibly assuming that the *Mi-*

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[7] Under *Miranda*, a suspect must be "warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney[,] one will be appointed for him prior to any questioning if he so desires." 384 U. S., at 479.

[8] With respect to vulnerable defendants, such as juveniles and those with mental impairments of various kinds, *amici* National Association of Criminal Defense Lawyers et al. assert that "[o]verruling *Jackson* would be particularly detrimental . . . because of the confusing instructions regarding counsel that they would receive. At the initial hearing, they would likely learn that an attorney was being appointed for them. In a later

randa warnings given in this case were sufficient to ensure Montejo's waiver was both knowing and voluntary, the Court conveniently avoids any comment on the actual advice Montejo received, which did not adequately inform him of his relevant Sixth Amendment rights or alert him to the possible consequences of waiving those rights.

A defendant's decision to forgo counsel's assistance and speak openly with police is a momentous one. Given the high stakes of making such a choice and the potential value of counsel's advice and mediation at that critical stage of the criminal proceedings, it is imperative that a defendant possess "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986), before his waiver is deemed valid. See *Iowa* v. *Tovar*, 541 U. S. 77, 81 (2004); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Because the administration of *Miranda* warnings was insufficient to ensure Montejo understood the Sixth Amendment right he was being asked to surrender, the record in this case provides no basis for concluding that Montejo validly waived his right to counsel, even in the absence of *Jackson*'s enhanced protections.

IV

The Court's decision to overrule *Jackson* is unwarranted. Not only does it rest on a flawed doctrinal premise, but the dubious benefits it hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel. Moreover, even apart

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custodial interrogation, however, they would be informed in the traditional manner of 'their right to counsel' and right to have counsel 'appointed' if they are indigent, notwithstanding that counsel had already been appointed in open court. These conflicting statements would be confusing to anyone, but would be especially baffling to defendants with mental disabilities or other impairments." Supplemental Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 7–8.

from the protections afforded by *Jackson*, the police interrogation in this case violated Jesse Montejo's Sixth Amendment right to counsel.

I respectfully dissent.

JUSTICE BREYER, dissenting.

I join JUSTICE STEVENS' dissent except for footnote 5. Although the principles of *stare decisis* are not inflexible, I believe they bind the Court here. I reached a similar conclusion in *Arizona* v. *Gant*, *ante*, at 354–355 (dissenting opinion), and in several other recent cases. See, *e. g.*, *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 923–929 (2007) (same); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 865–866 (2007) (same); *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 534–536 (2007) (SOUTER, J., dissenting); *Bowles* v. *Russell*, 551 U. S. 205, 219–220 (2007) (SOUTER, J., dissenting); *Gonzales* v. *Carhart*, 550 U. S. 124, 190–191 (2007) (GINSBURG, J., dissenting); *District of Columbia* v. *Heller*, 554 U. S. 570, 675–679 (2008) (STEVENS, J., dissenting).

Syllabus

ABUELHAWA *v.* UNITED STATES

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

No. 08–192. Argued March 4, 2009—Decided May 26, 2009

A wiretap of Mohammed Said's telephone recorded six calls in which petitioner Abuelhawa arranged to buy cocaine from Said in two separate 1-gram transactions. Those two purchases were misdemeanors under the Controlled Substances Act (CSA), 21 U. S. C. § 844, while Said's two sales were felonies, §§ 841(a)(1) and (b). The Government charged Abuelhawa with six felonies on the theory that each of the phone calls, some placed by him, some by Said, violated § 843(b), which makes it a felony "to use any communication facility in . . . facilitating" felony distribution and other drug crimes. The District Court denied Abuelhawa's acquittal motion, in which he argued that his efforts to make misdemeanor purchases could not be treated as facilitating Said's felonies. The jury convicted Abuelhawa on all six felony counts. The Fourth Circuit affirmed, reasoning that "facilitat[e]" should be given its ordinary meaning in § 843(b) and that Abuelhawa's use of a phone to buy cocaine counted as ordinary facilitation because it made Said's distribution of the drug easier.

Held: Using a telephone to make a misdemeanor drug purchase does not "facilitat[e]" felony drug distribution in violation of § 843(b). Stopping with the plain meaning of "facilitate" here would ignore the rule that because statutes are not read as a collection of isolated phrases, "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan* v. *Postal Service*, 546 U. S. 481, 486. Here it does not. The literal sweep of "facilitat[e]" sits uncomfortably with common usage: Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the other's conduct. The common usage has its parallel in cases holding that where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the legislature's punishment calibration. In *Gebardi* v. *United States*, 287 U. S. 112, 119, for example, the Court held that a woman who voluntarily crossed a state line with a man to have sex could not be tagged with the Mann Act violation for "aid[ing] or assist[ing]" interstate transportation for immoral purposes because the statutory penalties were "clearly directed against the acts of the transporter as distinguished from the consent of

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the subject of the transportation." Such cases have a bearing here in two ways. First, given the presumption, see, *e. g.*, *Williams* v. *Taylor*, 529 U. S. 362, 380–381, and n. 12, that the Congress that enacted § 843(b) was familiar with the traditional judicial limitation on applying terms like "aid," "abet," and "assist," it is likely the Legislature had a comparable scope in mind when it used "facilitate," a word with equivalent meaning. Second, any broader reading would for practical purposes substantially skew the congressional calibration of respective buyer-seller penalties. Moreover, the statute's history—which shows that in 1970 the CSA downgraded simple possession from a felony to a misdemeanor, § 844(a), and simultaneously limited the communications provision's prohibition of facilitating a drug "offense" to facilitating a "felony," § 843(b)—drives home what is clear from the statutory text: Congress meant to treat purchasing drugs for personal use more leniently than felony distribution, and to narrow the scope of the communications provision to cover only those who facilitate a felony. Yet, under the Government's reading of § 843(b), in a substantial number of cases Congress would for all practical purposes simultaneously have graded back up to felony status with the left hand the same offense, simple drug possession, it had dropped to a misdemeanor with the right. Given that Congress used no language spelling out a purpose so improbable, but legislated against a background usage of terms such as "aid," "abet," and "assist" that points in the opposite direction and accords with the CSA's choice to classify small purchases as misdemeanors, the Government's position is just too unlikely. Pp. 819–824.

523 F. 3d 415, reversed and remanded.

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

Sri Srinivasan argued the cause for petitioner. With him on the briefs were *Irving L. Gornstein*, *Ryan W. Scott*, and *Timothy J. McEvoy.*

Eric D. Miller argued the cause for the United States. With him on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Glavin*, *Deputy Solicitor General Dreeben*, and *Richard A. Friedman.**

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*Briefs of *amici curiae* urging reversal were filed for the Center on the Administration of Criminal Law by *James P. Rouhandeh*, *Daniel F. Schubert*, *Anthony S. Barkow*, and *Rachel E. Barkow;* and for the National Association of Criminal Defense Lawyers by *Jeffrey A. Lamken* and *Jeffrey Green.*

JUSTICE SOUTER delivered the opinion of the Court.

The Controlled Substances Act (CSA) makes it a felony "to use any communication facility in committing or in causing or facilitating" certain felonies prohibited by the statute. 84 Stat. 1263, 21 U. S. C. § 843(b). The question here is whether someone violates § 843(b) in making a misdemeanor drug purchase because his phone call to the dealer can be said to facilitate the felony of drug distribution. The answer is no.

I

Federal Bureau of Investigation agents believed Mohammed Said was selling cocaine and got a warrant to tap his cell phone. In the course of listening in, they recorded six calls between Said and petitioner Salman Khade Abuelhawa, during which Abuelhawa arranged to buy cocaine from Said in two separate transactions, each time a single gram. Abuelhawa's two purchases were misdemeanors, § 844, while Said's two sales were felonies, §§ 841(a)(1) and (b). The Government nonetheless charged Abuelhawa with six felonies on the theory that each of the phone calls, whether placed by Abuelhawa or by Said, had been made "in causing or facilitating" Said's felonies, in violation of § 843(b).[1] Abuelhawa moved for acquittal as a matter of law, arguing that his efforts to commit the misdemeanors of buying cocaine could

[1] In full, § 843(b) provides:

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term 'communication facility' means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication."

Section 843(d) provides, subject to exceptions not at issue here, that "any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine . . . , or both."

not be treated as causing or facilitating Said's felonies, but the District Court denied his motion, App. to Pet. for Cert. 20a–25a, and the jury convicted him on all six felony counts.

Abuelhawa argued the same point to the Court of Appeals for the Fourth Circuit, with as much success. The Circuit reasoned that "for purposes of § 843(b), 'facilitate' should be given its 'common meaning—to make easier or less difficult, or to assist or aid.'" 523 F. 3d 415, 420 (2008) (quoting *United States* v. *Lozano,* 839 F. 2d 1020, 1023 (CA4 1988)). The court said Abuelhawa's use of a phone to buy cocaine counted as ordinary facilitation because it "undoubtedly made Said's cocaine distribution easier; in fact, 'it made the sale possible.'" 523 F. 3d, at 421 (quoting *United States* v. *Binkley,* 903 F. 2d 1130, 1136 (CA7 1990); emphasis deleted). We granted certiorari, 555 U. S. 1028 (2008), to resolve a split among the Courts of Appeals on the scope of § 843(b),[2] and we now reverse.

II

The Government's argument is a reprise of the Fourth Circuit's opinion, that Abuelhawa's use of his cell phone satisfies the plain meaning of "facilitate" because it "allow[ed] the transaction to take place more efficiently, and with less risk of detection, than if the purchaser and seller had to meet in person." Brief for United States 10. And of course on the literal plane, the phone calls could be described as "facilitating" drug distribution; they "undoubtedly made . . . distribution easier." 523 F. 3d, at 421. But stopping there would ignore the rule that, because statutes are not read as a collection of isolated phrases, see *United States Nat. Bank of*

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[2] Compare, *e. g., United States* v. *Binkley,* 903 F. 2d 1130, 1135–1136 (CA7 1990) (buyer's use of phone in purchasing drugs facilitates seller's drug distribution), with *United States* v. *Baggett,* 890 F. 2d 1095, 1097–1098 (CA10 1989) (buyer's use of phone in purchasing drugs does not facilitate seller's drug distribution); *United States* v. *Martin,* 599 F. 2d 880, 888–889 (CA9 1979) (same), overruled on other grounds, *United States* v. *De Bright,* 730 F. 2d 1255 (CA9 1984).

Ore. v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 455 (1993), "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities," *Dolan* v. *Postal Service*, 546 U. S. 481, 486 (2006). We think the word here does not.

To begin with, the Government's literal sweep of "facilitate" sits uncomfortably with common usage. Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the other. A buyer does not just make a sale easier; he makes the sale possible. No buyer, no sale; the buyer's part is already implied by the term "sale," and the word "facilitate" adds nothing. We would not say that the borrower facilitates the bank loan.

The Government, however, replies that using the instrument of communication under § 843(b) is different from borrowing the money or merely handing over the sale price for cocaine. Drugs can be sold without anyone's mailing a letter or using a cell phone. Because cell phones, say, really do make it easier for dealers to break the law, Congress probably meant to ratchet up the culpability of the buyer who calls ahead. But we think that argument comes up short against several more reasons that count against the Government's position.

The common usage that limits "facilitate" to the efforts of someone other than a primary or necessary actor in the commission of a substantive crime has its parallel in the decided cases. The traditional law is that where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature, a line of reasoning exemplified in the courts' consistent refusal to treat noncriminal liquor purchases as falling under the prohibition against aiding or abetting the illegal sale of alcohol. See *Lott* v. *United States*, 205 F. 28, 29–31 (CA9 1913) (collecting cases). And

this Court followed the same course in rejecting the broadest possible reading of a similar provision in *Gebardi* v. *United States*, 287 U. S. 112 (1932). The question there was whether a woman who voluntarily crossed a state line with a man to engage in "illicit sexual relations" could be tagged with "aid[ing] or assist[ing] in . . . transporting, in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or of debauchery, or for any other immoral purpose" in violation of the Mann Act, ch. 395, 36 Stat. 825. *Gebardi*, 287 U. S., at 116–118 (internal quotation marks omitted). Since the statutory penalties were "clearly directed against the acts of the transporter as distinguished from the consent of the subject of the transportation," we refused to "infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter, any more than it has been inferred that the purchaser of liquor was to be regarded as an abettor of the illegal sale." *Id.*, at 119 (footnote omitted).

These cases do not strictly control the outcome of this one, but we think they have a bearing here, in two ways. As we have said many times, we presume legislatures act with case law in mind, *e. g.*, *Williams* v. *Taylor*, 529 U. S. 362, 380–381, and n. 12 (2000), and we presume here that when Congress enacted § 843(b), it was familiar with the traditional judicial limitation on applying terms like "aid," "abet," and "assist." We thus think it likely that Congress had comparable scope in mind when it used the term "facilitate," a word with equivalent meaning, compare Black's Law Dictionary 76 (8th ed. 2004) (defining "aid and abet" as to "facilitate the commission of a crime") with *id.*, at 627 (defining "facilitation" as "[t]he act or an instance of aiding or helping; . . . the act of making it easier for another person to commit a crime").

And applying the presumption is supported significantly by the fact that here, as in the earlier cases, any broader reading of "facilitate" would for practical purposes skew the

congressional calibration of respective buyer-seller penalties. When the statute was enacted, the use of land lines in drug transactions was common, and in these days when everyone over the age of three seems to carry a cell phone, the Government's interpretation would skew the calibration of penalties very substantially. The respect owed to that penalty calibration cannot be minimized. Prior to 1970, Congress punished the receipt, concealment, purchase, or sale of any narcotic drug as a felony, see 21 U. S. C. § 174 (1964 ed.) (repealed), and on top of that added a minimum of two years, and up to five, for using a communication facility in committing, causing, or facilitating, any drug "offense," 18 U. S. C. § 1403 (1964 ed.). In 1970, however, the CSA, 84 Stat. 1242, 21 U. S. C. § 801 *et seq.*, downgraded simple possession of a controlled substance to a misdemeanor, 21 U. S. C. § 844(a) (2006 ed.), and simultaneously limited the communications provision to prohibiting only the facilitation of a drug "felony," § 843(b). This history drives home what is already clear in the current statutory text: Congress meant to treat purchasing drugs for personal use more leniently than the felony of distributing drugs, and to narrow the scope of the communications provision to cover only those who facilitate a drug felony. Yet, under the Government's reading of § 843(b), in a substantial number of cases Congress would for all practical purposes simultaneously have graded back up to felony status with the left hand the same offense it had dropped to a misdemeanor with the right. As the Government sees it, Abuelhawa's use of a phone in making two small drug purchases would subject him, in fact, to six felony counts and a potential sentence of 24 years in prison, even though buying the same drugs minus the phone would have supported only two misdemeanor counts and 2 years of prison. Given the CSA's distinction between simple possession and distribution, and the background history of these offenses, it is impossible to believe that Congress intended

"facilitating" to cause that 12-fold quantum leap in punishment for simple drug possessors.[3]

The Government suggests that this background usage and the 1970 choice to reduce culpability for possession is beside the point because Congress sometimes incorporates aggravating factors into the Criminal Code, and the phone use here is just one of them; the Government mentions possession by a prior drug offender, a felony punishable by up to two years' imprisonment. And, for perspective, the Government points to unauthorized possession of flunitrazepam, a drug used to incapacitate rape victims, which is punishable by imprisonment up to three years. Brief for United States 20. It would not be strange, the Government says, for Congress to "decid[e] to treat the use of a communication facility in a drug transaction as a significant act warranting additional punishment" because "[t]oday's communication facilities . . . make illicit drug transactions easier and more efficient . . . [and] greatly reduce the risk that the participants will be detected while negotiating a transaction." *Id.*, at 23–24.

We are skeptical. There is no question that Congress intended § 843(b) to impede illicit drug transactions by penalizing the use of communication devices in coordinating illegal drug operations, and no doubt that its purpose will be served

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[3] The Government's suggestion that a result like this is not anomalous because a prosecutor could exercise his discretion to seek a lower sentence, see Tr. of Oral Arg. 41, simply begs the question. Of course, Congress legislates against a background assumption of prosecutorial discretion, but this tells us nothing about the boundaries of punishment within which Congress intended the discretion to be exercised; prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes. And it ill behooves the Government to invoke discretionary power in this case, with the prosecutor seeking a sentencing potential of 24 years when the primary offense is the purchase of two grams of cocaine. For that matter, see *id.*, at 41–43 (concession by Government that current Department of Justice guidelines require individual prosecutors who bring charges to charge the maximum crime supported by the facts in a case).

regardless of the outcome in this case. But it does not follow that Congress also meant a first-time buyer's phone calls to get two small quantities of drugs for personal use to expose him to punishment 12 times more severe than a purchase by a recidivist offender and 8 times more severe than the unauthorized possession of a drug used by rapists.[4] To the contrary, Congress used no language spelling out a purpose so improbable, but legislated against a background usage of terms such as "aid," "abet," and "assist" that points in the opposite direction and accords with the CSA's choice to classify small purchases as misdemeanors. The Government's position is just too unlikely.[5]

III

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

It is so ordered.

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[4] The Government does nothing for its own cause by noting that 21 U. S. C. § 856 makes it a felony to facilitate "the simple possession of drugs by others by making available for use . . . a place for the purpose of unlawfully using a controlled substance" even though the crime facilitated may be a mere misdemeanor. Brief for United States 21 (internal quotation marks and alterations omitted). This shows that Congress knew how to be clear in punishing the facilitation of a misdemeanor as a felony, and it only highlights Congress's decision to limit § 843(b) to the facilitation of a "felony."

[5] The Government asks us to affirm the Fourth Circuit on an alternative ground: that Abuelhawa used a communication facility "in causing" Said's drug felony rather than "in . . . facilitating" the felony. But the Government's argument on this point takes the same form as its argument about the term "facilitate," and the reasons that lead us to reject the one argument apply just as well to the other.

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BOBBY, WARDEN *v.* BIES

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

No. 08–598. Argued April 27, 2009—Decided June 1, 2009

In *Atkins* v. *Virginia*, 536 U. S. 304, this Court held that the Eighth Amendment bars execution of mentally retarded offenders. Prior to *Atkins*, mental retardation merited consideration as a mitigating factor, but did not bar imposition of the death penalty. See *Penry* v. *Lynaugh*, 492 U. S. 302. Nearly a decade before *Atkins*, respondent Bies was tried and convicted in Ohio of the aggravated murder, kidnaping, and attempted rape of a ten-year-old boy. Instructed at the sentencing stage to weigh mitigating circumstances (including evidence of Bies' mild to borderline mental retardation) against aggravating factors (including the crime's brutality), the jury recommended a death sentence, which the trial court imposed. Ohio's Court of Appeals and Supreme Court affirmed the conviction and sentence, each concluding that Bies' mental retardation was entitled to "some weight" as a mitigating factor, but that the aggravating circumstances outweighed the mitigating circumstances. Bies then filed an unsuccessful petition for state postconviction relief, contending for the first time that the Eighth Amendment prohibits execution of a mentally retarded defendant. Soon after Bies sought federal habeas relief, this Court decided *Atkins*. The opinion left to the States the task of developing appropriate ways to determine when a person claiming mental retardation would fall within *Atkins*' compass. Ohio heeded *Atkins*' call in *State* v. *Lott*. The District Court then stayed Bies' federal habeas proceedings so that he could present an *Atkins* claim to the state postconviction court. Observing that Bies' mental retardation had not previously been established under the *Atkins-Lott* framework, the state court denied Bies' motion for summary judgment and ordered a full hearing on the *Atkins* claim. Rather than proceeding with that hearing, Bies returned to federal court, arguing that the Double Jeopardy Clause barred the State from relitigating the mental retardation issue. The District Court granted the habeas petition, and the Sixth Circuit affirmed. Relying on *Ashe* v. *Swenson*, 397 U. S. 436, the Court of Appeals determined that all requirements for the issue preclusion component of the Double Jeopardy Clause were met in Bies' case. It concluded, *inter alia*, that the Ohio Supreme Court, on direct appeal, had decided the mental retardation issue under the same standard that court later adopted in *Lott*, and that

the state court's recognition of Bies' mental state had been necessary to the death penalty judgment. When the Sixth Circuit denied the State's petition for rehearing en banc, a concurring judge offered an alternative basis for decision. He opined that, under *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, jeopardy attaches once a capital defendant is "acquitted" based on findings establishing an entitlement to a life sentence; reasoning that the Ohio courts' mental retardation findings entitled Bies to a life sentence, he concluded that the Double Jeopardy Clause barred any renewed inquiry into Bies' mental state.

Held: The Double Jeopardy Clause does not bar the Ohio courts from conducting a full hearing on Bies' mental capacity. Pp. 833–837.

(a) The alternative basis for decision offered by the concurring opinion at the Sixth Circuit's rehearing stage is rejected. The State did not "twice put [Bies] in jeopardy," U. S. Const., Amdt. 5, in the core constitutional sense. *Sattazahn* offers Bies no aid, for there was no acquittal here. Bies' jury voted to impose the death penalty. At issue is his attempt to vacate that sentence, not an effort by the State to retry him or to increase his punishment. Nor did the state courts' mental retardation determinations entitle Bies to a life sentence. At the time of his sentencing and direct appeal, *Penry*, not *Atkins*, was the guiding decision, and the dispositive issue was whether the mitigating factors were outweighed by the aggravating circumstances beyond a reasonable doubt. Pp. 833–834.

(b) The issue preclusion doctrine, on which the Sixth Circuit panel primarily relied, does not bar a full airing of the issue whether Bies qualifies as mentally retarded under *Atkins* and *Lott*. The doctrine bars relitigation of issues actually determined and necessary to the ultimate outcome of a prior proceeding. Initially, it is not clear that the issue of Bies' mental retardation was actually determined under the *Lott* test at trial or on direct appeal. Nor did the State concede that Bies would succeed under *Atkins* and *Lott*, which had not then been decided. More fundamental, it is clear that the state courts' statements regarding Bies' mental capacity were not necessary to the judgments affirming his death sentence. Instead, those determinations cut against the ultimate outcome. In holding otherwise, the Sixth Circuit conflated a determination necessary to the bottom-line judgment with a subsidiary finding that, standing alone, is not outcome determinative. The Sixth Circuit also erred in relying on *Ashe*'s statement: "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U. S., at 443. Bies' case does not involve the kind of "ultimate fact" addressed in *Ashe*. There, the State was precluded

from trying Ashe for robbing a poker player because he had already been acquitted of robbing a different player in the same poker game, and the acquittal was based on a determination that Ashe was not a participant in the poker game robbery. Bies, in contrast, was not acquitted, and determinations of his mental capacity were not necessary to the ultimate imposition of the death penalty. Moreover, even if the core issue preclusion requirements had been met, an exception to the doctrine's application would be warranted due to the intervening *Atkins* decision. Mental retardation as a mitigator and mental retardation under *Atkins* and *Lott* are discrete legal issues. One difference is that mental retardation, urged as a mitigating factor, may instead "enhance the likelihood that [a jury will find] the aggravating factor of future dangerousness." *Atkins*, 536 U. S., at 321. This reality explains why prosecutors, pre-*Atkins*, had little incentive to contest retardation evidence. Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law. The federal courts' intervention in this case derailed the state-court proceeding. Recourse first to Ohio's courts is what this Court envisioned in remitting to the States responsibility for implementing *Atkins*. The State acknowledges that Bies is entitled to such recourse, but rightly seeks a full and fair opportunity to contest his plea under the *Atkins* and *Lott* precedents. Pp. 834–837.

519 F. 3d 324, reversed and remanded.

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

Benjamin C. Mizer, Solicitor General of Ohio, argued the cause for petitioner. With him on the briefs were *Richard Cordray*, Attorney General, and *David M. Lieberman* and *Kimberly A. Olson*, Deputy Solicitors.

John H. Blume argued the cause for respondent. With him on the brief were *Keir M. Weyble*, *Sheri L. Johnson*, *Randall L. Porter*, and *S. Scott Haynes*.

JUSTICE GINSBURG delivered the opinion of the Court.

In *Atkins* v. *Virginia*, 536 U. S. 304 (2002), this Court held that the Eighth Amendment's prohibition of "cruel and unusual punishments" bars execution of mentally retarded offenders. Prior to *Atkins*, the Court had determined that

mental retardation merited consideration as a mitigating factor, but did not bar imposition of the death penalty. See *Penry* v. *Lynaugh*, 492 U. S. 302 (1989).

In 1992, nearly a decade before the Court's decision in *Atkins*, respondent Michael Bies was tried and convicted in Ohio of the aggravated murder, kidnaping, and attempted rape of a ten-year-old boy. Instructed at the sentencing stage to weigh mitigating circumstances (including evidence of Bies' mild to borderline mental retardation) against aggravating factors (including the brutality of the crime), the jury recommended a sentence of death, which the trial court imposed. Ohio's appellate courts affirmed the conviction and sentence. The Ohio Supreme Court, in its 1996 opinion on direct review, observed that Bies' "mild to borderline mental retardation merit[ed] some weight in mitigation," but concluded that "the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt." *State* v. *Bies*, 74 Ohio St. 3d 320, 328, 658 N. E. 2d 754, 761–762.

After this Court decided *Atkins*, the Ohio trial court ordered a full hearing on the question of Bies' mental capacity. The federal courts intervened, however, granting habeas relief to Bies, and ordering the vacation of his death sentence. Affirming the District Court's judgment, the Sixth Circuit reasoned that the Ohio Supreme Court, in 1996, had definitively determined, as a matter of fact, Bies' mental retardation. That finding, the Court of Appeals concluded, established Bies' "legal entitlement to a life sentence." *Bies* v. *Bagley*, 519 F. 3d 324, 334, n. 6 (2008). Therefore, the Sixth Circuit ruled, the Double Jeopardy Clause of the Federal Constitution barred any renewed inquiry into the matter of Bies' mental state.

We reverse the judgment of the Court of Appeals. The Sixth Circuit, in common with the District Court, fundamentally misperceived the application of the Double Jeopardy Clause and its issue preclusion (collateral estoppel) compo-

nent.[1] First, Bies was not "twice put in jeopardy." He was sentenced to death, and Ohio sought no further prosecution or punishment. Instead of "serial prosecutions by the government[,] this case involves serial efforts by the defendant to vacate his capital sentence." *Bies* v. *Bagley*, 535 F. 3d 520, 531–532 (CA6 2008) (Sutton, J., dissenting from denial of rehearing en banc) (internal quotation marks omitted). Further, mental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues. Most grave among the Sixth Circuit's misunderstandings, issue preclusion is a plea available to prevailing parties. The doctrine bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding. The Ohio courts' recognition of Bies' mental state as a mitigating factor was hardly essential to the death sentence he received. On the contrary, the retardation evidence cut against the final judgment. Issue preclusion, in short, does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties.

I

For his part in brutally causing the death of a ten-year-old boy, Bies was convicted by an Ohio jury of attempted rape, kidnaping, and aggravated murder with three death penalty specifications. App. 85; Ohio Rev. Code Ann. §2929.04(A)(3), (7) (Lexis 2006).

At sentencing, Bies presented testimony from clinical psychiatrist Donna E. Winter, who had evaluated him at the court's order during the guilt phase and again before the mitigation hearing. App. 191, 202. Bies did not qualify for a plea of not guilty by reason of insanity, Dr. Winter con-

[1] "[R]eplac[ing] a more confusing lexicon," the term "issue preclusion," in current usage, "encompasses the doctrines [earlier called] 'collateral estoppel' and 'direct estoppel.'" *Taylor* v. *Sturgell*, 553 U. S. 880, 892, n. 5 (2008).

cluded, because he knew the difference between right and wrong at the time of the offense. *Id.*, at 36, 51, 198–200. Bies' IQ, she further reported, fell in the 65–75 range, *id.*, at 211–212, indicating that he is "mildly mentally retarded to borderline mentally retarded," *id.*, at 20–21, 32, 199–200, 213. Dr. Winter also observed: "[Bies] goes about the community, unassisted [and] carries out the activities of daily life fairly independently." *Id.*, at 199. The State responded to Bies' mitigating evidence by emphasizing the brutality of the murder and the risk of Bies' future dangerousness. Instructed to weigh the mitigating circumstances against aggravating factors, the jury recommended a death sentence, which the trial court imposed. *Id.*, at 88–89.

The Ohio Court of Appeals and Supreme Court each independently reviewed the evidence and affirmed. *Id.*, at 84–108; *Bies*, 74 Ohio St. 3d 320, 658 N. E. 2d 754. Neither court devoted detailed attention to the issue of retardation. Both concluded that Bies' mild to borderline mental retardation merited "some weight" in mitigation, as did his youth and lack of a criminal record. App. 105–106; 74 Ohio St. 3d, at 328, 658 N. E. 2d, at 761. The aggravating circumstances, each court found, overwhelmed the mitigating circumstances beyond a reasonable doubt. App. 106; 74 Ohio St. 3d, at 328, 658 N. E. 2d, at 762. We denied Bies' petition for a writ of certiorari. *Bies* v. *Ohio*, 517 U. S. 1238 (1996).

Bies then filed a petition for state postconviction relief, contending for the first time that the Eighth Amendment to the Federal Constitution prohibits execution of a mentally retarded defendant. The trial court agreed that Bies was "mildly mentally retarded," but concluded that, under then-governing Ohio precedent, "a mildly mentally retarded defendant may be [p]unished by execution." App. 153. The Ohio Court of Appeals affirmed the judgment, *id.*, at 175–176, and the Ohio Supreme Court dismissed Bies' appeal without an opinion, *State* v. *Bies*, 87 Ohio St. 3d 1440, 719 N. E. 2d 4 (1999) (Table).

Bies next filed a federal habeas petition in the United States District Court for the Southern District of Ohio. Soon after that filing, this Court held, in *Atkins* v. *Virginia*, 536 U. S., at 321, that the Eighth Amendment prohibits execution of mentally retarded offenders. Our opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall within [*Atkins*' compass]." We "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.*, at 317 (internal quotation marks omitted).

Ohio heeded *Atkins*' call six months later in *State* v. *Lott*, 97 Ohio St. 3d 303, 2002–Ohio–6625, 779 N. E. 2d 1011 *(per curiam)*. At an *Atkins* hearing, the Ohio Supreme Court held, a defendant must prove: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." 97 Ohio St. 3d, at 305, 779 N. E. 2d, at 1014. "IQ tests," the court stated, "are one of the many factors that need to be considered, [but] they alone are not sufficient to make a final determination [of retardation]." *Ibid.* The court also announced "a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Ibid.*

The District Court stayed its proceedings on Bies' federal habeas petition while Bies presented an *Atkins* claim to the state postconviction court. App. to Pet. for Cert. 83a. Bies there moved for summary judgment, arguing that the record established his mental retardation, and that the State was "precluded and estopped" from disputing it. *Id.*, at 104a. The state court recognized that *Atkins* and *Lott* had materially changed the significance of a mental retardation finding. The court observed that mental retardation had not previously been established under the *Atkins*-*Lott* framework; given those precedent-setting decisions, the court concluded, "there is a serious issue as to Mr. Bies' mental status."

App. to Pet. for Cert. 104a. Accordingly, the court denied summary judgment and ordered a full hearing on the *Atkins* claim.

Rather than proceeding with the hearing directed by the state court, Bies returned to the Federal District Court. He argued that the Fifth Amendment's Double Jeopardy Clause, made applicable to the States by the Fourteenth Amendment, barred the State from relitigating the issue of his mental condition. App. to Pet. for Cert. 81a. The District Court granted the habeas petition and ordered vacation of Bies' death sentence. *Id.*, at 68a.

The Court of Appeals affirmed. 519 F. 3d, at 342. It concluded that Bies' case was "controlled by" *Ashe* v. *Swenson*, 397 U. S. 436 (1970), which held that the doctrine of issue preclusion "is embodied in the Fifth Amendment guarantee against double jeopardy." 519 F. 3d, at 332 (quoting 397 U. S., at 445). The Court of Appeals found all requirements for issue preclusion met in Bies' case. It concluded, *inter alia*, that the Ohio Supreme Court, in resolving Bies' direct appeal, had decided the issue of Bies' mental retardation under the same standard later adopted in *Lott*. 519 F. 3d, at 336. Further, the Court of Appeals held, the state court's recognition that Bies qualified as mentally retarded had been necessary to the judgment imposing the death sentence. "[D]etermining which mitigating factors are actually present," the court reasoned, "is a necessary first step to determining whether those factors outweigh the aggravating circumstances." *Id.*, at 337.

The Court of Appeals denied the State's petition for rehearing en banc. 535 F. 3d 520. Judge Clay, concurring, opined that *Sattazahn* v. *Pennsylvania*, 537 U. S. 101 (2003), provided an additional, independent basis for affirmance. 535 F. 3d, at 523–524. Under that decision, he noted, jeopardy attaches, and relitigation is precluded, once a judge or jury has "acquitted" a capital defendant "by entering findings sufficient to establish legal entitlement to [a] life sen-

tence." *Id.*, at 522 (quoting *Sattazahn*, 537 U. S., at 108–109). In Bies' case, Judge Clay concluded, the Ohio courts' determination of mental retardation "entitle[d]" Bies to a life sentence, and thus the Double Jeopardy Clause barred the State from disputing the issue of Bies' mental retardation. 535 F. 3d, at 523–524.

Judge Sutton dissented from the denial of rehearing en banc. *Sattazahn* was inapposite, he maintained, because Bies was never "twice put in jeopardy." 535 F. 3d, at 531 (internal quotation marks omitted). Nor, in Judge Sutton's view, did *Ashe* support the panel's decision, for issue preclusion did not come into play in Bies' case. 535 F. 3d, at 532.

We granted certiorari, 555 U. S. 1131 (2009), and now reverse.

II

A

The alternative basis for decision offered at the rehearing stage in the Court of Appeals can be rejected without extensive explanation. The State did not "twice put [Bies] in jeopardy," U. S. Const., Amdt. 5, in the core constitutional sense. "[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" *Sattazahn*, 537 U. S., at 109. *Sattazahn* offers Bies no aid. In that case, the defendant's first capital jury had deadlocked at the penalty phase, and the court, as required by state law, entered a life sentence. *Id.*, at 104–105. This Court held the Double Jeopardy Clause did not bar the State's request for the death penalty at the defendant's retrial, noting that "neither the judge nor the jury had acquitted the defendant in his first . . . proceeding by entering findings sufficient to establish legal entitlement to the life sentence." *Id.*, at 108–109 (internal quotation marks omitted).

Here, as in *Sattazahn*, there was no acquittal. Bies' jury voted to impose the death penalty. At issue now is Bies'

"second run at vacating his death sentence," 535 F. 3d, at 531 (Sutton, J., dissenting from denial of rehearing en banc), not an effort by the State to retry him or to increase his punishment.

Nor did any state-court determination of Bies' mental retardation "entitl[e]" him to a life sentence. Cf. *id.*, at 523 (Clay, J., concurring in denial of rehearing en banc). At the time Bies was sentenced and on direct appeal, *Penry*, not *Atkins*, was this Court's guiding decision. Under *Penry*, no single mitigator or aggravator was determinative of the judgment. Instead, the dispositive issue, correctly comprehended by the Ohio courts, was whether "the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt." *Bies*, 74 Ohio St. 3d, at 328, 658 N. E. 2d, at 762.

B

The Court of Appeals panel relied primarily on the doctrine of issue preclusion, recognized in *Ashe* to be "embodied in" the Double Jeopardy Clause. 397 U. S., at 445. Preclusion doctrine, however, does not bar a full airing of the issue whether Bies qualifies as mentally retarded under *Atkins* and *Lott*.

Issue preclusion bars successive litigation of "an issue of fact or law" that "is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment." Restatement (Second) of Judgments § 27 (1980) (hereinafter Restatement). If a judgment does not depend on a given determination, relitigation of that determination is not precluded. *Id.*, § 27, Comment *h*. In addition, even where the core requirements of issue preclusion are met, an exception to the general rule may apply when a "change in [the] applicable legal context" intervenes. *Id.*, § 28, Comment *c*.

As an initial matter, it is not clear from the spare statements of the Ohio appellate courts that the issue of Bies' mental retardation under the *Lott* test was actually deter-

mined at trial or during Bies' direct appeal. No court found, for example, that Bies suffered "significant limitations in two or more adaptive skills." *Lott*, 97 Ohio St. 3d, at 305, 779 N. E. 2d, at 1014. Nor did the State concede that Bies would succeed under *Atkins* and *Lott*, which had not then been decided.

More fundamental, it *is* clear that the courts' statements regarding Bies' mental capacity were not necessary to the judgments affirming his death sentence. A determination ranks as necessary or essential only when the final outcome hinges on it. See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4421, p. 543 (2d ed. 2002). "Far from being necessary to the judgment, the Ohio courts' mental-retardation findings cut against it—making them quintessentially the kinds of rulings not eligible for issue-preclusion treatment." 535 F. 3d, at 533 (Sutton, J., dissenting from denial of rehearing en banc).

In finding the state court's determination "necessary to [the] judgment," 519 F. 3d, at 342, the Court of Appeals panel reasoned that the Ohio courts determined Bies' mental capacity pursuant to their "mandatory duty" to weigh the aggravating and mitigating circumstances. *Id.*, at 338. "[W]eighing [aggravators against mitigators]," the panel explained, "could not have occurred unless the court first determined what to place on either side of the scale." *Ibid.* This reasoning conflates a determination necessary to the bottom-line judgment with a subsidiary finding that, standing alone, is not outcome determinative. Issue preclusion cannot transform Bies' loss at the sentencing phase into a partial victory.

For the same reason, the Court of Appeals erred in its repeated reliance on the following passage in *Ashe:* "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 519 F. 3d, at 331–333 (quoting 397 U. S., at 443). Bies' case does not

involve an "ultimate fact" of the kind our decision in *Ashe* addressed. There, the State sought to try Ashe for robbing a poker player even though a jury had already acquitted him of robbing a different player in the same poker game. The State's second attempt was precluded, we held, because the first jury had based its verdict of acquittal upon a determination that Ashe was not one of the participants in the poker game robbery. *Id.*, at 445. Bies, in contrast, was not acquitted—and, as already observed, determinations of his mental capacity were not necessary to the ultimate imposition of the death penalty.[2]

Moreover, even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in *Atkins*. Mental retardation as a mitigator and mental retardation under *Atkins* and *Lott* are discrete legal issues. The *Atkins* decision itself highlights one difference: "[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U. S., at 321. This reality explains why prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation. See App. 65 (excerpt from prosecutor's closing argument describing as Bies' "[c]hief characteristic" his "sensitivity to any kind of frustration and his rapid tendency to get enraged"); *id.*, at 39–54 (cross-examination of Bies' expert witness designed to emphasize Bies' dangerousness to others). Because the change in law

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[2] This case, we note, is governed by the Antiterrorism and Effective Death Penalty Act of 1996. Bies plainly fails to qualify for relief under that Act: The Ohio courts' decisions were not "contrary to, or . . . an unreasonable application of, clearly established Federal law," 28 U. S. C. § 2254(d)(1), and were not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). See also 535 F. 3d 520, 534 (CA6 2008) (Sutton, J., dissenting from denial of rehearing en banc).

substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law. See Restatement § 28, Comment *c*.

The federal courts' intervention in this case derailed a state trial court proceeding "designed to determine whether Bies ha[s] a successful *Atkins* claim." 535 F. 3d, at 534 (Sutton, J., dissenting from denial of rehearing en banc). Recourse first to Ohio's courts is just what this Court envisioned in remitting to the States responsibility for implementing the *Atkins* decision. The State acknowledges that Bies is entitled to such recourse, but it rightly seeks a full and fair opportunity to contest his plea under the postsentencing precedents set in *Atkins* and *Lott*.

* * *

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

It is so ordered.

Syllabus

CSX TRANSPORTATION, INC. *v.* HENSLEY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, EASTERN DIVISION

No. 08–1034. Decided June 1, 2009

A common-carrier railroad employee with asbestosis can recover damages under the Federal Employers' Liability Act (FELA) for fear of developing lung cancer in the future if he proves "that his alleged fear is genuine and serious." *Norfolk & Western R. Co.* v. *Ayers*, 538 U. S. 135, 157. Respondent Hensley sought such fear-of-cancer damages from petitioner CSX Transportation, Inc. The trial court denied CSX's requests for jury instructions on the *Ayers* damages standard, and the jury awarded Hensley damages. The Tennessee Court of Appeals affirmed, concluding that *Ayers* was limited to the narrow, substantive issue whether a FELA plaintiff can recover fear-of-cancer damages and did not discuss or authorize jury instructions.

Held: The Court of Appeals' ruling and the trial court's refusal to give an instruction on the *Ayers* standard were clear error. Contrary to the State Court of Appeals' assertion, *Ayers* expressly recognized several verdict control devices, "includ[ing], on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.*, at 159, n. 19. The Court of Appeals' reasoning does not withstand scrutiny. Its statement that an instruction on the *Ayers* standard would have been futile because cancer evokes raw emotions demonstrates a serious misunderstanding of the nature and function of the jury. Jurors routinely serve as impartial factfinders in sensitive, life-and-death cases and are presumed to follow the court's instructions. The fact that cancer claims could evoke raw emotions is a powerful reason to instruct the jury on the *Ayers* standard, especially given the volume of pending asbestos claims, the danger that an improperly instructed jury could award damages on slight evidence, and the high standard a plaintiff must satisfy in order to obtain damages. It is no answer that courts can apply the *Ayers* standard when ruling on sufficiency-of-the-evidence challenges. Sufficiency reviews are separate from jury instructions, and both verdict control devices provide important protections against imposing unbounded liability in fear-of-cancer claims.

Certiorari granted; 278 S. W. 3d 282, reversed and remanded.

PER CURIAM.

The Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, provides that employees of common-carrier railroads may recover for work-related injuries caused in whole or in part by their railroad-employer's negligence. See 45 U. S. C. §§ 51–60. In this case respondent Thurston Hensley sued petitioner CSX Transportation, Inc., in Tennessee state court. Hensley, who was employed by CSX as an electrician, alleged that the railroad negligently caused him to contract asbestosis—a noncancerous scarring of lung tissue caused by long-term exposure to asbestos.

Hensley sought pain-and-suffering damages from CSX based on, among other things, his fear of developing lung cancer in the future. The Court addressed this subject in *Norfolk & Western R. Co.* v. *Ayers*, 538 U. S. 135 (2003), and held that those types of damages are available in certain FELA cases. The Court stated:

> "Norfolk presented the question whether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the FELA without proof of physical manifestations of the claimed emotional distress. Our answer is yes, with an important reservation. We affirm only the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages. It is incumbent upon such a complainant, however, to prove that his alleged fear is genuine and serious." *Id.*, at 157 (internal quotation marks, citation, and alteration omitted).

At the close of a 3-week trial, Hensley and CSX submitted proposed jury instructions to the trial court. CSX proposed two instructions—requests 30 and 33—related to Hensley's claim for fear-of-cancer damages. Request 30 stated the basic requirements to obtain those damages under *Ayers*.

Supp. Tech. Record, Exh. A, p. 4 ("Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate . . . that the . . . fear is genuine and serious"). Request 33 stated certain factors the jury could consider in applying the *Ayers* standard. Supp. Tech. Record, Exh. A, at 5–6. The trial court denied both requests over CSX's objections, and the jury was not instructed as to the legal standard for fear-of-cancer damages. 17 Tr. 2410–2415; 20 *id.*, at 2903–2904. After two hours of deliberations, the jury found for Hensley and awarded him $5 million in damages.

The Tennessee Court of Appeals affirmed. 278 S. W. 3d 282 (2008). It described our opinion in *Ayers* as "specifically limit[ed]" to the "narrow issue" of whether a FELA plaintiff with asbestosis can recover for fear of cancer. 278 S. W. 3d, at 300. According to the Tennessee Court of Appeals, *Ayers* "did not discuss or authorize jury instructions on this issue, but merely ruled on substantive law." 278 S. W. 3d, at 300 (internal quotation marks omitted). The Tennessee Court of Appeals also reasoned that "little if any purpose would be served by instructing the jury that the plaintiff's fear must be 'genuine and serious.'" *Ibid.* That is because "the mere suggestion of the possibility of cancer has the potential to evoke raw emotions," and "[a]ny juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*." *Ibid.* Instead, the Tennessee Court of Appeals stated, "it is for the courts to serve as gatekeepers" by ensuring that fear-of-cancer claims "do not *go* to the jury unless there is credible evidence of a 'genuine and serious' fear." *Ibid.*

CSX petitioned for certiorari, arguing that the Tennessee Court of Appeals misread and misapplied this Court's decision in *Ayers*. CSX's contention is correct. The ruling of the Tennessee Court of Appeals, and the refusal of the trial court to give an instruction, were clear error. Contrary to

the assertion of the Tennessee Court of Appeals, the *Ayers* Court expressly recognized that several "verdict control devices [are] available to the trial court" when a FELA plaintiff seeks fear-of-cancer damages. 538 U. S., at 159, n. 19. Those "include, on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Ibid.* CSX requested an instruction on the substance of the genuine-and-serious standard, and the trial court erred by not giving one.

The reasons given by the Tennessee Court of Appeals for upholding the denial of an instruction on the standard do not withstand scrutiny. The court stated that instructing the jury on the legal standard for fear-of-cancer damages would have been futile because cancer touches many lives and therefore "evoke[s] [jurors'] raw emotions." 278 S. W. 3d, at 300. This is a serious misunderstanding of the nature and function of the jury. The jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions. Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions. See *Greer* v. *Miller*, 483 U. S. 756, 766, n. 8 (1987). And the trial court in this case correctly instructed the jury as to its legal duty to "follow all of the instructions." 20 Tr. 2882.

Instructing the jury on the standard for fear-of-cancer damages would not have been futile. To the contrary, the fact that cancer claims could "evoke raw emotions" is a powerful reason to instruct the jury on the proper legal standard. Giving the instruction on this point is particularly important in the FELA context. That is because of the volume of pending asbestos claims and also because the nature of those claims enhances the danger that a jury, without proper instructions, could award emotional-distress damages based on slight evidence of a plaintiff's fear of contracting

cancer. But as this Court said in *Ayers*, more is required. Although plaintiffs can seek fear-of-cancer damages in some FELA cases, they must satisfy a high standard in order to obtain them. 538 U. S., at 157–158, and n. 17. Refusing defendants' requests to instruct the jury as to that high standard would render it all but meaningless.

It is no answer that, as the Tennessee Court of Appeals stated, courts can apply the *Ayers* standard when ruling on sufficiency-of-the-evidence challenges. To be sure, *Ayers* recognized that a "review of the evidence on damages for sufficiency" is another of the "verdict control devices" available to courts when plaintiffs seek fear-of-cancer damages. *Id.*, at 159, n. 19. But a determination that there is sufficient evidence to send a claim to a jury is not the same as a determination that a plaintiff has met the burden of proof and should succeed on a claim outright. Put another way, a properly instructed jury could find that a plaintiff's fear is not "genuine and serious" even when there is legally sufficient evidence for the jury to rule for the plaintiff on the issue. That is why *Ayers* recognized that sufficiency reviews and jury instructions are important and separate protections against imposing unbounded liability on asbestos defendants in fear-of-cancer claims.

When this Court in *Ayers* held that certain FELA plaintiffs can recover based on their fear of developing cancer, it struck a delicate balance between plaintiffs and defendants—and it did so against the backdrop of systemic difficulties posed by the "elephantine mass of asbestos cases." *Id.*, at 166 (internal quotation marks omitted). Jury instructions stating the proper standard for fear-of-cancer damages were part of that balance, *id.*, at 159, n. 19, and courts must give such instructions upon a defendant's request. The ruling of the Tennessee Court of Appeals conflicts with *Ayers*. The trial court should have given the substance of the requested instructions. See also *Hedgecorth* v. *Union Pacific R. Co.*, 210 S. W. 3d 220, 227–229 (Mo. App. 2006).

The petition for certiorari is granted. The motions for leave to file briefs *amici curiae* of American Tort Reform Association et al.; Association of American Railroads; and Washington Legal Foundation are granted. The judgment of the Tennessee Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

During his 33 years of employment at L&N Railroad (now CSX Transportation, Inc., or CSX), respondent Thurston Hensley was regularly exposed to a solvent that eventually caused toxic encephalopathy, an incurable and permanent form of brain damage that ended his ability to work. He was also exposed to asbestos that gave rise to a chronic pulmonary condition known as asbestosis. As we have previously noted, asbestosis sufferers "have a significant (one in ten) risk of dying of mesothelioma, a fatal cancer of the lining of the lung or abdominal cavity." *Norfolk & Western R. Co.* v. *Ayers*, 538 U. S. 135, 142 (2003).

In addition to claiming damages for the economic injuries caused by those two diseases, Hensley sought damages for his fear of developing cancer in the future. At trial, CSX requested two jury instructions on this fear-of-cancer claim: The first stated that Hensley had the burden of proving "that [his] fear is genuine and serious," App. to Pet. for Cert. 70a; the second illustrated ways in which Hensley could prove that his fear was genuine and serious.[1] The trial court re-

[1] CSX's second proposed charge (request 33) would have instructed the jury: "In determining whether the Plaintiff has suffered emotional distress resulting from any reasonable fear of developing cancer as a result of his diagnosis of asbestosis, you must determine whether he has demonstrated that his fear is genuine and serious. . . . In making this determination, you may take into account whether or not the Plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has

jected both instructions and instead charged the jury in accordance with Tennessee's Pattern Jury Instructions for pain and suffering. See App. to Brief in Opposition 14; *id.*, at 19.

The jury unanimously found CSX liable for negligently causing Hensley's brain damage and asbestosis, see App. to Pet. for Cert. 58a, and awarded him $5 million in compensatory damages—an award CSX has never challenged as excessive. App. to Brief in Opposition 23. Because CSX did not request a special verdict or special interrogatory, we do not know what portion (if any) of the award was meant to compensate Hensley for his fear of developing cancer.

This Court's decision to nullify the jury's damages award rests on the premise that footnote 19 in our opinion in *Ayers* created a rule that requires trial judges, on a defendant's demand, to instruct the jury that any fear-of-cancer claim must be genuine and serious to be compensable. The footnote at issue states:

> "In their prediction that adhering to the line drawn in *Gottshall* and *Metro-North* will, in this setting, bankrupt defendants, the dissents largely disregard, *inter alia,* the verdict control devices available to the trial court. These include, on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious, review of the evidence on damages for sufficiency, and particularized verdict forms." 538 U. S., at 159, n. 19 (citations omitted).

Naturally read, this footnote merely points out that a defendant has the right to request a genuine-and-serious instruc-

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sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear." App. to Pet. for Cert. 70a–71a; see also *Hedgecorth* v. *Union Pacific R. Co.*, 210 S. W. 3d 220, 227 (Mo. Ct. App. 2006) (noting an identical instruction requested by Union Pacific Railroad).

tion and that, if requested, such an instruction is *available* to the trial court. It does not suggest that all requests must be granted. And it certainly does not indicate that a court's decision not to give the instruction would be treated as *per se* reversible error. That was my view of footnote 19 when I joined the *Ayers* majority.

Since *Ayers*, two state appellate courts—the Tennessee Court of Appeals in this case and the Missouri Court of Appeals in *Hedgecorth* v. *Union Pacific R. Co.*, 210 S. W. 3d 220 (2006), cert. denied, 552 U. S. 812 (2007)—have read footnote 19 as I do. These courts have understood that the primary duty of the trial court is to serve as a gatekeeper, refusing to allow the jury to award fear-of-cancer damages absent evidence that the fear was genuine and serious. Both courts affirmed decisions to reject genuine-and-serious instructions and to rely instead on general pain-and-suffering instructions to charge the jury. In so doing, they rightly noted that *Ayers* focused on whether fear-of-cancer claims were cognizable under the Federal Employers' Liability Act (FELA), 45 U. S. C. §§ 51–60, and that it "did not discuss or authorize jury instructions." *Hedgecorth*, 210 S. W. 3d, at 229; see 278 S. W. 3d 282, 300 (Tenn. App. 2008) (case below).

These courts have read *Ayers* correctly. Immediately after the disputed statement in footnote 19, we made clear that we were passing, "specifically and only, on the question whether this case should be aligned with those in which fear of future injury stems from a current injury, or with those presenting a stand-alone claim for negligent infliction of emotional distress." 538 U. S., at 159. In siding with the former option, we consulted and followed the common-law view that "pain and suffering damages may include compensation for fear of cancer when that fear accompanies a physical injury." *Id.*, at 148 (internal quotation marks omitted). We had no occasion to, and therefore did not, offer a federal common-law rule that would displace the various pain-and-

suffering instructions routinely given to juries. In fact, we specifically took issue with "the dissents' readiness to 'develop a federal common law' to contain jury verdicts under the FELA." *Id.*, at 158, n. 17. Yet, inexplicably, the Court today reads *Ayers*—in dicta no less—to have done precisely what it criticized.

In its rush to reverse the Tennessee Court of Appeals, the Court issues a mandate that is bound to invite further questions. For instance, if it is *per se* error for the trial court to deny a request for a genuine-and-serious instruction, is it also *per se* error to fail to employ particularized verdict forms? After all, that too is a verdict-control device listed in footnote 19. *Id.*, at 159, n. 19. How much discretion, if any, is accorded the trial court to decide which devices are necessary? Is the list of verdict-control devices identified in *Ayers* exhaustive? The risk that the Court's opinion will generate more confusion than clarity is inherent in a summary decisional process that does not give the parties an opportunity to brief and argue the merits.

A $5 million verdict may well justify careful review of all claims of error. But the Court's foray into error correction is not compelled by *Ayers*. A proper reading of *Ayers* and an appropriate amount of respect for the jury in this case should have counseled the Court to stay its hand. Instead, it authorizes a fresh review of the jury's damages award in response to the possibility that the jury decided to compensate Hensley for his fear of cancer without concluding that his fear was genuine and serious. Yet, as a practical matter, it is hard to believe the jury would have awarded any damages for Hensley's fear of cancer if it did not believe that fear to be genuine and serious. The trial court instructed the jury that while Hensley had "no obligation to prove with mathematical certainty such intangible things as pain and suffering or loss of enjoyment of life," he did have to prove

"that a loss has, indeed, occurred." App. to Pet. for Cert. 62a. This is an unwise summary disposition.[2]

Accordingly, I respectfully dissent.

JUSTICE GINSBURG, dissenting.

The Court's opinion in *Norfolk & Western R. Co.* v. *Ayers*, 538 U. S. 135 (2003), would support this plain and simple instruction: "It is incumbent upon [the plaintiff] to prove that his alleged fear [of cancer] is genuine and serious," *id.*, at 157. The defense-oriented instructions requested, however, were far more elaborate, compare *ante*, at 839–840 *(per curiam)*, with App. to Pet. for Cert. 70a–71a, and the trial court rightly refused to give them. Nothing in *Ayers* required the court to deliver, on its own initiative, a fitting substitute. I would therefore deny the petition for certiorari and dissent from the Court's summary reversal.

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[2] Although the Court concludes that the trial court erred by not giving a genuine-and-serious charge, the question whether the instructional error was nevertheless harmless remains open to review on remand by the Tennessee Court of Appeals. Cf. *Hedgpeth* v. *Pulido*, 555 U. S. 57 (2008) *(per curiam)*; *Neder* v. *United States*, 527 U. S. 1 (1999); *Rose* v. *Clark*, 478 U. S. 570 (1986).

Syllabus

REPUBLIC OF IRAQ *v.* BEATY ET AL.

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

No. 07–1090. Argued April 20, 2009—Decided June 8, 2009*

The Foreign Sovereign Immunities Act of 1976 (FSIA) prohibits suits against other countries in American courts, 28 U. S. C. § 1604, with certain exceptions. One exception, § 1605(a)(7) (now repealed), stripped a foreign state of immunity in any suit arising from certain acts of terrorism that occurred when the state was designated as a sponsor of terrorism under § 6(j) of the Export Administration Act of 1979 or § 620A of the Foreign Assistance Act of 1961.

Iraq was designated as a sponsor of terrorism in 1990, but in 2003, following the American-led invasion of Iraq, Congress enacted the Emergency Wartime Supplemental Appropriations Act (EWSAA), § 1503 of which included a proviso clause (the second in a series of eight) authorizing the President to "make inapplicable with respect to Iraq [§] 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." Although President Bush exercised that authority, the D. C. Circuit held in its 2004 *Acree* decision that the EWSAA did not permit the President to waive § 1605(a)(7), and thereby restore Iraq's sovereign immunity, for claims arising from actions Iraq took while designated as a sponsor of terrorism.

Thereafter, Congress repealed § 1605(a)(7) in § 1083(b)(1)(A)(iii) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA) and replaced it with a new, roughly similar exception, § 1083(a). The NDAA also declared that nothing in the EWSAA "ever authorized, directly or indirectly, the making inapplicable of any provision of [the FSIA] or the removal of the jurisdiction of any court" (thus purporting to ratify *Acree*), § 1083(c)(4); and authorized the President to waive "any provision of this section with respect to Iraq" under certain conditions, § 1083(d). On the same day the President signed the NDAA into law he also waived all of § 1083's provisions as to Iraq.

Respondents filed these suits against Iraq in early 2003, alleging mistreatment by Iraqi officials during and after the 1991 Gulf War. Under *Acree*, the courts below refused to dismiss either case on juris-

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*Together with No. 08–539, *Republic of Iraq et al.* v. *Simon et al.*, also on certiorari to the same court.

dictional grounds. The D. C. Circuit also rejected Iraq's alternative argument that even if § 1605(a)(7)'s application to it survived the President's EWSAA waiver, the provision was repealed by NDAA § 1083(b)(1)(A)(iii); and that the President had waived NDAA § 1083(a)'s *new* exception with respect to Iraq under his § 1083(d) authority. The court held instead that it retained jurisdiction over cases pending against Iraq when the NDAA was enacted.

Held: Iraq is no longer subject to suit in federal court. Pp. 856–867.

(a) The District Court lost jurisdiction over both suits in May 2003, when the President exercised his EWSAA authority to make § 1605(a)(7) "inapplicable with respect to Iraq." Pp. 856–862.

(i) Iraq's (and the United States') reading of EWSAA § 1503's second proviso as sweeping in § 1605(a)(7)'s terrorism exception to foreign sovereign immunity is straightforward. In the proviso's terms, the exception is a "provision of law" (indisputably) that "applies to" (strips immunity from) "countries that have supported terrorism" (as designated pursuant to certain statutory provisions). Because he exercised his waiver authority with respect to "all" provisions of law encompassed by the second proviso, his actions made § 1605(a)(7) "inapplicable" to Iraq. Pp. 856–857.

(ii) *Acree*'s resistance to the above construction was based on a sophisticated attempt to construe EWSAA § 1503's second proviso as limiting that section's principal clause, which authorized suspension of "any provision of the Iraq Sanctions Act of 1990." While a proviso's "general office . . . is to except something from the enacting clause, or to qualify and restrain its generality," *United States* v. *Morrow*, 266 U. S. 531, 534, another recognized use is "to introduce independent legislation," *id.*, at 535, which was the function of the proviso here. In any event, § 1605(a)(7) falls within the scope of the proviso even accepting the narrower interpretation adopted by the *Acree* decision. Pp. 857–860.

(iii) Respondents' other objections to the straightforward interpretation of EWSAA § 1503's proviso are rejected. P. 861.

(iv) Nothing in the NDAA changes the above analysis. Although NDAA § 1083(c)(4) appears to ratify *Acree*, this Court need not decide whether such a ratification is effective because § 1083(d)(1) authorized the President to "waive any provision of this section with respect to Iraq," and he waived "all" such provisions, including § 1083(c)(4). Pp. 861–862.

(b) The Court rejects the argument that § 1605(a)(7)'s inapplicability does not bar claims arising from Iraq's conduct *prior* to the President's waiver. In order to exercise jurisdiction over these cases, the District

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Court had to "apply" § 1605(a)(7) with respect to Iraq, but the President's waiver made that provision "inapplicable." No retroactivity problem is posed by this construction, if only because the primary conduct by Iraq that forms the basis for these suits actually occurred before § 1605(a)(7)'s enactment. Pp. 863–865.

(c) Respondents also argue that EWSAA § 1503's sunset clause—under which "the authorities contained in [that] section" expired in 2005—revived § 1605(a)(7) and restored jurisdiction as of the sunset date. But expiration of the § 1503 *authorities* is not the same as cancellation of the *effect* of the prior valid exercise of those authorities. Pp. 865–866.

No. 07–1090, and No. 08–539, 529 F. 3d 1187, reversed.

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

Jonathan S. Franklin argued the cause for petitioners in both cases. With him on the briefs were *Robert A. Burgoyne*, *Tillman J. Breckenridge*, and *Timothy B. Mills.*

Douglas Hallward-Driemeier argued the cause for the United States as *amicus curiae* urging reversal in both cases. With him on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Hertz*, *Douglas N. Letter*, and *Lewis S. Yelin.*

Thomas C. Goldstein argued the cause for respondents in both cases. *Andrew C. Hall*, *James Cooper-Hill*, and *Nelson M. Jones III* filed a brief for Jordan Beaty et al., respondents in No. 07–1090. *Michael Rips*, *Anthony A. Onorato*, *Justin B. Perri*, and *Stephen A. Fennell* filed a brief for Robert Simon et al., respondents in No. 08–539.†

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†Briefs of *amici curiae* urging affirmance in both cases were filed for Eleven Members of Congress et al. by *Douglas W. Dunham*, *Ellen Quackenbos*, *Daniel J. Popeo*, and *Richard A. Samp;* and for James S. Vine et al. in support of respondents in No. 08–539 by *Daniel Wolf.*

Briefs of *amici curiae* urging affirmance in No. 08–539 were filed for the Center for Justice & Accountability by *William J. Aceves* and *Kim J. Landsman;* for the Human Rights Committee of the American Branch of the International Law Association by *Jordan J. Paust;* for St. Mary's University School of Law, Center for Terrorism Law et al. by *Jeffrey F.*

JUSTICE SCALIA delivered the opinion of the Court.

We consider in these cases whether the Republic of Iraq remains subject to suit in American courts pursuant to the terrorism exception to foreign sovereign immunity, now repealed, that had been codified at 28 U. S. C. § 1605(a)(7).

I

A

Under the venerable principle of foreign sovereign immunity, foreign states are ordinarily "immune from the jurisdiction of the courts of the United States and of the States," § 1604. See generally *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812). But the statute embodying that principle—the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. § 1602 *et seq.*—recognizes a number of exceptions; if any of these is applicable, the state is subject to suit, and federal district courts have jurisdiction to adjudicate the claim. § 1330(a); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 489 (1983).

In 1996, Congress added to the list of statutory exceptions one for state sponsors of terrorism, which was codified at 28 U. S. C. § 1605(a)(7). Subject to limitations not relevant here, that exception stripped immunity in any suit for money damages

> "against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act . . . except

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Addicott; for Tortured American Prisoners of War by *John Norton Moore;* for Dr. Louis Fisher et al. by *Charles Swift* and *Ruth J. Vernet;* and for Dr. Stephen Neale by *Leslie E. Chebli.*

Steven R. Perles and *Thomas Fortune Fay* filed a brief of *amici curiae* in No. 08–539 for Plaintiffs in Peterson v. Islamic Republic of Iran, CA 01–2094 (RCL) etc., in the United States District Court for the District of Columbia.

> that the court shall decline to hear a claim under this paragraph—
>
> "(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U. S. C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U. S. C. 2371) at the time the act occurred . . . ."

In brief, § 1605(a)(7) stripped immunity from a foreign state for claims arising from particular acts, if those acts were taken at a time when the state was designated as a sponsor of terrorism.

B

In September 1990, Acting Secretary of State Lawrence Eagleburger formally designated Iraq, pursuant to § 6(j) of the Export Administration Act of 1979, as redesignated and amended, 99 Stat. 135, 50 U. S. C. App. § 2405(j), as "a country which has repeatedly provided support for acts of international terrorism," 55 Fed. Reg. 37793. Over a decade later, in March 2003, the United States and a coalition of allies initiated military action against that country. In a matter of weeks, the regime of Iraqi dictator Saddam Hussein collapsed and coalition forces occupied Baghdad. American attention soon shifted from combat operations to the longer term project of rebuilding Iraq, with the ultimate goal of creating a stable ally in the region.

Toward that end, Congress enacted in April 2003 the Emergency Wartime Supplemental Appropriations Act (EWSAA), 117 Stat. 559. Section 1503 of that Act authorized the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." *Id.*, at 579. President George W. Bush exercised that authority to its fullest extent in May 2003, declaring "inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 . . . and any other

provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26459.

Shortly thereafter, the United States Court of Appeals for the District of Columbia Circuit had occasion to consider whether that Presidential action had the effect of rendering inapplicable to Iraq the terrorism exception to foreign sovereign immunity. The court concluded in a divided panel decision that the President's EWSAA authority did not permit him to waive § 1605(a)(7), and thereby restore sovereign immunity to Iraq, for claims arising from acts it had taken while designated as a sponsor of terror. *Acree* v. *Republic of Iraq*, 370 F. 3d 41, 48 (2004). Because Iraq succeeded in having the claims against it dismissed on other grounds, *id.*, at 59–60, it could not seek certiorari to challenge the D. C. Circuit's interpretation of the EWSAA.

C

There is yet another legislative enactment, and yet another corresponding executive waiver, that bear on the question presented. The National Defense Authorization Act for Fiscal Year 2008 (NDAA), 122 Stat. 3, was passed in January 2008. That Act (1) repealed the FSIA's terrorism exception, § 1083(b)(1)(A)(iii); (2) replaced it with a new, roughly similar exception, § 1083(a); (3) declared that nothing in § 1503 of the EWSAA had "ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States" (thus purporting to ratify the Court of Appeals' *Acree* decision), § 1083(c)(4), 122 Stat. 343; and (4) authorized the President to waive "any provision of this section with respect to Iraq" so long as he made certain findings and so notified Congress within 30 days, § 1083(d), *id.*, at 343–344.

The last provision was added to the NDAA after the President vetoed an earlier version of the bill, which did not include the waiver authority. The President's veto message

said that the bill "would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts." Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. of Pres. Doc. 1641 (2007). Only when Congress added the waiver authority to the NDAA did the President agree to approve it; and on the same day he signed it into law he also officially waived "all provisions of section 1083 of the Act with respect to Iraq," 73 Fed. Reg. 6571 (2008).

II

We consider today two cases that have been navigating their way through the lower courts against the backdrop of the above-described congressional, military, Presidential, and judicial actions. Respondents in the *Simon* case are American nationals (and relatives of those nationals) who allege that they were captured and cruelly mistreated by Iraqi officials during the 1991 Gulf War. The *Beaty* respondents are the children of two other Americans, Kenneth Beaty and William Barloon, who are alleged to have been similarly abused by the regime of Saddam Hussein in the aftermath of that war. Each set of respondents filed suit in early 2003 against Iraq in the United States District Court for the District of Columbia, alleging violations of local, federal, and international law.

Respondents invoked the terrorism exception to foreign sovereign immunity, and given *Acree*'s holding that the President had not rendered that statutory provision inapplicable to Iraq, the District Court refused to dismiss either case on jurisdictional grounds. In *Beaty*, after the District Court denied Iraq's motion to dismiss, 480 F. Supp. 2d 60, 70 (2007), Iraq invoked the collateral order doctrine to support an interlocutory appeal. See *Mitchell* v. *Forsyth*, 472 U. S. 511, 524–529 (1985). In *Simon*, the District Court determined that the claims were time barred and dismissed on that alter-

native basis, *Vine* v. *Republic of Iraq*, 459 F. Supp. 2d 10, 25 (2006), after which the *Simon* respondents appealed.

In the *Beaty* appeal, Iraq (supported by the United States as *amicus*) requested that the Court of Appeals for the District of Columbia Circuit reconsider *Acree*'s holding en banc. The court denied that request over the dissent of Judges Brown and Kavanaugh, and a panel then summarily affirmed in an unpublished order the District Court's denial of Iraq's motion to dismiss. No. 07–7057 (Nov. 21, 2007) *(per curiam)*, App. to Pet. for Cert. in No. 07–1090, pp. 1a–2a.

While the *Simon* appeal was still pending, Congress enacted the NDAA, and the Court of Appeals requested supplemental briefing addressing the impact of that legislation on the court's jurisdiction. Iraq contended, as an alternative argument to its position that *Acree* was wrongly decided, that even if 28 U. S. C. § 1605(a)(7)'s application to Iraq survived the President's EWSAA waiver, the provision was repealed by § 1083(b)(1)(A)(iii) of the NDAA, 122 Stat. 341; and that the *new* terrorism exception to sovereign immunity—which was created by the NDAA and codified at 28 U. S. C. § 1605A (2006 ed., Supp. III)—was waived by the President with respect to Iraq pursuant to his NDAA authority.

The Court of Appeals rejected that argument, holding instead, based on a close reading of the statutory text, that "the NDAA leaves intact our jurisdiction over cases . . . that were pending against Iraq when the Congress enacted the NDAA." 529 F. 3d 1187, 1194 (2008). The panel then reversed the District Court's determination that the *Simon* respondents' claims were untimely, *id.*, at 1195–1196, and rebuffed Iraq's request for dismissal under the political question doctrine, *id.*, at 1196–1198.

Iraq sought this Court's review of both cases, asking us to determine whether under current law it remains subject to suit in the federal courts. We granted certiorari, 555 U. S. 1092 (2009), and consolidated the cases.

III

A

Section 1503 of the EWSAA consists of a principal clause, followed by eight separate proviso clauses. The dispute in these cases concerns the second of the provisos. The principal clause and that proviso read:

> "The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: . . . *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism . . . ." 117 Stat. 579.

Iraq and the United States both read the quoted proviso's residual clause as sweeping in the terrorism exception to foreign sovereign immunity. Certainly that reading is, as even the *Acree* Court acknowledged, "straightforward." 370 F. 3d, at 52.

Title 28 U. S. C. § 1605(a)(7)'s exception to sovereign immunity for state sponsors of terrorism stripped jurisdictional immunity from a country unless "the foreign state was not designated as a state sponsor of terrorism." This is a "provision of law" (indisputably) that "applies to" (strips immunity from) "countries that have supported terrorism" (as designated pursuant to certain statutory provisions). Of course the word "any" (in the phrase "any other provision of law") has an "expansive meaning," *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997), giving us no warrant to limit the class of provisions of law that the President may waive. Because the President exercised his authority with respect to "all" provisions of law encompassed by the second proviso, his actions made § 1605(a)(7) "inapplicable" to Iraq.

To a layperson, the notion of the President's suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign

affairs. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 322–324 (1936) (canvassing precedents from as early as the "inception of the national government"). The granting of Presidential waiver authority is particularly apt with respect to congressional elimination of foreign sovereign immunity, since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch. See, *e. g.*, *Ex parte Peru*, 318 U. S. 578, 586–590 (1943). It is entirely unremarkable that Congress, having taken upon itself in the FSIA to "free the Government" from the diplomatic pressures engendered by the case-by-case approach, *Verlinden*, 461 U. S., at 488, would nonetheless think it prudent to afford the President some flexibility in unique circumstances such as these.

B

The Court of Appeals in *Acree* resisted the above construction, primarily on the ground that the relevant text is found in a proviso. We have said that, at least presumptively, the "grammatical and logical scope [of a proviso] is confined to the subject-matter of the principal clause." *United States* v. *Morrow*, 266 U. S. 531, 534–535 (1925). Using that proposition as a guide, the *Acree* panel strove mightily to construe the proviso as somehow restricting the principal clause of EWSAA §1503, which authorized the President to suspend "any provision of the Iraq Sanctions Act of 1990," 117 Stat. 579.

In the Court of Appeals' view, the second proviso related to that subsection of the Iraq Sanctions Act (referred to in the principal provision) which dictated that certain enumerated statutory provisions, including §620A of the Foreign Assistance Act of 1961 and "all other provisions of law that *impose sanctions* against a country which has repeatedly provided support for acts of international terrorism," shall be fully enforced against Iraq. §586F(c), 104 Stat. 2051 (emphasis added). The panel understood the second EWSAA

proviso as doing nothing more than clarifying that the authority granted by the principal clause (to suspend any part of the Iraq Sanctions Act) included the power to make inapplicable to Iraq the various independent provisions of law that § 586F(c) of the Iraq Sanctions Act instructed to be enforced against Iraq—which might otherwise continue to apply of their own force even without the Iraq Sanctions Act. However, the residual clause of § 586F(c) encompasses only provisions that "impose sanctions"; and, in the Court of Appeals' view, that excludes § 1605(a)(7), which is a rule going instead to the jurisdiction of the federal courts. Thus, the EWSAA proviso swept only as broadly as § 586F(c), and therefore did not permit the President to waive the FSIA terrorism exception.

This is a highly sophisticated effort to construe the proviso as a limitation upon the principal clause. Ultimately, however, we think that effort neither necessary nor successful. It is true that the "general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality." *Morrow*, *supra*, at 534. But its general (and perhaps appropriate) office is not, alas, its exclusive use. Use of a proviso "to state a general, independent rule," *Alaska* v. *United States*, 545 U. S. 75, 106 (2005), may be lazy drafting, but is hardly a novelty. See, *e. g.*, *McDonald* v. *United States*, 279 U. S. 12, 21 (1929). *Morrow* itself came with the caveat that a proviso is sometimes used "to introduce independent legislation." 266 U. S., at 535. We think that was its office here. The principal clause granted the President a power; the second proviso purported to grant him an *additional* power. It was not, on any fair reading, an exception to, qualification of, or restraint on the principal power.

Contrasting the second EWSAA proviso to some of the other provisos illustrates the point. For example, the first proviso cautioned that "nothing in this section shall affect

the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992," 117 Stat. 579, and the third forbade the export of certain military equipment "under the authority of this section," *ibid.* Both of these plainly sought to define and limit the authority granted by the principal clause. The fourth proviso, however, mandated that "section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq," *ibid.*, and it is impossible to see how that self-executing suspension of a distinct statute in any way cabined or clarified the principal clause's authorization to suspend the Iraq Sanctions Act.

There are other indications that the second proviso's waiver authority was not limited to the statutory provisions embraced by § 586F(c) of the Iraq Sanctions Act. If that is all it was meant to accomplish, why would Congress not simply have tracked § 586F(c)'s residual clause? Instead of restricting the President's authority to statutes that "impose sanctions" on sponsors of terror, the EWSAA extended it to any statute that "applies" to such states. That is undoubtedly a broader class.

Even if the best reading of the EWSAA proviso were that it encompassed only statutes that impose sanctions or prohibit assistance to state sponsors of terrorism, see *Acree*, 370 F. 3d, at 54, we would disagree with the Court of Appeals' conclusion that the FSIA exception is not such a law. Allowing lawsuits to proceed certainly has the extra benefit of facilitating the compensation of injured victims, but the fact that § 1605(a)(7) targeted only foreign states designated as sponsors of terrorism suggests that the law was intended as a sanction, to punish and deter undesirable conduct. Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions (both of which are explicitly mandated by § 586F(c) of the Iraq Sanctions Act).

The application of this sanction affects the jurisdiction of the federal courts, but that fact alone does not deprive it of its character as a sanction.

It may well be that when Congress enacted the EWSAA it did not have specifically in mind the terrorism exception to sovereign immunity. The Court of Appeals evidently found that to be of some importance. *Id.*, at 56 (noting there is "no reference in the legislative history to the FSIA"). But the whole value of a generally phrased residual clause, like the one used in the second proviso, is that it serves as a catchall for matters not specifically contemplated—known unknowns, in the happy phrase coined by Secretary of Defense Donald Rumsfeld. Pieces of Intelligence: The Existential Poetry of Donald H. Rumsfeld 2 (H. Seely comp. 2003). If Congress wanted to limit the waiver authority to particular statutes that it had in mind, it could have enumerated them individually.

We cannot say with any certainty (for those who think this matters) whether the Congress that passed the EWSAA *would have wanted* the President to be permitted to waive § 1605(a)(7). Certainly the exposure of Iraq to billions of dollars in damages could be thought to jeopardize the statute's goal of speedy reconstruction of that country. At least the President thought so. And in the "vast external realm, with its important, complicated, delicate and manifold problems," *Curtiss-Wright Export Corp.*, 299 U. S., at 319, courts ought to be especially wary of overriding apparent statutory text supported by executive interpretation in favor of speculation about a law's true purpose.[1]

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[1] The eighth proviso of EWSAA § 1503 says that absent further congressional action, "the authorities contained in this section shall expire on September 30, 2004." 117 Stat. 579. The Court of Appeals expressed doubt that Congress would have wanted federal-court jurisdiction to disappear for a year and then suddenly return. *Acree* v. *Republic of Iraq*, 370 F. 3d 41, 56–57 (CADC 2004). Our analysis of the sunset provision, see Part V, *infra*, disposes of that concern.

C

Respondents advance two other objections to the straightforward interpretation of the EWSAA proviso. First, in a less compelling variant of the D. C. Circuit's approach, the *Simon* respondents argue that "section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism" means § 620A of the Foreign Assistance Act or any other provision of law cited therein. The provision would thus allow the President to make inapplicable to Iraq the statutes that § 620A precludes from being used to provide support to terror-sponsoring nations. Not to put too fine a point upon it, that is an absurd reading, not only textually but in the result it produces: It would mean that the effect of the EWSAA was to permit the President to *exclude* Iraq from, rather than *include* it within, such beneficent legislation as the Food for Peace Act of 1966, 7 U. S. C. § 1691 *et seq.*

Both respondents also invoke the canon against implied repeals, *TVA* v. *Hill*, 437 U. S. 153, 190 (1978), but that canon has no force here. Iraq's construction of the statute neither rests on implication nor effects a repeal. The EWSAA proviso *expressly* allowed the President to render certain statutes inapplicable; the only question is its scope. And it did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation. Cf. *Clinton* v. *City of New York*, 524 U. S. 417, 443–445 (1998).

D

We must consider whether anything in the subsequent NDAA legislation changes the above analysis. In particular, § 1083(c)(4) of that statute specifically says that "[n]othing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United

States." 122 Stat. 343. This looks like a ratification by Congress of the conclusion reached in the *Acree* decision.

Is such a ratification effective? The NDAA is not subsequent legislative history, as Iraq claims, cf. *Sullivan* v. *Finkelstein*, 496 U. S. 617, 632 (1990) (SCALIA, J., concurring in part); rather, it is binding law, approved by the Legislature and signed by the President. Subsequent legislation can of course alter the meaning of an existing law for the future; and it can even alter the past operation of an existing law (constitutional objections aside) if it makes that retroactive operation clear. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 267–268 (1994). To tell the truth, however, we are unaware of any case dealing with the retroactive amendment of a law that had already expired, as the EWSAA had here. And it is doubtful whether Congress can retroactively claw back power it has given to the Executive, invalidating Presidential action that was valid when it was taken. Thankfully, however, we need not explore these difficulties here.

In § 1083(d)(1) of the NDAA, the President was given authority to "waive any provision of this section with respect to Iraq." 122 Stat. 343. The President proceeded to waive "all" provisions of that section as to Iraq, including (presumably) § 1083(c)(4). 73 Fed. Reg. 6571. The Act can therefore add nothing to our analysis of the EWSAA. Respondent Beaty objects that the President cannot waive a *fact*. But neither can Congress legislate a fact. Section 1083(c)(4) could change our interpretation of the disputed EWSAA language only if it has some *substantive* effect, changing what would otherwise be the law. And if the President's waiver does anything, it eliminates any substantive effect that the NDAA would otherwise have on cases to which Iraq is a party.[2]

[2] Respondents contend that the NDAA waiver is irrelevant because the President's veto of the *initial* version of the bill—which did not include the waiver authority—was defective. We need not inquire into that point, since Congress (evidently thinking the veto effective) enacted a new bill

IV

Having concluded that the President did render 28 U. S. C. § 1605(a)(7) "inapplicable with respect to Iraq," and that such action was within his assigned powers, we consider respondents' argument that the inapplicability of the provision does not bar their claims, since they arise from Iraq's conduct *prior* to the President's waiver. Any other interpretation, they say, would cause the law to operate in a disfavored retroactive fashion.

This argument proceeds as follows: The FSIA exception becomes "applicable" to a foreign state when that foreign state is designated as a sponsor of terrorism. In parallel fashion, rendering the exception "inapplicable" should be equivalent to *removing* the state's designation. And under § 1605(a)(7), jurisdiction turned on the foreign state's designation "at the time the act [giving rise to the claim] occurred." On this reading, the President's waiver meant only that Iraq could not be sued pursuant to § 1605(a)(7) for any *future* conduct, even though it technically remained designated as a state sponsor of terrorism.

Respondents support this interpretation with a policy argument and a canon of construction. First, why would Congress have sought to give Iraq *better* treatment than any other state that saw the error of its ways, reformed its behavior, and was accordingly removed from the list of terror-sponsoring regimes? See *Acree*, 370 F. 3d, at 56 (calling such a result "perplexing"). Providing immunity for future acts is one thing, but wiping the slate clean is quite another. Second, this Court has often applied a presumption that, absent clear indication to the contrary, statutory amendments do not apply to pending cases. *Landgraf, supra,* at 280. A

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that was identical in all material respects but for the addition of Presidential waiver authority. Since that authority would be nugatory, and the rest of the new law utterly redundant, if a law resulting from the former bill remained in effect, that law would have been effectively repealed.

narrow reading of "inapplicable" would better comport with that presumption.

As a textual matter, the proffered definition of "inapplicable" is unpersuasive. If a provision of law is "inapplicable" then it cannot be applied; to "apply" a statute is "[t]o put [it] to use." Webster's New International Dictionary 131 (2d ed. 1954). When the District Court exercised jurisdiction over these cases against Iraq, it surely was putting § 1605(a)(7) to use with respect to that country. Without the *application* of that provision, there was no basis for subject-matter jurisdiction. 28 U. S. C. §§ 1604, 1330(a). If Congress had wanted to authorize the President merely to cancel Iraq's designation as a state sponsor of terrorism, then Congress could have done so.

As a policy matter, moreover, we do not find that result particularly "perplexing." As then-Judge Roberts explained in his separate opinion in *Acree*, Congress in 2003 "*for the first time* confronted the prospect that a friendly successor government would, in its infancy, be vulnerable under Section 1605(a)(7) to crushing liability for the actions of its renounced predecessor." 370 F. 3d, at 61 (opinion concurring in part and concurring in judgment) (emphasis in original). The Government was at the time spending considerable sums of money to rebuild Iraq, see Rogers, Congress Gives Initial Approval for War Funding, Airline Aid, Wall Street Journal, Apr. 4, 2003, p. A10. What would seem perplexing is converting a billion-dollar reconstruction project into a compensation scheme for a few of Saddam's victims.

As for the judicial presumption against retroactivity, that does not induce us to read the EWSAA proviso more narrowly. Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases. Foreign sovereign immunity "reflects current political realities and relationships," and its availability (or lack thereof)

generally is not something on which parties can rely "in shaping their primary conduct." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 696 (2004); see also *id.*, at 703 (SCALIA, J., concurring).

In any event, the primary conduct by Iraq that forms the basis for these suits actually occurred prior to the enactment of the FSIA terrorism exception in 1996. See *Saudi Arabia* v. *Nelson*, 507 U. S. 349, 351 (1993). That is, Iraq was immune from suit at the time it is alleged to have harmed respondents. The President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts.

V

Accordingly, the District Court lost jurisdiction over both suits in May 2003, when the President exercised his authority to make § 1605(a)(7) inapplicable with respect to Iraq. At that point, immunity kicked back in and the cases ought to have been dismissed, "the only function remaining to the court [being] that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869).

In respondents' view, that is not fatal to their claims. They point to the eighth proviso in § 1503 of the EWSAA:

> "*Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first." 117 Stat. 579.

The effect of this provision, they contend, is that the EWSAA waiver expired in 2005,[3] and that when it did so § 1605(a)(7) was revived, immunity was again stripped, and

[3] The sunset date was extended by one year in a later bill. § 2204(2), 117 Stat. 1230.

jurisdiction was restored. If that is true, then at the very least they ought to be permitted to refile their suits and claim equitable tolling for the period between 2005 and the present, during which time they understandably relied on *Acree*'s holding.

The premise, however, is flawed. It is true that the "authorities contained in" § 1503 of the EWSAA expired, but expiration of the *authorities* (viz., the President's powers to suspend and make inapplicable certain laws) is not the same as cancellation of the *effect* of the President's prior valid exercise of those authorities (viz., the restoration of sovereign immunity). As Iraq points out, Congress has in other statutes provided explicitly that *both* the authorities granted *and* the effects of their exercise sunset on a particular date. *E. g.*, 19 U. S. C. § 2432(c)(3) ("A waiver with respect to any country shall terminate on the day after the waiver authority granted by this subsection ceases to be effective with respect to such country"). The EWSAA contains no such language.

We think the better reading of the eighth EWSAA proviso (the sunset clause) is that the powers granted by the section could be exercised only for a limited time, but that actions taken by the President pursuant to those powers (*e. g.*, suspension of the Iraq Sanctions Act) would not lapse on the sunset date. If it were otherwise, then the Iraq Sanctions Act—which has never been repealed, and which imposes a whole host of restrictions on relations with Iraq—would have returned to force in September 2005. Nobody believes that is so.

* * *

When the President exercised his authority to make inapplicable with respect to Iraq all provisions of law that apply to countries that have supported terrorism, the exception to foreign sovereign immunity for state sponsors of terrorism became inoperative as against Iraq. As a result, the courts below lacked jurisdiction; we therefore need not reach Iraq's

alternative argument that the NDAA subsequently stripped jurisdiction over the cases. The judgments of the Court of Appeals are reversed.

It is so ordered.

Syllabus

CAPERTON ET AL. *v.* A. T. MASSEY COAL CO., INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 08–22. Argued March 3, 2009—Decided June 8, 2009

After a West Virginia jury found respondents, a coal company and its affiliates (hereinafter Massey), liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations and awarded petitioners (hereinafter Caperton) $50 million in damages, West Virginia held its 2004 judicial elections. Knowing the State Supreme Court of Appeals would consider the appeal, Don Blankenship, Massey's chairman and principal officer, supported Brent Benjamin rather than the incumbent justice seeking reelection. His $3 million in contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin's own committee. Benjamin won by fewer than 50,000 votes. Before Massey filed its appeal, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the State's Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion, indicating that he found nothing showing bias for or against any litigant. The court then reversed the $50 million verdict. During the rehearing process, Justice Benjamin refused twice more to recuse himself, and the court once again reversed the jury verdict. Four months later, Justice Benjamin filed a concurring opinion, defending the court's opinion and his recusal decision.

Held: In all the circumstances of this case, due process requires recusal. Pp. 876–890.

(a) The Due Process Clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, *Tumey* v. *Ohio*, 273 U. S. 510, 523, but this Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow* v. *Larkin*, 421 U. S. 35, 47. Two such instances place the present case in proper context. Pp. 876–881.

(1) The first involved local tribunals in which a judge had a financial interest in a case's outcome that was less than what would have been considered personal or direct at common law. In *Tumey*, a village mayor with authority to try those accused of violating a law prohibiting the possession of alcoholic beverages faced two potential conflicts: Be-

cause he received a salary supplement for performing judicial duties that was funded from the fines assessed, he received a supplement only upon a conviction; and sums from the fines were deposited to the village's general treasury fund for village improvements and repairs. Disqualification was required under the principle that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." 273 U. S., at 532. In *Ward* v. *Monroeville*, 409 U. S. 57, a conviction in another mayor's court was invalidated even though the fines assessed went only to the town's general fisc, because the mayor faced a "'possible temptation'" created by his "executive responsibilities for village finances." *Id.*, at 60. Recusal was also required where an Alabama Supreme Court Justice cast the deciding vote upholding a punitive damages award while he was the lead plaintiff in a nearly identical suit pending in Alabama's lower courts. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813. The proper constitutional inquiry was not "whether in fact [the justice] was influenced," *id.*, at 825, but "whether sitting on [that] case . . . '"would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true,"'" *ibid.* While the "degree or kind of interest . . . sufficient to disqualify a judge . . . '[could not] be defined with precision,'" *id.*, at 822, the test did have an objective component. Pp. 877–879.

(2) The second instance emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but had determined in an earlier proceeding whether criminal charges should be brought and then proceeded to try and convict the petitioners. *In re Murchison*, 349 U. S. 133. Finding that "no man can be a judge in his own case," and "no man is permitted to try cases where he has an interest in the outcome," *id.*, at 136, the Court noted that the circumstances of the case and the prior relationship required recusal. The judge's prior relationship with the defendant, as well as the information acquired from the prior proceeding, was critical. In reiterating that the rule that "a defendant in criminal contempt proceedings should be [tried] before a judge other than the one reviled by the contemnor," *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 466, rests on the relationship between the judge and the defendant, *id.*, at 465, the Court noted that the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or there is an unconstitutional "'potential for bias,'" *id.*, at 466. Pp. 880–881.

(b) Because the objective standards implementing the Due Process Clause do not require proof of actual bias, this Court does not question Justice Benjamin's subjective findings of impartiality and propriety and

need not determine whether there was actual bias. Rather, the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U. S., at 47. There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The proper inquiry centers on the contribution's relative size in comparison to the total amount contributed to the campaign, the total amount spent in the election, and the apparent effect of the contribution on the outcome. It is not whether the contributions were a necessary and sufficient cause of Benjamin's victory. In an election decided by fewer than 50,000 votes, Blankenship's campaign contributions—compared to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented." *Ibid.* The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical, for it was reasonably foreseeable that the pending case would be before the newly elected justice. There is no allegation of a *quid pro quo* agreement, but the extraordinary contributions were made at a time when Blankenship had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause. Applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal. Pp. 881–887.

(c) Massey and its *amici* err in predicting that this decision will lead to adverse consequences ranging from a flood of recusal motions to unnecessary interference with judicial elections. They point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case, which are extreme by any measure. And because the States may have codes of conduct with more rigorous recusal standards than due process requires, most recusal disputes will be resolved without resort to the Constitution, making the constitutional standard's application rare. Pp. 887–890.

223 W. Va. 624, 679 S. E. 2d 223, reversed and remanded.

Syllabus

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 890. SCALIA, J., filed a dissenting opinion, *post*, p. 902.

Theodore B. Olson argued the cause for petitioners. With him on the briefs were *Matthew D. McGill*, *Amir C. Tayrani*, *Robert V. Berthold, Jr.*, *David B. Fawcett*, and *Bruce E. Stanley*.

Andrew L. Frey argued the cause for respondents. With him on the brief were *Evan M. Tager*, *Dan Himmelfarb*, *Jeffrey A. Berger*, *Lewis F. Powell III*, and *D. C. Offutt, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the American Academy of Appellate Lawyers by *Wendy Cole Lascher*, *Gloria C. Phares*, and *Timothy J. Berg;* for the American Bar Association by *H. Thomas Wells, Jr.*, *Keith R. Fisher*, and *William F. Sheehan;* for the National Association of Criminal Defense Lawyers by *Pamela Harris;* and for Public Citizen by *Allison M. Zieve* and *Alan B. Morrison*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, and *Corey Maze*, Solicitor General, *Kevin C. Newsom*, and *Marc James Ayers*, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *James D. "Buddy" Caldwell* of Louisiana, *Michael A. Cox* of Michigan, and *Mark L. Shurtleff* of Utah; for the Center for Competitive Politics by *Stephen M. Hoersting* and *Reid Alan Cox;* for the James Madison Center for Free Speech by *James Bopp, Jr.;* and for Ronald D. Rotunda et al. by *C. Thomas Ludden*.

Briefs of *amici curiae* were filed for the American Association for Justice by *Robert S. Peck* and *Les Weisbrod;* for the Brennan Center for Justice at New York University School of Law et al. by *James J. Sample*, *Aziz Huq*, *J. Gerald Hebert*, *Paul S. Ryan*, and *Tara Malloy;* for the Center for Political Accountability et al. by *Karl J. Sandstrom;* for the Committee for Economic Development et al. by *Daniel F. Kolb*, *Edmund Polubinski III*, and *David B. Toscano;* for the Conference of Chief Justices by *Thomas R. Phillips*, *Roy A. Schotland*, and *George T. Patton, Jr.;* for Justice At Stake et al. by *Elizabeth B. Wydra;* for the Supreme Court of the State of Louisiana by *Esmond Phelps Gay* and *Kevin Richard Tully;* for Ten Current and Former Chief Justices and Justices by *Patrick J. Wright;* and for 27 Former Chief Justices and Justices by *Charles K. Wiggins* and *J. Mark White*.

JUSTICE KENNEDY delivered the opinion of the Court.

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of $50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.

Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

I

In August 2002 a West Virginia jury returned a verdict that found respondents A. T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of $50 million in compensatory and punitive damages.

In June 2004 the state trial court denied Massey's post-trial motions challenging the verdict and the damages award, finding that Massey "intentionally acted in utter disregard of [Caperton's] rights and ultimately destroyed [Caperton's] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so." App. 32a, ¶ 10(p). In March 2005 the trial court denied Massey's motion for judgment as a matter of law.

Don Blankenship is Massey's chairman, chief executive officer, and president. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U. S. C. § 527. The § 527 organization opposed McGraw and supported Benjamin. 223 W. Va. 624, 700, 679 S. E. 2d 223, 299 (2008) (Benjamin, Acting C. J., concurring). Blankenship's donations accounted for more than two-thirds of the total funds it raised. App. 150a. This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—"'to support . . . Brent Benjamin.'" *Id.*, at 184a, 186a, 200a (quoting Blankenship's state campaign financial disclosure filings; bold typeface omitted).

To provide some perspective, Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. *Id.*, at 288a. Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined. Brief for Petitioners 28.

Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%). 223 W. Va., at 702, 679 S. E. 2d, at 301 (Benjamin, Acting C. J., concurring).

In October 2005, before Massey filed its petition for appeal in West Virginia's highest court, Caperton moved to disqual-

ify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion in April 2006. He indicated that he "carefully considered the bases and accompanying exhibits proffered by the movants." But he found "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." App. 336a–337a. In December 2006 Massey filed its petition for appeal to challenge the adverse jury verdict. The West Virginia Supreme Court of Appeals granted review.

In November 2007 that court reversed the $50 million verdict against Massey. The majority opinion, authored by then-Chief Justice Davis and joined by Justices Benjamin and Maynard, found that "Massey's conduct warranted the type of judgment rendered in this case." *Id.*, at 357a. It reversed, nevertheless, based on two independent grounds—first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. *Id.*, at 345a. Justice Starcher dissented, stating that the "majority's opinion is morally and legally wrong." *Id.*, at 420a–422a. Justice Albright also dissented, accusing the majority of "misapplying the law and introducing sweeping 'new law' into our jurisprudence that may well come back to haunt us." *Id.*, at 430a–431a.

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. *Id.*, at 440a–441a, 456a. Justice Maynard granted Caperton's recusal motion. On the other side Justice Starcher granted Massey's recusal motion, apparently

based on his public criticism of Blankenship's role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well. He noted that "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." *Id.*, at 459a–460a. Justice Benjamin declined Justice Starcher's suggestion and denied Caperton's recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices. Caperton moved a third time for disqualification, arguing that Justice Benjamin had failed to apply the correct standard under West Virginia law—*i. e.*, whether "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial." *Id.*, at 466a, ¶ 8. Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the "push poll" was "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification." *Id.*, at 483a.

In April 2008 a divided court again reversed the jury verdict, and again it was a 3-to-2 decision. Justice Davis filed a modified version of her prior opinion, repeating the two earlier holdings. She was joined by Justice Benjamin and Judge Fox. Justice Albright, joined by Judge Cookman, dissented: "Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority." 223 W. Va., at 685, 679 S. E. 2d, at 284. The dissent also noted "genuine due process implications arising under federal law" with respect to Justice Benjamin's failure to recuse himself. *Id.*, at 686, n. 16, 679 S. E. 2d, at 285, n. 16 (citing *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813 (1986); *In re Murchison*, 349 U. S. 133, 136 (1955)).

Four months later—a month after the petition for writ of certiorari was filed in this Court—Justice Benjamin filed a concurring opinion. He defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton's challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiterated that he had no "'direct, personal, substantial, pecuniary interest' in this case." 223 W. Va., at 702, 679 S. E. 2d, at 301 (quoting *Lavoie*, *supra*, at 822). Adopting "a standard merely of 'appearances,'" he concluded, "seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations." 223 W. Va., at 707, 679 S. E. 2d, at 306.

We granted certiorari. 555 U. S. 1028 (2008).

II

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, *supra*, at 136. As the Court has recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC* v. *Cement Institute*, 333 U. S. 683, 702 (1948). The early and leading case on the subject is *Tumey* v. *Ohio*, 273 U. S. 510 (1927). There, the Court stated that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Id.*, at 523.

The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. *Ibid.* This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison); see Frank, Dis-

qualification of Judges, 56 Yale L. J. 605, 611–612 (1947). Under this rule, "disqualification for bias or prejudice was not permitted"; those matters were left to statutes and judicial codes. *Lavoie*, *supra*, at 820; see also Part IV, *infra* (discussing judicial codes). Personal bias or prejudice "alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Lavoie*, *supra*, at 820.

As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U. S., at 47. To place the present case in proper context, two instances where the Court has required recusal merit further discussion.

A

The first involved the emergence of local tribunals where a judge had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law.

This was the problem addressed in *Tumey*. There, the mayor of a village had the authority to sit as a judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages. Inherent in this structure were two potential conflicts. First, the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal. The mayor-judge thus received a salary supplement only if he convicted the defendant. 273 U. S., at 520. Second, sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs. *Id.*, at 522.

The Court held that the Due Process Clause required disqualification "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.*, at 535. It so held despite observing that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it." *Id.*, at 532. The Court articulated the controlling principle:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Ibid.*

The Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest. It was also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality.

This concern with conflicts resulting from financial incentives was elaborated in *Ward* v. *Monroeville*, 409 U. S. 57 (1972), which invalidated a conviction in another mayor's court. In *Monroeville*, unlike in *Tumey*, the mayor received no money; instead, the fines the mayor assessed went to the town's general fisc. The Court held that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." 409 U. S., at 60. The principle, instead, turned on the "'possible temptation'" the mayor might face; the mayor's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor's court." *Ibid.* As the Court reiterated in another case that Term, "the [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson* v. *Berryhill*, 411 U. S. 564, 579 (1973) (an administrative board com-

posed of optometrists had a pecuniary interest of "sufficient substance" so that it could not preside over a hearing against competing optometrists).

The Court in *Lavoie* further clarified the reach of the Due Process Clause regarding a judge's financial interest in a case. There, a justice had cast the deciding vote on the Alabama Supreme Court to uphold a punitive damages award against an insurance company for bad-faith refusal to pay a claim. At the time of his vote, the justice was the lead plaintiff in a nearly identical lawsuit pending in Alabama's lower courts. His deciding vote, this Court surmised, "undoubtedly 'raised the stakes' " for the insurance defendant in the justice's suit. 475 U. S., at 823–824.

The Court stressed that it was "not required to decide whether in fact [the justice] was influenced." *Id.*, at 825. The proper constitutional inquiry is "whether sitting on the case then before the Supreme Court of Alabama ' "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." ' " *Ibid.* (quoting *Monroeville, supra,* at 60, in turn quoting *Tumey, supra,* at 532). The Court underscored that "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' " 475 U. S., at 822 (quoting *Murchison,* 349 U. S., at 136). In the Court's view, however, it was important that the test have an objective component.

The *Lavoie* Court proceeded to distinguish the state-court justice's particular interest in the case, which required recusal, from interests that were not a constitutional concern. For instance, "while [the other] justices might conceivably have had a slight pecuniary interest" due to their potential membership in a class-action suit against their own insurance companies, that interest is " 'too remote and insubstantial to violate the constitutional constraints.' " 475 U. S., at 825–826 (quoting *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 243 (1980)).

B

The second instance requiring recusal that was not discussed at common law emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding. This Court characterized that first proceeding (perhaps pejoratively) as a "'one-man grand jury.'" *Murchison,* 349 U. S., at 133.

In that first proceeding, and as provided by state law, a judge examined witnesses to determine whether criminal charges should be brought. The judge called the two petitioners before him. One petitioner answered questions, but the judge found him untruthful and charged him with perjury. The second declined to answer on the ground that he did not have counsel with him, as state law seemed to permit. The judge charged him with contempt. The judge proceeded to try and convict both petitioners. *Id.*, at 134–135.

This Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage because of his earlier participation followed by his decision to charge them. The Due Process Clause required disqualification. The Court recited the general rule that "no man can be a judge in his own case," adding that "no man is permitted to try cases where he has an interest in the outcome." *Id.*, at 136. It noted that the disqualifying criteria "cannot be defined with precision. Circumstances and relationships must be considered." *Ibid.* These circumstances and the prior relationship required recusal: "Having been a part of [the one-man grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137. That is because "[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session." *Id.*, at 138.

The *Murchison* Court was careful to distinguish the circumstances and the relationship from those where the Con-

stitution would not require recusal. It noted that the single-judge grand jury is "more a part of the accusatory process than an ordinary lay grand juror," and that "adjudication by a trial judge of a contempt committed in [a judge's] presence in open court cannot be likened to the proceedings here." *Id.*, at 137. The judge's prior relationship with the defendant, as well as the information acquired from the prior proceeding, was of critical import.

Following *Murchison* the Court held in *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 466 (1971), "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." The Court reiterated that this rule rests on the relationship between the judge and the defendant: "[A] judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.*, at 465.

Again, the Court considered the specific circumstances presented by the case. It noted that "not every attack on a judge . . . disqualifies him from sitting." *Ibid.* The Court distinguished the case from *Ungar* v. *Sarafite*, 376 U. S. 575 (1964), in which the Court had "ruled that a lawyer's challenge, though 'disruptive, recalcitrant and disagreeable commentary,' was still not 'an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.' " *Mayberry*, *supra*, at 465–466 (quoting *Ungar*, *supra*, at 584). The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

III

Based on the principles described in these cases we turn to the issue before us. This problem arises in the context

of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

Caperton contends that Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant's contempt.

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide "objective evidence" or "objective information," but merely "subjective belief" of bias. App. 336a, 337a–338a, 444a–445a. Nor could anyone "point to any actual conduct or activity on [his] part which could be termed 'improper.'" 223 W. Va., at 694, 679 S. E. 2d, at 293. In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.

Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. "The work of deciding cases goes on every day in hundreds of courts throughout the land.

Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, The Nature of the Judicial Process 9 (1921).

The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See *Tumey*, 273 U. S., at 532; *Mayberry*, *supra*, at 465–466; *Lavoie*, 475 U. S., at 825. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest

"poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U. S., at 47.

We turn to the influence at issue in this case. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. Cf. *Mayberry*, 400 U. S., at 465 ("It is, of course, not every attack on a judge that disqualifies him from sitting"); *Lavoie*, *supra*, at 825–826 (some pecuniary interests are "'too remote and insubstantial'"). We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. App. 288a. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined. Brief for Petitioners 28.

Massey responds that Blankenship's support, while significant, did not cause Benjamin's victory. In the end the people of West Virginia elected him, and they did so based on many reasons other than Blankenship's efforts. Massey points out that every major state newspaper, but one, en-

dorsed Benjamin. Brief for Respondents 54. It also contends that then-Justice McGraw cost himself the election by giving a speech during the campaign, a speech the opposition seized upon for its own advantage. *Ibid.*

Justice Benjamin raised similar arguments. He asserted that "the outcome of the 2004 election was due primarily to [his own] campaign's message," as well as McGraw's "devastat[ing]" speech in which he "made a number of controversial claims which became a matter of statewide discussion in the media, on the internet, and elsewhere." 223 W. Va., at 701, and n. 29, 679 S. E. 2d, at 300, and n. 29; see also *id.*, at 702–703, and nn. 35–39, 679 S. E. 2d, at 301–302, and nn. 35–39.

Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias. Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Tumey*, *supra*, at 532. In an election decided by fewer than 50,000 votes (382,036 to 334,301), see 223 W. Va., at 702, 679 S. E. 2d, at 301, Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, *supra*, at 47.

The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company $50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved. Due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U. S., at 136. The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—"'"offer[s] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" *Lavoie*, 475 U. S., at 825 (quoting *Monroeville*, 409 U. S., at 60, in turn quoting *Tumey*, 273 U. S., at 532). On these ex-

treme facts the probability of actual bias rises to an unconstitutional level.

IV

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.

It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated. See, *e. g.*, *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846–847 (1998) (reiterating the due process prohibition on "executive abuse of power . . . which shocks the conscience"); *id.*, at 858 (KENNEDY, J., concurring) (explaining that "objective considerations, including history and precedent, are the controlling principle" of this due process standard).

This Court's recusal cases are illustrative. In each case the Court dealt with extreme facts that created an unconstitutional probability of bias that "'cannot be defined with precision.'" *Lavoie*, *supra*, at 822 (quoting *Murchison*, *supra*, at 136). Yet the Court articulated an objective standard to protect the parties' basic right to a fair trial in a fair tribunal. The Court was careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level. See, *e. g.*, *Lavoie*, *supra*, at 825–826; *Mayberry*, 400 U. S., at 465–466; *Murchison*, *supra*, at 137;

see also Part II, *supra.* In this case we do nothing more than what the Court has done before.

As such, it is worth noting the effects, or lack thereof, of the Court's prior decisions. Even though the standards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying the standards to less extreme situations.

One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State—West Virginia included—has adopted the American Bar Association's objective standard: "A judge shall avoid impropriety and the appearance of impropriety." ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004); see Brief for American Bar Association as *Amicus Curiae* 14, and n. 29. The ABA Model Code's test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Canon 2A, Commentary; see also W. Va. Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same).

The West Virginia Code of Judicial Conduct also requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 3E(1); see also 28 U. S. C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). Under Canon 3E(1), "'[t]he question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.'" *State ex rel. Brown* v. *Dietrick*, 191 W. Va. 169, 174, n. 9, 444 S. E. 2d 47,

52, n. 9 (1994); see also *Liteky* v. *United States*, 510 U. S. 540, 558 (1994) (KENNEDY, J., concurring in judgment) ("[U]nder [28 U. S. C.] §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute"). Indeed, some States require recusal based on campaign contributions similar to those in this case. See, *e. g.*, Ala. Code §§12–24–1, 12–24–2 (2006); Miss. Code of Judicial Conduct, Canon 3E(2) (2008).

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11. This is a vital state interest:

> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring).

It is for this reason that States may choose to "adopt recusal standards more rigorous than due process requires." *Id.*, at 794; see also *Bracy* v. *Gramley*, 520 U. S. 899, 904 (1997) (distinguishing the "constitutional floor" from the ceiling set "by common law, statute, or the professional standards of the bench and bar").

"The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards

for judicial disqualification than those we find mandated here today." *Lavoie*, 475 U. S., at 828. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.

* * *

The judgment of the Supreme Court of Appeals of West Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court's decision will undermine rather than promote these values.

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any limited way. The Court's new "rule" provides no guidance to

judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

I

There is a "presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise. See *Republican Party of Minn.* v. *White*, 536 U. S. 765, 796 (2002) (KENNEDY, J., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor' " (quoting *Bridges* v. *California*, 314 U. S. 252, 273 (1941))). We have thus identified only *two* situations in which the Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is presiding over certain types of criminal contempt proceedings.

It is well established that a judge may not preside over a case in which he has a "direct, personal, substantial, pecuniary interest." *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927). This principle is relatively straightforward, and largely tracks the longstanding common-law rule regarding judicial recusal. See Frank, Disqualification of Judges, 56 Yale L. J. 605, 609 (1947) ("The common law of disqualification . . . was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else"). For example, a defendant's due process rights are violated when he is tried before a judge who is "paid for his service only when he convicts the defendant." *Tumey*, *supra*, at 531; see also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 824 (1986) (recusal required when the judge's decision in a related case "had the clear and

immediate effect of enhancing both the legal status and the settlement value of his own case"); *Connally* v. *Georgia*, 429 U. S. 245, 250 (1977) (*per curiam*).

It may also violate due process when a judge presides over a criminal contempt case that resulted from the defendant's hostility towards the judge. In *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971), the defendant directed a steady stream of expletives and *ad hominem* attacks at the judge throughout the trial. When that defendant was subsequently charged with criminal contempt, we concluded that he "should be given a public trial before a judge other than the one reviled by the contemnor." *Id.*, at 466; see also *Taylor* v. *Hayes*, 418 U. S. 488, 501 (1974) (a judge who had "become embroiled in a running controversy" with the defendant could not subsequently preside over that defendant's criminal contempt trial).

Our decisions in this area have also emphasized when the Due Process Clause does *not* require recusal:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey, supra*, at 523; see also *Lavoie, supra*, at 820.

Subject to the two well-established exceptions described above, questions of judicial recusal are regulated by "common law, statute, or the professional standards of the bench and bar." *Bracy* v. *Gramley*, 520 U. S. 899, 904 (1997).

In any given case, there are a number of factors that could give rise to a "probability" or "appearance" of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause re-

quires recusal for any of these reasons, even though they could be viewed as presenting a "probability of bias." Many state *statutes* require recusal based on a probability or appearance of bias, but "that alone would not be sufficient basis for imposing a *constitutional* requirement under the Due Process Clause." *Lavoie*, *supra*, at 820 (emphasis added). States are, of course, free to adopt broader recusal rules than the Constitution requires—and every State has—but these developments are not continuously incorporated into the Due Process Clause.

II

In departing from this clear line between when recusal is constitutionally required and when it is not, the majority repeatedly emphasizes the need for an "objective" standard. *Ante*, at 872, 877, 879, 881–888. The majority's analysis is "objective" in that it does not inquire into Justice Benjamin's motives or decisionmaking process. But the standard the majority articulates—"probability of bias"—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.

But there are other fundamental questions as well. With little help from the majority, courts will now have to determine:

1. How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?
2. How do we determine whether a given expenditure is "disproportionate"? Disproportionate *to what*?
3. Are independent, noncoordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?

4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?
5. Does the amount at issue in the case matter? What if this case were an employment dispute with only $10,000 at stake? What if the plaintiffs only sought nonmonetary relief such as an injunction or declaratory judgment?
6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?
7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?
8. What if the "disproportionately" large expenditure is made by an industry association, trade union, physicians' group, or the plaintiffs' bar? Must the judge recuse in all cases that affect the association's interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?
9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received "disproportionate" support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are "tough on crime," must the judge recuse in all criminal cases?
10. What if the candidate draws "disproportionate" support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?
11. What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the

decision? Does the Court's analysis apply if the supporter "chooses the judge" not in *his* case, but in someone else's?

12. What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (*e. g.*, a facial challenge to an agency rulemaking or a suit seeking to limit an agency's jurisdiction)?
13. Must the judge's vote be outcome determinative in order for his nonrecusal to constitute a due process violation?
14. Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?
15. What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no "debt of gratitude" to the supporter? Does that "moot" the due process claim?
16. What if the judge voted against the supporter in many other cases?
17. What if the judge disagrees with the supporter's message or tactics? What if the judge expressly *disclaims* the support of this person?
18. Should we assume that elected judges feel a "debt of hostility" towards major *opponents* of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?
19. If there is independent review of a judge's recusal decision, *e. g.*, by a panel of other judges, does this completely foreclose a due process claim?
20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?

21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?
22. Does it matter whether the campaign expenditures come from a party or the party's attorney? If from a lawyer, must the judge recuse in every case involving that attorney?
23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?
24. Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?
25. What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that "[w]hether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry." *Ante*, at 885. But elsewhere in the opinion, the majority considers "the apparent effect such contribution had on the outcome of the election," *ante*, at 884, and whether the litigant has been able to "choos[e] the judge in his own cause," *ante*, at 886. If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge won in a landslide? What if the judge won primarily because of his opponent's missteps?
26. Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers?
27. How final must the pending case be with respect to the contributor's interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?

28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?
29. When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice versa? Does a contribution or expenditure by one family member get imputed to other family members?
30. What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?
31. What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?
32. Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?
33. What procedures must be followed to challenge a state judge's failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U. S. C. § 1983, which allows a person deprived of a federal right by a state official to sue for damages? If § 1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?
34. What about state-court cases that are already closed? Can the losing parties in those cases now seek collateral relief in federal district court under § 1983? What statutes of limitation should be applied to such suits?
35. What is the proper remedy? After a successful *Caperton* motion, must the parties start from scratch before

the lower courts? Is any part of the lower court judgment retained?

36. Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's actions or vote suggest a probability of bias?

37. Are the parties entitled to discovery with respect to the judge's recusal decision?

38. If a judge erroneously fails to recuse, do we apply harmless-error review?

39. Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?

40. What if the parties settle a *Caperton* claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?

These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority's decision in different circumstances. Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

The Court's inability to formulate a "judicially discernible and manageable standard" strongly counsels against the recognition of a novel constitutional right. See *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (holding political gerrymandering claims nonjusticiable based on the lack of workable standards); *id.*, at 317 (KENNEDY, J., concurring in judgment) ("The failings of the many proposed standards for measuring the burden a gerrymander imposes . . . make our intervention improper"). The need to consider these and countless other questions helps explain why the common law and this Court's constitutional jurisprudence

have never required disqualification on such vague grounds as "probability" or "appearance" of bias.

III

A

To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority's only answer is that the present case is an "extreme" one, so there is no need to worry about other cases. *Ante*, at 886–887. The Court repeats this point over and over. See *ante*, at 884 ("[T]his is an exceptional case"); *ante*, at 886–887 ("[o]n these extreme facts"); *ante*, at 887 ("Our decision today addresses an extraordinary situation"); *ibid.* ("The facts now before us are extreme by any measure"); *ante*, at 890 (Court's rule will "be confined to rare instances").

But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed. The success rate for certiorari petitions before this Court is approximately 1.1%, and yet the previous Term some 8,241 were filed. Every one of the "*Caperton* motions" or appeals or § 1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute. And all future litigants will assert that their case is *really* the most extreme thus far.

Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."

Consider the cautionary tale of our decisions in *United States* v. *Halper*, 490 U. S. 435 (1989), and *Hudson* v. *United States*, 522 U. S. 93 (1997). Historically, we have held that the Double Jeopardy Clause only applies to criminal penalties, not civil ones. See, *e. g.*, *Helvering* v. *Mitchell*, 303 U. S. 391, 398–400 (1938). But in *Halper*, the Court held that a civil penalty could violate the Clause if it were "over-

whelmingly disproportionate to the damages [the defendant] has caused" and resulted in a "clear injustice." 490 U. S., at 446, 449. We acknowledged that this inquiry would not be an "exact pursuit," but the Court assured litigants that it was only announcing "a rule for the rare case, the case such as the one before us." *Id.*, at 449; see also *id.*, at 453 (KENNEDY, J., concurring) ("Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case").

Just eight years later, we granted certiorari in *Hudson* "because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*." 522 U. S., at 98; see also *ibid.*, n. 4. The novel claim that we had recognized in *Halper* turned out not to be so "rare" after all, and the test we adopted in that case—"overwhelmingly disproportionate"—had "proved unworkable." 522 U. S., at 101–102 (internal quotation marks omitted). We thus abandoned the *Halper* rule, ruing our "ill considered" "deviation from longstanding double jeopardy principles." 522 U. S., at 101.

The déjà vu is enough to make one swoon. Today, the majority again departs from a clear, longstanding constitutional rule to accommodate an "extreme" case involving "grossly disproportionate" amounts of money. I believe we will come to regret this decision as well, when courts are forced to deal with a wide variety of *Caperton* motions, each claiming the title of "most extreme" or "most disproportionate."

B

And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent.* Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad

campaign by an independent third party might distort the campaign's message or cause a backlash against the candidate, even though the candidate was not responsible for the ads. See *Buckley* v. *Valeo*, 424 U. S. 1, 47 (1976) (*per curiam*) ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"); see also Brief for Conference of Chief Justices as *Amicus Curiae* 27, n. 50 (citing examples of judicial elections in which independent expenditures backfired and hurt the candidate's campaign). The majority repeatedly characterizes Blankenship's spending as "contributions" or "campaign contributions," *ante*, at 872, 873, 884–887, 889, but it is more accurate to refer to them as "independent expenditures." Blankenship only "contributed" $1,000 to the Benjamin campaign.

Moreover, Blankenship's independent expenditures do not appear "grossly disproportionate" compared to other such expenditures in this very election. "And for the Sake of the Kids"—an independent group that received approximately two-thirds of its funding from Blankenship—spent $3,623,500 in connection with the election. 223 W. Va. 624, 704–705, 679 S. E. 2d 223, 303–304 (2008) (Benjamin, Acting C. J., concurring). But large independent expenditures were also made in support of Justice Benjamin's opponent. "Consumers for Justice"—an independent group that received large contributions from the plaintiffs' bar—spent approximately $2 million in this race. *Id.*, at 704, n. 41, 679 S. E. 2d, at 303, n. 41. And Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was "intended to influence the outcome" of particular pending litigation. Brief for Petitioners 29.

It is also far from clear that Blankenship's expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin (53.3% to 46.7%). Many observers believed that Justice Benjamin's opponent doomed

his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as "'deeply disturbing'" and worse. 223 W. Va., at 703, n. 38, 679 S. E. 2d, at 302, n. 38. Justice Benjamin's opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship "cho[se] the judge in his own cause." *Ante*, at 886. I would give the voters of West Virginia more credit than that.

* * *

It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a "probability of bias" should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous "probability of bias," will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

I respectfully dissent.

JUSTICE SCALIA, dissenting.

The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law. See this Court's Rule 10. As THE CHIEF JUSTICE's dissent makes painfully clear, the principal consequence of today's decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges. This course was urged upon us on grounds that it would preserve the public's confidence in the judicial system. Brief for Petitioners 16.

The decision will have the opposite effect. What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court's opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim. The facts relevant to adjudicating it will have to be litigated—and likewise the law governing it, which will be indeterminate for years to come, if not forever. Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.

A Talmudic maxim instructs with respect to the Scripture: "Turn it over, and turn it over, for all is therein." 8 The Babylonian Talmud: Seder Nezikin, Tractate Aboth, Ch. V, Mishnah 22, pp. 76–77 (I. Epstein ed. 1935) (footnote omitted). Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable. In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.

Syllabus

UNITED STATES *v.* DENEDO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 08–267. Argued March 25, 2009—Decided June 8, 2009

Military authorities charged respondent, a native Nigerian serving in the U. S. Navy, with violating the Uniform Code of Military Justice (UCMJ). With counsel's assistance, respondent agreed to plead guilty to reduced charges. The special court-martial accepted the plea and convicted and sentenced respondent; the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed; and he was discharged from the Navy in 2000. In 2006, the Department of Homeland Security commenced removal proceedings against respondent based on the conviction. To avoid deportation, he filed a petition for a writ of *coram nobis* under the authority of the All Writs Act, asking the NMCCA to vacate the conviction it had earlier affirmed on the ground that his guilty plea resulted from ineffective assistance of counsel, who had assured him his plea bargain carried no risk of deportation. Though rejecting the Government's contention that it lacked jurisdiction to grant the writ, the NMCCA denied relief for lack of merit. Agreeing that the NMCCA has jurisdiction, the Court of Appeals for the Armed Forces (CAAF) remanded for further proceedings on the merits.

Held:

1. This Court has subject-matter jurisdiction under 28 U. S. C. § 1259(4), which permits it to review CAAF decisions in cases "in which [that court] granted relief." Respondent's parsimonious view that the CAAF did not " 'gran[t] relief' " in this case, but simply remanded to the NMCCA, is rejected. Though § 1259 does not define "relief," the word's familiar meaning encompasses any redress or benefit provided by a court. The CAAF's judgment reversing the NMCCA satisfies that definition. Pp. 909–910.

2. Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect. Pp. 910–917.

(a) Military courts' power to issue extraordinary writs under the All Writs Act, see *Noyd* v. *Bond*, 395 U. S. 683, 695, n. 7, does not determine the anterior question whether those courts have jurisdiction to entertain a *coram nobis* petition. As recognized by the All Writs Act—which permits "courts established by Act of Congress" to issue "all writs necessary or appropriate in aid of their respective jurisdic-

Syllabus

tions," 28 U. S. C. § 1651(a)—a court's power to issue any form of relief, extraordinary or otherwise, is contingent on its subject-matter jurisdiction over the case or controversy. Such jurisdiction is determined by Congress. *Bowles* v. *Russell*, 551 U. S. 205, 212. Thus, to issue respondent a writ of *coram nobis* on remand, the NMCCA must have had statutory subject-matter jurisdiction over respondent's original judgment of conviction. Pp. 910–913.

(b) Pursuant to the UCMJ, the NMCCA and the CAAF have subject-matter jurisdiction over this case. The NMCCA has jurisdiction to entertain respondent's *coram nobis* request under UCMJ Article 66, which provides: "For the purpose of reviewing court-martial cases, the [NMCCA] may sit . . . ." 10 U. S. C. § 866(a). Because respondent's *coram nobis* request is simply a further "step in [his] criminal" appeal, *United States* v. *Morgan*, 346 U. S. 502, 505, n. 4, the NMCCA's jurisdiction to issue the writ derives from the earlier jurisdiction it exercised under § 866(a) to hear and determine the conviction's validity on direct review. Respondent's *coram nobis* request is not barred by the requirement that the NMCCA "act only with respect to the findings and sentence as approved by the convening authority." § 866(c). An alleged error in the original judgment predicated on ineffective assistance of counsel challenges the conviction's validity, see *Knowles* v. *Mirzayance*, *ante*, at 115, so respondent's Sixth Amendment claim is "with respect to" the special court-martial's "findings" of guilty. Because the NMCCA has jurisdiction, the CAAF has jurisdiction to review the NMCCA's denial of respondent's petition challenging the validity of his original conviction. That the CAAF's authority is confined "to matters of law" connected to "the findings and sentence as approved by the convening authority and as affirmed or set aside . . . by the Court of Criminal Appeals," § 867(c), poses no obstacle to respondent's requested review. His Sixth Amendment claim presents a "matte[r] of law" "with respect to the [guilty] findings . . . as approved by the [special court-martial] and as affirmed . . . by" the NMCCA. Pp. 913–915.

(c) The Government's argument that UCMJ Article 76 affirmatively prohibits the type of collateral review respondent seeks errs in "conflating the jurisdictional question with the merits" of respondent's petition, *Arthur Andersen LLP* v. *Carlisle*, *ante*, at 628. Article 76 provides for the finality of judgments in military cases. Just as the finality principle did not jurisdictionally bar the court in *Morgan*, *supra*, from examining its earlier judgment, neither does it bar the NMCCA from doing so here. The Government's contention that *coram nobis* permits a court to correct its *own* errors, not those of an inferior court, is disposed of on similar grounds. Pp. 915–917.

66 M. J. 114, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post,* p. 918.

Pratik A. Shah argued the cause for the United States. With him on the briefs were then-*Acting Solicitor General Kneedler*, former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, *Deputy Solicitor General Dreeben*, *John F. De Pue*, *Daniel J. Dell'Orto*, *Louis J. Puleo*, *Brian K. Keller*, and *Timothy H. Delgado.*

Matthew S. Freedus argued the cause for respondent. With him on the brief were *Eugene R. Fidell*, *Brian L. Mizer*, *Kathleen L. Kadlec*, and *Dillon J. Ambrose.**

JUSTICE KENNEDY delivered the opinion of the Court.

The case before us presents a single issue: whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error *coram nobis* to challenge its earlier, and final, decision affirming a criminal conviction. The military court which had affirmed the conviction and where the writ of *coram nobis* was sought is the Navy-Marine Corps Court of Criminal Appeals (NMCCA). Its ruling that it had jurisdiction to grant the writ, but then denying its issuance for lack of merit, was appealed to the United States Court of Appeals for the Armed Forces (CAAF). After the CAAF agreed that the NMCCA has jurisdiction to issue the writ, it remanded for further proceedings on the merits. The Government of the United States, contending that a writ of *coram nobis* directed to a final judgment of conviction is beyond the jurisdiction of the military courts, now brings the case to us.

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*Briefs of *amici curiae* urging affirmance were filed for Former Judge Advocates General et al. by *Ronald W. Meister;* and for Law Professors by *William M. Hohengarten*, *Lindsay C. Harrison*, and *Judith Resnik*, *pro se.*

I

Respondent Jacob Denedo came to the United States in 1984 from his native Nigeria. He enlisted in the Navy in 1989 and became a lawful permanent resident in 1990. In 1998, military authorities charged him with conspiracy, larceny, and forgery—in contravention of Articles 81, 121, and 123 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §§ 881, 921, 923—all for his role in a scheme to defraud a community college. With the assistance of both military and civilian counsel, respondent made a plea bargain to plead guilty to reduced charges. In exchange for his plea the convening authority referred respondent's case to a special court-martial, § 819, which, at that time, could not impose a sentence greater than six months' confinement.

The special court-martial, consisting of a single military judge, accepted respondent's guilty plea after determining that it was both knowing and voluntary. The court convicted respondent of conspiracy and larceny. It sentenced him to three months' confinement, a bad-conduct discharge, and a reduction to the lowest enlisted pay grade. Respondent appealed on the ground that his sentence was unduly severe. The NMCCA affirmed. App. to Pet. for Cert. 64a–67a. Respondent did not seek further review in the CAAF, and he was discharged from the Navy on May 30, 2000.

In 2006, the Department of Homeland Security commenced removal proceedings against respondent based upon his special court-martial conviction. To avoid deportation, respondent decided to challenge his conviction once more, though at this point it had been final for eight years. He maintained, in a petition for a writ of *coram nobis* filed with the NMCCA, that the conviction it had earlier affirmed must be deemed void because his guilty plea was the result of ineffective assistance of counsel. Respondent alleged that he informed his civilian attorney during plea negotiations that "'his primary concern and objective'" was to avoid deportation and that he was willing to "'risk . . . going to jail'"

to avert separation from his family. 66 M. J. 114, 118 (CAAF 2008). On respondent's account, his attorney—an alcoholic who was not sober during the course of the special court-martial proceeding—erroneously assured him that "'if he agreed to plead guilty at a special-court-martial he would avoid any risk of deportation.'" *Ibid.* Respondent argued that the NMCCA could set aside its earlier decision by issuing a writ of *coram nobis* under the authority of the All Writs Act, 28 U. S. C. § 1651(a).

The Government filed a motion to dismiss for want of jurisdiction. It contended that the NMCCA had no authority to conduct postconviction proceedings. In a terse, four-sentence order, the NMCCA summarily denied both the Government's motion and respondent's petition for a writ of *coram nobis.* App. to Pet. for Cert. 63a. Respondent appealed and the CAAF, dividing 3 to 2, affirmed in part and reversed in part. The CAAF agreed with the NMCCA that standing military courts have jurisdiction to conduct "collateral review under the All Writs Act." 66 M. J., at 119. This is so, the CAAF explained, because "when a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system . . . a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." *Id.*, at 120 (citing 28 U. S. C. § 1651(a)).

Satisfied that it had jurisdiction, the CAAF next turned to whether the writ of *coram nobis* should issue. It held that a nondefaulted, ineffective-assistance claim that was yet to receive a full and fair review "within the military justice system" could justify issuance of the writ. 66 M. J., at 125. Finding that respondent's ineffective-assistance claim satisfied "the threshold criteria for coram nobis review," the CAAF remanded to the NMCCA so it could ascertain in the first instance "whether the merits of [respondent's] petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required." *Id.*, at 126, 130.

Judge Stucky filed a dissenting opinion. Assuming that the majority had correctly determined its jurisdiction to grant the requested relief, he concluded that respondent's ineffective-assistance claim lacked merit. *Id.*, at 131. Judge Ryan also dissented. Reasoning that the majority had misapplied this Court's holding in *Clinton* v. *Goldsmith*, 526 U. S. 529 (1999), she concluded that the UCMJ does not confer jurisdiction upon military tribunals to conduct "post-finality collateral review." 66 M. J., at 136. We granted certiorari, 555 U. S. 1041 (2008), and now affirm.

II

Before we address another court's subject-matter jurisdiction we must first determine our own. See *Ashcroft* v. *Iqbal*, *ante*, at 671 ("Subject-matter jurisdiction . . . should be considered when fairly in doubt"). The Government, upon which the burden to demonstrate subject-matter jurisdiction lies, *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342 (2006), claims that our power to hear this appeal rests on 28 U. S. C. § 1259(4). That jurisdictional provision permits us to review CAAF decisions in "[c]ases . . . in which the Court of Appeals for the Armed Forces granted relief." Respondent maintains that we lack jurisdiction because the CAAF did not "'grant relief'"; "all it did was remand" to the NMCCA. Brief for Respondent 6–7 (brackets omitted).

Respondent's parsimonious construction of the word "relief" need not detain us long. Though § 1259 does not define the term, its familiar meaning encompasses any "redress or benefit" provided by a court. Black's Law Dictionary 1317 (8th ed. 2004). The CAAF's judgment reversing the NMCCA satisfies that definition. The NMCCA denied respondent's petition for a writ of *coram nobis*, while the CAAF's decision reversed and remanded so that the NMCCA could determine anew if the writ should issue. That decision conferred a palpable benefit on respondent; for

a chance of success on the merits, however slight, is superior to no possibility at all.

To be sure, respondent would have preferred the CAAF to issue a writ of *coram nobis* or to direct the NMCCA to do so rather than remanding for the NMCCA to conduct further proceedings. We have jurisdiction, however, to review any decision granting "relief," not just those providing "ultimate relief" or "complete relief." Indeed, appellate courts reverse and remand lower court judgments—rather than issuing complete relief—with regularity. See, *e. g.*, *FCC* v. *Fox Television Stations, Inc.*, *ante*, at 513. There is no merit to the view that a decision granting partial relief should be construed as granting no relief at all.

Because the CAAF "granted relief" to respondent, the text of § 1259 is satisfied here. We have jurisdiction to determine whether the CAAF was correct in ruling that the NMCCA had authority to entertain the petition for a writ of *coram nobis.*

III

A

The writ of *coram nobis* is an ancient common-law remedy designed "to correct errors of fact." *United States* v. *Morgan*, 346 U. S. 502, 507 (1954). In American jurisprudence the precise contours of *coram nobis* have not been "well defined," *Bronson* v. *Schulten*, 104 U. S. 410, 416 (1882), but the writ traces its origins to the King's Bench and the Court of Common Pleas. *United States* v. *Plumer*, 27 F. Cas. 561, 573 (No. 16,056) (CC Mass. 1859) (opinion for the court by Clifford, Circuit Justice); see also *Morgan*, *supra*, at 507, n. 9 (citing 2 W. Tidd, Practice of Courts of King's Bench and Common Pleas 1136 (4th Am. ed. 1856)). In English practice the office of the writ was to foster respect for judicial rulings by enabling the same court "where the action was commenced and where the judgment was rendered" to avoid the rigid strictures of judgment finality by correcting technical

errors "such as happened through the fault of the clerk in the record of the proceedings prior to the judgment." *Plumer*, *supra*, at 572–573.

Any rationale confining the writ to technical errors, however, has been superseded; for in its modern iteration *coram nobis* is broader than its common-law predecessor. This is confirmed by our opinion in *Morgan*. In that case we found that a writ of *coram nobis* can issue to redress a fundamental error, there a deprivation of counsel in violation of the Sixth Amendment, as opposed to mere technical errors. 346 U. S., at 513. The potential universe of cases that range from technical errors to fundamental ones perhaps illustrates, in the case of *coram nobis*, the "tendency of a principle to expand itself to the limit of its logic." B. Cardozo, The Nature of the Judicial Process 51 (1921). To confine the use of *coram nobis* so that finality is not at risk in a great number of cases, we were careful in *Morgan* to limit the availability of the writ to "extraordinary" cases presenting circumstances compelling its use "to achieve justice." 346 U. S., at 511. Another limit, of course, is that an extraordinary remedy may not issue when alternative remedies, such as habeas corpus, are available. See *id.*, at 510–511.

In federal courts the authority to grant a writ of *coram nobis* is conferred by the All Writs Act, which permits "courts established by Act of Congress" to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U. S. C. § 1651(a). Though military courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act, *Noyd* v. *Bond*, 395 U. S. 683, 695, n. 7 (1969), that authority does not determine the anterior question whether military courts have jurisdiction to entertain a petition for *coram nobis*. As the text of the All Writs Act recognizes, a court's power to issue any form of relief—extraordinary or otherwise—is contingent on that court's subject-matter jurisdiction over the case or controversy.

Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts. *Bowles* v. *Russell*, 551 U. S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"). This rule applies with added force to Article I tribunals, such as the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Article I, § 8, of the Constitution. *Goldsmith*, 526 U. S., at 533–534.

Our decision in *Goldsmith* demonstrates these teachings. There an Air Force officer, James Goldsmith, was convicted of various crimes by general court-martial and sentenced to six years' confinement. *Id.*, at 531. Following his conviction, Congress enacted a statute authorizing the President to drop convicted officers from the rolls of the Armed Forces. When the Air Force notified Goldsmith that he would be dropped from the rolls, he lodged a petition before the Air Force Court of Criminal Appeals (AFCCA) claiming that the proposed action contravened the *Ex Post Facto* Clause of the Constitution. *Id.*, at 532–533. Goldsmith sought extraordinary relief as authorized by the All Writs Act to enjoin the President from removing him from the rolls. The AFCCA denied relief, but the CAAF granted it.

Concluding that the UCMJ does not authorize military courts to review executive action—including a decision to drop an officer from the rolls—we held that the AFCCA and the CAAF lacked jurisdiction over Goldsmith's case. *Id.*, at 535. This was so, we unequivocally found, irrespective of the military court's authority to issue extraordinary relief pursuant to the All Writs Act and its previous jurisdiction over Goldsmith's criminal proceeding. The power to issue relief depends upon, rather than enlarges, a court's jurisdiction. *Id.*, at 536–537.

That principle does not control the question before us. Because *coram nobis* is but an extraordinary tool to correct

a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired. See *Morgan*, *supra*, at 505, n. 4 (*coram nobis* is "a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding"); see also *United States* v. *Beggerly*, 524 U. S. 38, 46 (1998) (noting that an "independent action"—which, like *coram nobis*, is an equitable means to obtain relief from a judgment—" 'may be regarded as ancillary to the [prior] suit, so that the relief asked may be granted by the court which made the decree in that suit . . . . The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the [court]' " (quoting *Pacific R. Co. of Mo.* v. *Missouri Pacific R. Co.*, 111 U. S. 505, 522 (1884))). It follows that to issue respondent a writ of *coram nobis* on remand, the NMCCA must have had statutory subject-matter jurisdiction over respondent's original judgment of conviction.

B

In the critical part of its opinion discussing the jurisdiction and authority of the NMCCA to issue a writ of *coram nobis* in an appropriate case, the CAAF describes respondent's request for review as one "under the All Writs Act." 66 M. J., at 119. This is correct, of course, if it simply confirms that the Act authorizes federal courts to issue writs "in aid of" their jurisdiction; but it does not advance the inquiry into whether jurisdiction exists.

And there are limits to the use of *coram nobis* to alter or interpret earlier judgments. As *Goldsmith* makes plain, the All Writs Act and the extraordinary relief the statute authorizes are not a source of subject-matter jurisdiction. 526 U. S., at 534–535. Statutes which address the power of a court to use certain writs or remedies or to decree certain forms of relief, for instance to award damages in some speci-

fied measure, in some circumstances might be construed also as a grant of jurisdiction to hear and determine the underlying cause of action. Cf. *Marbury* v. *Madison*, 1 Cranch 137 (1803). We have long held, however, that the All Writs Act should not be interpreted in this way. *Goldsmith*, *supra*, at 536; *Plumer*, 27 F. Cas., at 574 (jurisdiction cannot be acquired "by means of the writ to be issued"). The authority to issue a writ under the All Writs Act is not a font of jurisdiction. See *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U. S. 28, 31 (2002).

Quite apart from the All Writs Act, we conclude that the NMCCA has jurisdiction to entertain respondent's request for a writ of *coram nobis*. Article 66 of the UCMJ provides: "For the purpose of reviewing court-martial cases, the [Court of Criminal Appeals] may sit . . . ." 10 U. S. C. § 866(a). Because respondent's request for *coram nobis* is simply a further "step in [his] criminal" appeal, *Morgan*, 346 U. S., at 505, n. 4, the NMCCA's jurisdiction to issue the writ derives from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review. As even the Government concedes, the textual authority under the UCMJ to "'revie[w] court-martial cases'" provided the NMCCA with jurisdiction to hear an appeal of respondent's judgment of conviction. See Brief for United States 17–18. That jurisdiction is sufficient to permit the NMCCA to entertain respondent's petition for *coram nobis*. See also Cts. Crim. App. Rule Prac. & Proc. 2(b), 44 M. J. LXV (1996) (recognizing NMCCA discretionary authority to entertain petitions for extraordinary writs).

It is true that when exercising its jurisdiction under § 866(a), the NMCCA "may act only with respect to the findings and sentence as approved by the convening authority." § 866(c). That limitation does not bar respondent's request for a writ of *coram nobis*. An alleged error in the original judgment predicated on ineffective assistance of counsel challenges the validity of a conviction, see *Knowles* v. *Mir-*

zayance, *ante*, at 115, so respondent's Sixth Amendment claim is "with respect to" the special court-martial's "findings of guilty," 10 U. S. C. § 866(c). Pursuant to the UCMJ, the NMCCA has subject-matter jurisdiction to hear respondent's request for extraordinary relief.

Because the NMCCA had jurisdiction over respondent's petition for *coram nobis*, the CAAF had jurisdiction to entertain respondent's appeal from the NMCCA's judgment. When exercising its jurisdiction, the CAAF's authority is confined "to matters of law" connected to "the findings and sentence as approved by the convening authority and as affirmed or set aside . . . by the Court of Criminal Appeals," § 867(c), but these limitations pose no obstacle to respondent's requested review of the NMCCA's decision. Respondent's Sixth Amendment claim presents a "matte[r] of law" "with respect to the [guilty] findings . . . as approved by the [special court-martial] and as affirmed . . . by the Court of Criminal Appeals." *Ibid.* The CAAF had subject-matter jurisdiction to review the NMCCA's denial of respondent's petition challenging the validity of his original conviction.

C

The Government counters that Article 76 of the UCMJ, 10 U. S. C. § 876, "affirmatively prohibit[s] the type of collateral review sought by respondent." Brief for United States 18. That is incorrect. The Government's argument commits the error of "conflating the jurisdictional question with the merits" of respondent's petition. *Arthur Andersen LLP*, *ante*, at 628. Article 76 states in relevant part:

> "The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publish-

> ing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States . . . ." 10 U. S. C. § 876.

Article 76 codifies the common-law rule that respects the finality of judgments. *Schlesinger* v. *Councilman*, 420 U. S. 738, 749 (1975). Just as the rules of finality did not jurisdictionally bar the court in *Morgan* from examining its earlier judgment, neither does the principle of finality bar the NMCCA from doing so here.

The Government may ultimately be correct that the facts of respondent's case are insufficient to set aside the final judgment that Article 76 makes binding. No doubt, judgment finality is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases. But the long-recognized authority of a court to protect the integrity of its earlier judgments impels the conclusion that the finality rule is not so inflexible that it trumps each and every competing consideration. Our holding allows military courts to protect the integrity of their dispositions and processes by granting relief from final judgments in extraordinary cases when it is shown that there were fundamental flaws in the proceedings leading to their issuance. The Government remains free to argue that respondent's is a merely ordinary case that is not entitled to extraordinary relief. But respondent's entitlement to relief is a merits question outside the scope of the jurisdictional question presented.

The Government's contention that *coram nobis* permits a court "to correct its *own* errors, not . . . those of an inferior court," Brief for United States 36, can be disposed of on similar grounds. Just as respondent's request for *coram nobis* does not confer subject-matter jurisdiction, the Government's argument that the relief should not issue "in light of the writ's traditional scope" does not undermine it, *ibid.* (emphasis deleted). In sum, the Government's argument

speaks to the scope of the writ, not the NMCCA's jurisdiction to issue it. The CAAF rejected the former argument. Only the latter one is before us.

We hold that Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect. That conclusion is consistent with our holding that Article III courts have a like authority. *Morgan*, 346 U. S., at 508. The result we reach today is of central importance for military courts. The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments. Under the premises and statutes we have relied upon here, the jurisdiction and the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable are consistent with the powers Congress has granted those courts under Article I and with the system Congress has designed.

* * *

We do not prejudge the merits of respondent's petition. To be sure, the writ of error *coram nobis* is an extraordinary writ; and "an extraordinary remedy . . . should not be granted in the ordinary case." *Nken* v. *Holder*, *ante*, at 437 (KENNEDY, J., concurring). The relative strength of respondent's ineffective-assistance claim, his delay in lodging his petition, when he learned or should have learned of his counsel's alleged deficiencies, and the effect of the rule of judgment finality expressed in Article 76 are all factors the NMCCA can explore on remand. We hold only that the military appellate courts had jurisdiction to hear respondent's request for a writ of *coram nobis*. The judgment of the CAAF is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, concurring in part and dissenting in part.

The Court's approach is simple: Jurisdiction to issue writs of *coram nobis* is a "belated extension" of a court's original, statutory jurisdiction. *Ante*, at 913. The military courts here had original jurisdiction over Denedo's case. Those courts therefore have implicit "extended" jurisdiction to consider Denedo's *coram nobis* petition.

The flaw in this syllogism is at the first step: The only arguable authority for the proposition that *coram nobis* jurisdiction marches hand in hand with original jurisdiction is a footnote in *United States* v. *Morgan*, 346 U. S. 502 (1954), and that case concerned Article III courts. The military courts are markedly different. They are Article I courts whose jurisdiction is precisely limited at every turn. Those careful limits cannot be overridden by judicial "extension" of statutory jurisdiction, or the addition of a "further step" to the ones marked out by Congress. *Ante*, at 914 (internal quotation marks omitted).

I agree with the majority that this Court has jurisdiction to review the decision below, but respectfully dissent from its holding that military courts have jurisdiction to issue writs of *coram nobis*.

I

"Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks." *Reid* v. *Covert*, 354 U. S. 1, 35–36 (1957) (plurality opinion). Courts-martial are composed of active service members who sit only to hear the particular case before them. Once a court-martial reaches a judgment and imposes a sentence, it is dissolved, and its members return to their regular duties.

Prior to the Uniform Code of Military Justice (UCMJ), military courts of appeals did not exist. If a service mem-

ber wanted to challenge a court-martial conviction, he pursued a collateral attack in an Article III court. There, review was limited to whether the conviction was void "because of lack of jurisdiction or some other equally fundamental defect," *Schlesinger* v. *Councilman*, 420 U. S. 738, 747 (1975); beyond that, Article III courts adhered to "the general rule that the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts," *Smith* v. *Whitney*, 116 U. S. 167, 177 (1886).

The UCMJ established a "complete system of [military] review," *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion), including direct review in what are now the Courts of Criminal Appeals (CCAs) and the Court of Appeals for the Armed Forces (CAAF). But in keeping with the historical backdrop against which these courts were created, Congress did not grant military courts of appeals "broad responsibility with respect to administration of military justice"; on the contrary, their jurisdiction is "narrowly circumscribed" by the governing statutes. *Clinton* v. *Goldsmith*, 526 U. S. 529, 534, 535 (1999) (internal quotation marks omitted).

The CCAs provide direct, record-based review of court-martial judgments, but they may only review cases referred by the judge advocate general, who in turn refers only those cases in which specific sentences are imposed. 10 U. S. C. §§ 866(b), (c). When reviewing that subset of court-martial judgments, a CCA "may act only with respect to the findings and sentence as approved by the convening authority." § 866(c). If a case is reviewed by the CCA, the CCA's decision may then be reviewed by the CAAF. § 867(a). But that court, too, conducts limited direct review: It "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the [CCA]." § 867(c). Once direct review in the CCA and the CAAF is complete, and review in this Court is exhausted or waived, a judgment as to the le-

gality of the court-martial proceedings is final, and the sentence imposed may be executed. § 871(c)(1).

The UCMJ provides only one avenue for reconsideration of a final court-martial conviction: a petition for a new trial under Article 73. See § 873. An Article 73 petition may be brought "within two years after approval by the convening authority of a court-martial sentence," meaning it may be brought before or after a conviction becomes final. *Ibid.* If direct review is still pending before a CCA or the CAAF when the petition is filed, the judge advocate general (to whom the petition must be directed) will refer the petition to that court. *Ibid.* But once the conviction is final, only the judge advocate general may act on an Article 73 petition. *Ibid.*

Article 76 "'describ[es] the terminal point for proceedings within the court-martial system.'" *Councilman, supra,* at 750 (quoting *Gusik* v. *Schilder,* 340 U. S. 128, 132 (1950)). Under that provision, final court-martial judgments are "binding upon all departments, courts, agencies, and officers of the United States, *subject only* to action upon a petition for a new trial [under Article 73]," or to action by the appropriate Secretary or the President. 10 U. S. C. § 876 (emphasis added). Once an Article 73 petition is denied, a service member has no relief left to seek within the court-martial system. See *Gusik, supra,* at 133–134.[1]

Federal courts are authorized to issue extraordinary writs such as *coram nobis* only as "necessary or appropriate in aid of their respective jurisdictions." 28 U. S. C. § 1651(a). The All Writs Act "confine[s] the power of the CAAF to issuing

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[1] A court-martial conviction may still be collaterally attacked in an Article III court, but that is because *those* courts possess jurisdiction beyond that granted by the UCMJ. See, *e. g.,* 28 U. S. C. §§ 2241, 1331. We have repeatedly held that Article 76 "does not expressly effect any change in the subject-matter jurisdiction of Art. III courts." *Schlesinger* v. *Councilman,* 420 U. S. 738, 749 (1975). Our cases have never questioned that Article 76 limits the jurisdiction of *military* courts.

process 'in aid of' its existing statutory jurisdiction" and "does not enlarge that jurisdiction." *Goldsmith, supra,* at 534–535; see also *Noyd* v. *Bond,* 395 U. S. 683, 695, n. 7 (1969) (although military courts can issue extraordinary writs in aid of their direct review jurisdiction, "[a] different question would, of course, arise in a case which the [courts are] not authorized to review under the governing statutes"). The UCMJ grants military courts of appeals no jurisdiction over final court-martial judgments, so there is no jurisdiction for a postconviction extraordinary writ to "aid." A petition for *coram nobis* by its nature seeks postconviction review; it is therefore beyond the scope of these courts' "narrowly circumscribed" statutory jurisdiction. *Goldsmith, supra,* at 535.

II

The majority overrides these careful limits on military court jurisdiction by maintaining that later jurisdiction to issue *coram nobis* is a "belated extension" of the statutory jurisdiction, that "jurisdiction to issue [*coram nobis*] derives from the earlier jurisdiction." *Ante,* at 913, 914. The authority the Court cites for this key jurisdictional analysis is—a footnote. See *ante,* at 913 (citing *Morgan,* 346 U. S., at 505, n. 4); *ante,* at 914 (same). Now, footnotes are part of an opinion, too, even if not the most likely place to look for a key jurisdictional ruling. But since footnote 4 plays such an indispensable role in the majority's analysis, it must be read with care.

The first thing you notice in doing so is that the footnote does not mention the word "jurisdiction" at all. That is because it has nothing to do with jurisdiction. The issue addressed in the paragraph to which the footnote was appended was "choice of remedy." 346 U. S., at 505. The Court concluded that *coram nobis* was the appropriate one. The footnote simply addressed the concern that the remedy might not be available because the Federal Rules of Civil Procedure had abolished *coram nobis* as a remedy; the con-

cern was dismissed because the Court concluded the criminal rules, not the civil rules, applied. *Id.*, at 505, n. 4; see also *United States* v. *Keogh*, 391 F. 2d 138, 140 (CA2 1968) (Friendly, J.) ("The problem to which the footnote was addressed was that F. R. Civ. P. 60(b) had abolished writs of error *coram nobis*").

The point is further confirmed by the text in the body of the opinion: The Court's conclusion in the paragraph in which the footnote appears is that since the remedy sought was "in the nature of . . . *coram nobis*," the trial court could "properly *exercise* its jurisdiction." 346 U. S., at 505 (emphasis added). The issue was not the existence of jurisdiction, but whether the court had the authority to exercise it. The Court in the present case recognizes the distinction. See *ante*, at 915 ("When exercising its jurisdiction, the CAAF's authority is confined to matters of law" (internal quotation marks omitted)); *ante*, at 914 ("The authority to issue a writ under the All Writs Act is not a font of jurisdiction").

Even accepting the majority's reading of *Morgan*'s hitherto obscure footnote, that reading would only establish the "belated jurisdiction" theory for Article III courts. The military courts are Article I courts. The distinction has direct pertinence to the point at issue in this case.

Legal doctrines "must be placed in their historical setting. They cannot be wrenched from it and mechanically transplanted into an alien, unrelated context without suffering mutilation or distortion." *Reid*, 354 U. S., at 50 (Frankfurter, J., concurring in result). The Article III courts have been given broad jurisdiction. I can understand, if not necessarily agree with, the notion that they might enjoy some implicit "long-recognized authority" to correct their earlier judgments. See *ante*, at 916. But not so for Article I courts. The principle that Congress defines the jurisdiction of the lower federal courts "applies with added force to Article I tribunals." *Ante*, at 912. That is especially true with respect to military courts. The military justice system is

the last place courts should go about finding "extensions" of jurisdiction beyond that conferred by statute.

As we expressly recognized in *Goldsmith*, "there is no source of *continuing* jurisdiction for the CAAF over all actions administering sentences that the CAAF *at one time* had the power to review." 526 U. S., at 536 (emphasis added). Since the UCMJ grants military courts no postconviction jurisdiction, conferring on them perpetual authority to entertain *coram nobis* petitions plainly contravenes that basic principle.[2]

III

Even if the majority's reading of *Morgan*'s footnote could be transplanted to the military context, the majority's conclusion would still not follow. "'[T]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.'" *Carlisle* v. *United States*, 517 U. S. 416, 429 (1996) (quoting *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 43 (1985)).

The UCMJ contains not one, but two provisions specifically limiting the circumstances under which postconviction relief (other than action by the appropriate Secretary or the President) may be obtained within the court-martial system. First, Article 73 provides that, "within two years after ap-

[2] Once you get into the business of extending jurisdiction, it can be hard to stop. Denedo is no longer in the military. *Ante*, at 907. Military courts lack jurisdiction over "civilian ex-soldiers who ha[ve] severed all relationship with the military and its institutions." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 14 (1955). In the event *coram nobis* does issue with respect to a former service member, the Government maintains it would lack jurisdiction to retry. Tr. of Oral Arg. 56–57; see 10 U. S. C. §§802–803. Avoiding that extraordinary result would require another "belated extension" of the original court-martial proceeding, expanding the jurisdiction of military courts to try individuals who have long since severed their ties to the military.

proval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court." 10 U. S. C. § 873. The only relief available under this "special post-conviction remedy" is a new trial, *Burns*, 346 U. S., at 141 (plurality opinion), and even that may be granted only in an expressly circumscribed timeframe (two years) and set of circumstances (newly discovered evidence or fraud on the court). Article 73 stands in stark contrast to *coram nobis*, which the majority characterizes as a writ infinitely available "to redress a[ny] fundamental error." *Ante*, at 911; see *Morgan*, *supra*, at 512 ("fundamental error" not limited to jurisdictional defects or errors on the face of the record).

To be sure, the limited nature of relief available under Article 73 might lead one to question whether that is truly the *only* postconviction relief the UCMJ permits. "You're in the Army now" is a sufficient answer to such concerns; the relief available looks positively extravagant in light of the prior history and tradition of military justice. In any event, as the majority recognizes, see *ante*, at 915–916, Article 76 makes clear that all court-martial judgments "carried into execution" after completion of direct review are "final and conclusive," 10 U. S. C. § 876. Contrary to the majority's assertion, that language does not simply "codif[y] the common-law rule that respects the finality of judgments." *Ante*, at 916. In fact, Article 76 does not stop there. It goes on to instruct that final court-martial judgments are binding "*subject only* to action upon a petition for a new trial [under Article 73]," or action by the appropriate Secretary or the President. 10 U. S. C. § 876 (emphasis added).

In light of these provisions, only Article 73 provides *any* authority to the CCAs or the CAAF, and even that narrow authority is limited to pending cases. Once a conviction is final, only the judge advocate general can provide relief. See *supra*, at 920; 10 U. S. C. § 873. To the extent the CCAs

or the CAAF could be deemed to have some inherent continuing authority to issue writs of *coram nobis*, Articles 73 and 76 extinguish it.

IV

The Government goes on to argue that even if military courts have jurisdiction to issue writs of *coram nobis*, and even if Articles 73 and 76 do not bar such relief, the courts still lack authority to issue *coram nobis*, because the writ is neither "necessary" nor "appropriate" to the court-martial system of justice. See 28 U. S. C. § 1651(a) (federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions"). *Coram nobis* allows the court that issued a judgment to correct its own errors of fact. See *Morgan*, 346 U. S., at 507, n. 9 ("'If a judgment in the King's Bench be erroneous in matter of *fact* only, . . . it may be reversed *in the same court*, by writ of error *coram nobis*'" (quoting 2 W. Tidd, Practice of the Courts of King's Bench, and Common Pleas 1136 (4th Am. ed. 1856); some emphasis added)); see also *ante*, at 916 (referring to "authority of a court to protect the integrity of *its* earlier judgments" (emphasis added)). But a court-martial is not a standing court. On a case-by-case basis, "[i]t is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved." *Runkle* v. *United States*, 122 U. S. 543, 555–556 (1887); see also 66 M. J. 114, 124 (CAAF 2008) (a court-martial "does not have independent jurisdiction over a case after the military judge authenticates the record and the convening authority forwards the record after taking action"). Because the court-martial that issues the conviction no longer exists once the conviction is final, there is no court to which a postconviction petition for *coram nobis* could be directed.

The absence of standing courts-martial is no mere technicality, but rather an integral and intentional part of the military justice system. "Court-martial jurisdiction sprang from the belief that within the military ranks there is need

for a prompt, ready-at-hand means of compelling obedience and order." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 22 (1955). But meeting that need requires expending significant military resources, and "[t]o the extent that those responsible for performance of [the military's] primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Id.*, at 17. Accordingly, courts-martial, composed of active duty military personnel, have always been called into existence for a limited purpose and duration.

It is no answer that the CCAs and the CAAF are standing courts that could act as substitutes for *coram nobis* purposes. As this case illustrates, those courts are not equipped to handle the kind of factfinding necessary to resolve claims that might be brought on *coram nobis*. Instead, the CCAs will have to resort to the procedures invented by *United States* v. *DuBay*, 17 U. S. C. M. A. 147, 37 C. M. R. 411 (1967) (*per curiam*), under which a new convening authority will refer a case to a new court-martial, and task various military personnel who have no prior familiarity with the case to conduct an out-of-court evidentiary hearing on the merits of the petitioner's claim. *Id.*, at 149, 37 C. M. R., at 413. This "unwieldy and imperfect system" will undoubtedly divert valuable military resources, 66 M. J., at 136 (Ryan, J., dissenting), all in aid of postconviction relief Congress specifically withheld.

The Court expressly declines to consider the Government's "necessary or appropriate" argument: "[T]he Government's argument speaks to the scope of the writ, not the [CCA's] jurisdiction to issue it. The CAAF rejected the former argument. Only the latter one is before us." *Ante*, at 916–917. The Court may well be correct in dividing the questions into separate pigeonholes. But the Government's argument, even if an argument about authority rather than jurisdiction, applies to *every coram nobis* case, given the nature of the military justice system. It is curious to conclude

that military courts have jurisdiction, while not considering a raised and briefed argument that they may never exercise it.

* * *

Since the adoption of the UCMJ, "Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system." *Weiss* v. *United States*, 510 U. S. 163, 174 (1994). "But the military in important respects remains a specialized society separate from civilian society." *Ibid.* (internal quotation marks omitted). Neither the jurisdiction nor the powers of Article III courts are necessarily appropriate for military courts, and Congress's contrary determinations in this area are entitled to "the highest deference." *Loving* v. *United States*, 517 U. S. 748, 768 (1996). Rather than respect the rule that military courts have no jurisdiction to revisit final convictions, the majority creates an exception that swallows it. Because I would hold the military courts to the statutory restraints that govern them, I respectfully dissent.

Syllabus

UNITED STATES ex rel. EISENSTEIN *v.* CITY OF NEW YORK, NEW YORK, et al.

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

No. 08–660. Argued April 21, 2009—Decided June 8, 2009

Petitioner filed this *qui tam* action in the name of the United States against respondent city and several of its officials under the False Claims Act (FCA), 31 U. S. C. § 3729. The Government declined to exercise its statutory right to intervene, the District Court dismissed the complaint and entered judgment for respondents, and petitioner filed a notice of appeal 54 days later. Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U. S. C. § 2107(a) require, generally, that such a notice be filed within 30 days of the entry of judgment, but Rule 4(a)(1)(B) and § 2107(b) extend the period to 60 days when the United States is a "party." The Second Circuit held that the 30-day limit applied and dismissed petitioner's appeal as untimely.

Held: When the United States has declined to intervene in a privately initiated FCA action, it is not a "party" to the litigation for purposes of either § 2107 or Rule 4. Because petitioner's time for filing a notice of appeal in this case was therefore 30 days, his appeal was untimely. Pp. 931–937.

(a) Although the United States is aware of and minimally involved in every FCA action, it is not a "party" thereto unless it has brought the action or exercised its statutory right to intervene in the case. Indeed, intervention is the requisite method for a nonparty to become a party. See *Marino* v. *Ortiz*, 484 U. S. 301, 304. To hold otherwise would render the FCA's intervention provisions superfluous, contradicting the requirement that statutes be construed in a manner that gives effect to all their provisions, see, *e. g.*, *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 166. The FCA expressly gave the United States discretion to intervene in FCA actions, and the Court cannot disregard that congressional assignment of discretion by designating the United States a "party" even after it has declined to assume the rights and burdens attendant to full party status. Pp. 931–934.

(b) Petitioner's arguments for designating the United States a party in all FCA actions are unconvincing. First, neither the United States' "real party in interest" status, see Fed. Rule Civ. Proc. 17(a), nor the requirement that an FCA action be "brought in the name of the Government," 31 U. S. C. § 3730(b)(1), converts the United States into a "party"

where, as here, it has declined to bring the action or intervene. Second, the Government's right to receive pleadings and deposition transcripts when it declines to intervene, see § 3730(c)(3), does not support, but weighs against, petitioner's argument: If the United States were a party to every FCA suit, it would already be entitled to such materials under Federal Rule of Civil Procedure 5. Third, the fact that the United States is bound by the judgment in all FCA actions regardless of its participation in the case is not a legitimate basis for disregarding the statute's intervention scheme. Finally, given that Rule 4(a)(1)(B) hinges its 60-day time limit on the United States' "party" status, petitioner's contention that the limit's underlying purpose would be best served by applying it in every FCA case is unavailing. Pp. 934–937.

540 F. 3d 94, affirmed.

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

Gideon A. Schor argued the cause for petitioner. With him on the briefs was *Lewis D. Zirogiannis.*

Paul T. Rephen argued the cause for respondents. With him on the brief were *Michael A. Cardozo*, *Leonard J. Koerner*, and *Andrew G. Lipkin.*

Jeffrey B. Wall argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Kagan*, *Acting Assistant Attorney General Hertz*, *Deputy Solicitor General Stewart*, and *Douglas N. Letter.**

JUSTICE THOMAS delivered the opinion of the Court.

The question presented is whether the 30-day time limit to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(1)(A) or the 60-day time limit in Rule 4(a)(1)(B) applies when the United States declines to formally intervene in a *qui tam* action brought under the False Claims Act (FCA), 31 U. S. C. § 3729. The United States Court of Appeals for the Second Circuit held that the 30-day limit applies. We affirm.

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*Briefs of *amici curiae* urging reversal were filed for the Taxpayers Against Fraud Education Fund by *Joseph E. B. White;* and for Patricia Haight et al. by *Jeremy L. Friedman.*

I

Petitioner Irwin Eisenstein and four New York City (City) employees filed this lawsuit against the City to challenge a fee charged by the City to nonresident workers. They contended, *inter alia,* that the City deprived the United States of tax revenue that it otherwise would have received if the fee had not been deducted as an expense from the workers' taxable income. In their view, this violated the FCA, which creates civil liability for "[a]ny person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." § 3729(a)(1). Although the United States is a "real party in interest" in a case brought under the FCA, Fed. Rule Civ. Proc. 17(a), an FCA action does not need to be brought by the United States. The FCA also allows "[a] person [to] bring a civil action for a violation of section 3729 for the person and for the United States Government." § 3730(b)(1). In a case brought by a person rather than the United States, the FCA grants the United States 60 days to review the claim and decide whether it will "elect to intervene and proceed with the action." § 3730(b)(2). After reviewing the complaint in this case, the United States declined to intervene but requested continued service of the pleadings. The United States took no other action with respect to the litigation. The District Court subsequently granted respondents' motion to dismiss the complaint and entered final judgment in their favor.

Petitioner filed a notice of appeal 54 days later. While the appeal was pending, the Court of Appeals *sua sponte* ordered the parties to brief the issue whether the notice of appeal had been timely filed. Federal Rules of Appellate Procedure 4(a)(1)(A)–(B) and 28 U. S. C. §§ 2107(a)–(b) generally require that a notice of appeal be filed within 30 days of the entry of judgment but extend the period to 60 days when "the United States or an officer or agency thereof is a party," § 2107(b). Petitioner argued that his appeal was timely filed

under the 60-day limit because the United States is a "party" to every FCA suit. Respondents countered that the appeal was untimely under the 30-day limit because the United States is not a party to an FCA action absent formal intervention or other meaningful participation.

The Court of Appeals agreed with respondents that the 30-day limit applied and dismissed the appeal as untimely. See 540 F. 3d 94 (CA2 2008). We granted certiorari, 555 U. S. 1131 (2009), to resolve division in the Courts of Appeals on the question,[1] and now affirm.

II

A party has 60 days to file a notice of appeal if "the United States or an officer or agency thereof is a party" to the action. See §2107(b) ("In any such [civil] action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry [of judgment]"); Fed. Rule App. Proc. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered"). Although the United States is aware of and minimally involved in every FCA action, we hold that it is not a "party" to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case.[2]

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[1] Compare *Rodriguez* v. *Our Lady of Lourdes Medical Center*, 552 F. 3d 297, 302 (CA3 2008); *United States ex rel. Lu* v. *Ou*, 368 F. 3d 773, 775 (CA7 2004); *United States ex rel. Russell* v. *Epic Healthcare Mgmt. Group*, 193 F. 3d 304, 308 (CA5 1999); *United States ex rel. Haycock* v. *Hughes Aircraft Co.*, 98 F. 3d 1100, 1102 (CA9 1996), with *United States ex rel. Petrofsky* v. *Van Cott, Bagley, Cornwall, McCarthy*, 588 F. 2d 1327, 1329 (CA10 1978) *(per curiam)*.

[2] This does not mean that the United States must intervene before it can appeal any order of the court in an FCA action. Under the collateral-order doctrine recognized by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546–547 (1949), the United States

A

The FCA establishes a scheme that permits either the Attorney General, § 3730(a), or a private party, § 3730(b), to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the "relator." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 769 (2000). When a relator initiates such an action, the United States is given 60 days to review the claim and decide whether it will "elect to intervene and proceed with the action," §§ 3730(b)(2), (b)(4); see also § 3730(c)(3) (permitting the United States to intervene even after the expiration of the 60-day period "upon a showing of good cause").

If the United States intervenes, the relator has "the right to continue as a party to the action," but the United States acquires the "primary responsibility for prosecuting the action." § 3730(c)(1). If the United States declines to intervene, the relator retains "the right to conduct the action." § 3730(c)(3). The United States is thereafter limited to exercising only specific rights during the proceeding. These rights include requesting service of pleadings and deposition transcripts, § 3730(c)(3), seeking to stay discovery that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," § 3730(c)(4), and vetoing a relator's decision to voluntarily dismiss the action, § 3730(b)(1).

Petitioner nonetheless asserts that the Government is a "party" to the action even when it has not exercised its right

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may appeal, for example, the dismissal of an FCA action over its objection. See 31 U. S. C. § 3730(b)(1); see also § 3730(c)(3); *Marino* v. *Ortiz*, 484 U. S. 301, 304 (1988) *(per curiam)* (noting that "denials of [motions to intervene] are, of course, appealable"). In such a case, the Government is a party for purposes of appealing the specific order at issue even though it is not a party for purposes of the final judgment and Federal Rule of Appellate Procedure 4(a)(1)(B).

to intervene. We disagree. A "party" to litigation is "[o]ne by or against whom a lawsuit is brought." Black's Law Dictionary 1154 (8th ed. 2004). An individual may also become a "party" to a lawsuit by intervening in the action. See *id.*, at 840 (defining "intervention" as "[t]he legal procedure by which . . . a third party is allowed to become a party to the litigation"). As the Court long ago explained, "[w]hen the term [to intervene] is used in reference to legal proceedings, it covers the right of one to interpose in, *or become a party to*, a proceeding already instituted." *Rocca* v. *Thompson*, 223 U. S. 317, 330 (1912) (emphasis added). The Court has further indicated that intervention is the requisite method for a nonparty to become a party to a lawsuit. See *Marino* v. *Ortiz*, 484 U. S. 301, 304 (1988) *(per curiam)* (holding that "when [a] nonparty has an interest that is affected by the trial court's judgment . . . the better practice is for such a nonparty *to seek intervention* for purposes of appeal" because "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment" (internal quotation marks omitted; emphasis added)). The United States, therefore, is a "party" to a privately filed FCA action only if it intervenes in accordance with the procedures established by federal law.

To hold otherwise would render the intervention provisions of the FCA superfluous, as there would be no reason for the United States to intervene in an action in which it is already a party. Such a holding would contradict well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions. See, *e. g.*, *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 166 (2004); *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 476–477 (2003). Congress expressly gave the United States discretion to intervene in FCA actions—a decision that requires consideration of the costs and benefits of party status. See, *e. g.*, Fed. Rule Civ. Proc. 26(a) (requiring a party to disclose certain information

without awaiting any discovery request); Rule 34 (imposing obligations on parties served with requests for production of information); Rule 37 (providing for sanctions for noncompliance with certain party obligations). The Court cannot disregard that congressional assignment of discretion by designating the United States a "party" even after it has declined to assume the rights and burdens attendant to full party status.[3]

B

Petitioner's arguments that the United States should be designated a party in all FCA actions irrespective of its decision to intervene are unconvincing. First, petitioner points to the United States' status as a "real party in interest" in an FCA action and its right to a share of any resulting damages. See Fed. Rule Civ. Proc. 17(a); *Vermont Agency of Natural Resources*, *supra*, at 772; see also 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1545, pp. 351–353 (2d ed. 1990) ("[W]hen there has been . . . a partial assignment the assignor and the assignee each retain an interest in the claim and are both real parties in interest"). But the United States' status as a "real party in interest" in a *qui tam* action does not automatically convert it into a "party."

The phrase, "real party in interest," is a term of art utilized in federal law to refer to an actor with a substantive right whose interests may be represented in litigation by

[3] This Court's decision in *Devlin* v. *Scardelletti*, 536 U. S. 1 (2002), is not to the contrary. There, the Court held that in a class-action suit, a class member who was not a named party in the litigation could appeal the approval of a settlement without formally intervening. See *id.*, at 6–14. But the Court's ruling was premised on the class-action nature of the suit, see *id.*, at 10–11, and specifically noted that party status depends on "the applicability of various procedural rules that may differ based on context," *id.*, at 10. For the reasons explained above, we conclude that in the specific context of the FCA, intervention is necessary for the United States to obtain status as a "party" for purposes of Rule 4(a)(1)(B).

another. See, *e. g.*, Fed. Rule Civ. Proc. 17(a); see also Cts. Crim. App. Rule Prac. & Proc. 20(b), 44 M. J. LXXII (1996) ("When an accused has not been named as a party, the accused . . . shall be designated as the real party in interest"); Black's Law Dictionary, *supra*, at 1154 (defining a "real party in interest" as "[a] person entitled under the substantive law to enforce the right sued upon and who generally . . . benefits from the action's final outcome"). Congress' choice of the term "party" in Rule 4(a)(1)(B) and § 2107(b), and not the distinctive phrase, "real party in interest," indicates that the 60-day time limit applies only when the United States is an actual "party" in *qui tam* actions—and not when the United States holds the status of "real party in interest." Cf. *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)). Consequently, when, as here, a real party in interest has declined to bring the action or intervene, there is no basis for deeming it a "party" for purposes of Rule 4(a)(1)(B).

We likewise reject petitioner's related claim that the United States' party status for purposes of Rule 4(a)(1)(B) is controlled by the statutory requirement that an FCA action be "brought in the name of the Government." 31 U. S. C. § 3730(b)(1). A person or entity can be named in the caption of a complaint without necessarily becoming a party to the action. See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1321, p. 388 (3d ed. 2004) ("[T]he caption is not determinative as to the identity of the parties to the action"). And here, it would make little sense to interpret the naming requirement of § 3730(b)(1) to dispense with the specific procedures for intervention provided elsewhere in the statute.

Second, petitioner relies on the Government's right to receive pleadings and deposition transcripts in cases where it

declines to intervene, see § 3730(c)(3). But the existence of this right, if anything, weighs against petitioner's argument. If the United States were a party to every FCA suit, it would already be entitled to such materials under Federal Rule of Civil Procedure 5, thus leaving no need for a separate provision preserving this basic right of litigation for the Government.

Third, petitioner relies on the fact that the United States is bound by the judgment in all FCA actions regardless of its participation in the case. But this fact is not determinative; nonparties may be bound by a judgment for a host of different reasons. See *Taylor* v. *Sturgell*, 553 U. S. 880, 893–895 (2008) (describing "six established categories" in which a nonparty may be bound by a judgment); see also Restatement (Second) of Judgments § 41(1)(d), p. 393 (1980) (noting that a nonparty may be bound by a judgment obtained by a party who, *inter alia*, is "[a]n official or agency invested by law with authority to represent the person's interests"). If the United States believes that its rights are jeopardized by an ongoing *qui tam* action, the FCA provides for intervention—including "for good cause shown" after the expiration of the 60-day review period. The fact that the Government is bound by the judgment is not a legitimate basis for disregarding this statutory scheme.

Finally, petitioner contends that the underlying purpose of the 60-day time limit would be best served by applying Rule 4(a)(1)(B) in every FCA case. The purpose of the extended 60-day limit in cases where the United States is a party, he claims, is to provide the Government with sufficient time to review a case and decide whether to appeal. Petitioner contends that, even in cases where the Government did not intervene before the district court issued its decision, the Government may want to intervene for purposes of appeal, and should have the full 60 days to decide. But regardless of the purpose of Rule 4(a)(1)(B) and the convenience that additional time may provide to the Government, this

Court cannot ignore the Rule's text, which hinges the applicability of the 60-day period on the requirement that the United States be a "party" to the action.[4]

III

We hold that when the United States has declined to intervene in a privately initiated FCA action, it is not a "party" to the litigation for purposes of either § 2107 or Federal Rule of Appellate Procedure 4. Because petitioner's time for filing a notice of appeal in this case was therefore 30 days, his appeal was untimely. The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[4] Petitioner contends that the uncertainty regarding Rule 4(a)(1)(B) has created a "tra[p] for the unwary," and that our decision will unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party. See Brief for Petitioner 25–27 (internal quotation marks omitted). As an initial matter, it is unclear how many pending cases are implicated by petitioner's concern as such cases would have to involve parties who waited more than 30 days to appeal from the judgment in an FCA case in which the United States declined to intervene. But to the extent that there are such cases, the Court must nonetheless decide the jurisdictional question before it irrespective of the possibility of harsh consequences. See *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312, 318 (1988) ("We recognize that construing Rule 3(c) [of the Federal Rules of Appellate Procedure] as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is 'imposed by the legislature and not by the judicial process'" (quoting *Schiavone* v. *Fortune*, 477 U. S. 21, 31 (1986))).

Syllabus

BOYLE *v.* UNITED STATES

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

No. 07–1309. Argued January 14, 2009—Decided June 8, 2009

The evidence at petitioner Boyle's trial for violating the Racketeer Influenced and Corrupt Organizations Act (RICO) provision forbidding "any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," 18 U. S. C. § 1962(c), was sufficient to prove, among other things, that Boyle and others committed a series of bank thefts in several States; that the participants included a core group, along with others recruited from time to time; and that the core group was loosely and informally organized, lacking a leader, hierarchy, or any long-term master plan. Relying largely on *United States* v. *Turkette*, 452 U. S. 576, 583, the District Court instructed the jury that to establish a RICO association-in-fact "enterprise," the Government must prove (1) an ongoing organization with a framework, formal or informal, for carrying out its objectives, and (2) that association members functioned as a continuing unit to achieve a common purpose. The court also told the jury that an association-in-fact's existence is often more readily proved by what it does than by abstract analysis of its structure, and denied Boyle's request for an instruction requiring the Government to prove that the enterprise had "an ascertainable structural hierarchy distinct from the charged predicate acts." Boyle was convicted, and the Second Circuit affirmed.

Held:

1. An association-in-fact enterprise under RICO must have a "structure," but the pertinent jury instruction need not be framed in the precise language Boyle proposes, *i. e.*, as having "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." Pp. 943–951.

(a) In light of RICO's broad statement that an enterprise "includes any . . . group of individuals associated in fact although not a legal entity," § 1961(4), and the requirement that RICO be "liberally construed to effectuate its remedial purposes," note following § 1961, *Turkette* explained that "enterprise" reaches "a group of persons associated together for a common purpose of engaging in a course of conduct," 452 U. S., at 583, and "is proved by evidence of an ongoing organization,

formal or informal, and by evidence that the various associates function as a continuing unit," *ibid.* Pp. 943–945.

(b) The question presented by this case is whether an association-in-fact enterprise must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." Pet. for Cert. i. This question can be broken into three parts. First, the enterprise must have a "structure" that, under RICO's terms, has at least three features: a purpose, relationships among the associates, and longevity sufficient to permit the associates to pursue the enterprise's purpose. See *Turkette*, 452 U. S., at 583. The instructions need not actually use the term "structure," however, so long as the relevant point's substance is adequately expressed. Second, because a jury must find the existence of elements of a crime beyond a reasonable doubt, requiring a jury to find the existence of a structure that is *ascertainable* would be redundant and potentially misleading. Third, the phrase "beyond that inherent in the pattern of racketeering activity" is correctly interpreted to mean that the enterprise's existence is a separate element that must be proved, not that such existence may never be inferred from the evidence showing that the associates engaged in a pattern of racketeering activity. See *ibid.* Pp. 945–947.

(c) Boyle's argument that an enterprise must have structural features additional to those that can be fairly inferred from RICO's language—*e. g.*, a hierarchical structure or chain of command; fixed roles for associates; and an enterprise name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies—has no basis in the statute's text. As *Turkette* said, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. The breadth of RICO's "enterprise" concept is highlighted by comparing the statute with other federal laws having much more stringent requirements for targeting organized criminal groups: *E. g.*, § 1955(b) defines an "illegal gambling business" as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." Pp. 947–949.

(d) Rejection of Boyle's argument does not lead to a merger of the § 1962(c) crime and other federal offenses. For example, proof that a defendant violated § 1955 does not necessarily establish that he conspired to participate in a gambling enterprise's affairs through a pattern of racketeering activity. Rather, that would require the prosecution to prove either that the defendant committed a pattern of § 1955 violations or a pattern of state-law gambling crimes. See § 1961(1). Pp. 949–950.

(e) Because RICO's language is clear, the Court need not reach Boyle's statutory purpose, legislative history, or rule-of-lenity arguments. Pp. 950–951.

2. The instructions below were correct and adequate. By explicitly telling jurors they could not convict on the RICO charges unless they found that the Government had proved the existence of an enterprise, the instructions made clear that this was a separate element from the pattern of racketeering activity. The jurors also were adequately told that the enterprise needed the structural attributes that may be inferred from the statutory language. Finally, the instruction that an enterprise's existence "is oftentimes more readily proven by what is *[sic]* does, rather than by abstract analysis of its structure" properly conveyed *Turkette*'s point that proof of a pattern of racketeering activity may be sufficient in a particular case to permit an inference of the enterprise's existence. P. 951.

283 Fed. Appx. 825, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 952.

Marc Fernich argued the cause for petitioner. With him on the briefs was *Debra A. Karlstein.*

Anthony A. Yang argued the cause for the United States. With him on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz.**

JUSTICE ALITO delivered the opinion of the Court.

We are asked in this case to decide whether an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, must have "an ascertainable structure beyond

*Briefs of *amici curiae* urging reversal were filed for the Center on the Administration of Criminal Law by *Aaron M. Panner*, *Anthony S. Barkow*, and *Rachel E. Barkow;* and for the National Association of Criminal Defense Lawyers by *William W. Taylor III*, *Samuel J. Buffone*, *Richard D. Willstatter*, and *Terrance G. Reed.*

Kevin P. Roddy and *G. Robert Blakey* filed a brief for the National Association of Shareholder and Consumer Attorneys as *amicus curiae* urging affirmance.

Beth S. Brinkmann, *Brian R. Matsui*, *Robin S. Conrad*, and *Amar D. Sarwal* filed a brief for the Chamber of Commerce of the United States of America et al. as *amici curiae.*

that inherent in the pattern of racketeering activity in which it engages." Pet. for Cert. i. We hold that such an enterprise must have a "structure" but that an instruction framed in this precise language is not necessary. The District Court properly instructed the jury in this case. We therefore affirm the judgment of the Court of Appeals.

I

A

The evidence at petitioner's trial was sufficient to prove the following: Petitioner and others participated in a series of bank thefts in New York, New Jersey, Ohio, and Wisconsin during the 1990's. The participants in these crimes included a core group, along with others who were recruited from time to time. Although the participants sometimes attempted bank-vault burglaries and bank robberies, the group usually targeted cash-laden night-deposit boxes, which are often found in banks in retail areas.

Each theft was typically carried out by a group of participants who met beforehand to plan the crime, gather tools (such as crowbars, fishing gaffs, and walkie-talkies), and assign the roles that each participant would play (such as lookout and driver). The participants generally split the proceeds from the thefts. The group was loosely and informally organized. It does not appear to have had a leader or hierarchy; nor does it appear that the participants ever formulated any long-term master plan or agreement.

From 1991 to 1994, the core group was responsible for more than 30 night-deposit-box thefts. By 1994, petitioner had joined the group, and over the next five years, he participated in numerous attempted night-deposit-box thefts and at least two attempted bank-vault burglaries.

In 2003, petitioner was indicted for participation in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U. S. C. § 1962(c); conspiracy to commit that offense, in violation of § 1962(d); conspiracy to commit bank burglary, in violation of § 371; and

nine counts of bank burglary and attempted bank burglary, in violation of § 2113(a).

B

In instructing the jury on the meaning of a RICO "enterprise," the District Court relied largely on language in *United States* v. *Turkette*, 452 U. S. 576 (1981). The court told the jurors that, in order to establish the existence of such an enterprise, the Government had to prove that: "(1) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose." App. 112. Over petitioner's objection, the court also told the jury that it could "find an enterprise where an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts" and that "[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what is *[sic]* does, rather than by abstract analysis of its structure." *Id.*, at 111–112.[1]

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[1] The relevant portion of the instructions was as follows:

"The term 'enterprise' as used in these instructions may also include a group of people associated in fact, even though this association is not recognized as a legal entity. Indeed, an enterprise need not have a name. Thus, an enterprise need not be a form[al] business entity such as a corporation, but may be merely an informal association of individuals. A group or association of people can be an 'enterprise' if, among other requirements, these individuals 'associate' together for a purpose of engaging in a course of conduct. Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what is *[sic]* does, rather than by abstract analysis of its structure.

"Moreover, you may find an enterprise where an association of individuals, *without structural hierarchy,* forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and . . . by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the exist-

Petitioner requested an instruction that the Government was required to prove that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." *Id.*, at 95. The District Court refused to give that instruction.

Petitioner was convicted on 11 of the 12 counts against him, including the RICO counts, and was sentenced to 151 months' imprisonment. In a summary order, the Court of Appeals for the Second Circuit affirmed his conviction but vacated the sentence on a ground not relevant to the issues before us. 283 Fed. Appx. 825 (2007). The Court of Appeals did not specifically address the RICO jury instructions, stating only that the arguments not discussed in the order were "without merit." *Id.*, at 826. Petitioner was then resentenced, and we granted certiorari, 554 U. S. 944 (2008), to resolve conflicts among the Courts of Appeals concerning the meaning of a RICO enterprise.

II

A

RICO makes it "unlawful for any person employed by or *associated with any enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activ-

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ence of such an enterprise, the government must prove that: (1) There is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.

"Regarding 'organization,' *it is not necessary that the enterprise have any particular or formal structure*, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." App. 111–113 (emphasis added).

ity or collection of unlawful debt." 18 U. S. C. § 1962(c) (emphasis added).

The statute does not specifically define the outer boundaries of the "enterprise" concept but states that the term "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." § 1961(4).[2] This enumeration of included enterprises is obviously broad, encompassing "*any* . . . group of individuals associated in fact." *Ibid.* (emphasis added). The term "any" ensures that the definition has a wide reach, see, *e. g.*, *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 218–219 (2008), and the very concept of an association in fact is expansive. In addition, the RICO statute provides that its terms are to be "liberally construed to effectuate its remedial purposes." § 904(a), 84 Stat. 947, note following 18 U. S. C. § 1961; see also, *e. g.*, *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 257 (1994) ("RICO broadly defines 'enterprise' "); *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 497 (1985) ("RICO is to be read broadly"); *Russello* v. *United States*, 464 U. S. 16, 21 (1983) (noting "the pattern of the RICO statute in utilizing terms and concepts of breadth").

In light of these statutory features, we explained in *Turkette* that "an enterprise includes any union or group of individuals associated in fact" and that RICO reaches "a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U. S., at 580, 583. Such

[2] This provision does not purport to set out an exhaustive definition of the term "enterprise." Compare §§ 1961(1)–(2) (defining what the terms "racketeering activity" and "State" *mean*) with §§ 1961(3)–(4) (defining what the terms "person" and "enterprise" *include*). Accordingly, this provision does not foreclose the possibility that the term might include, in addition to the specifically enumerated entities, others that fall within the ordinary meaning of the term "enterprise." See *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 238 (1989) (explaining that the term "pattern" also retains its ordinary meaning notwithstanding the statutory definition in § 1961(5)).

an enterprise, we said, "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*, at 583.

Notwithstanding these precedents, the dissent asserts that the definition of a RICO enterprise is limited to "businesslike entities." See *post*, at 952 (opinion of STEVENS, J.). We see no basis to impose such an extratextual requirement.[3]

B

As noted, the specific question on which we granted certiorari is whether an association-in-fact enterprise must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." Pet. for Cert. i. We will break this question into three parts. First, must an association-in-fact enterprise have a "structure"? Second, must the structure be "ascertainable"? Third, must the "structure" go "beyond that inherent in the pattern of racketeering activity" in which its members engage?

"*Structure.*" We agree with petitioner that an association-in-fact enterprise must have a structure. In the sense relevant here, the term "structure" means "[t]he way in which parts are arranged or put together to form a whole"

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[3] The dissent claims that the "businesslike" limitation "is confirmed by the text of § 1962(c) and our decision in *Reves* v. *Ernst & Young*, 507 U. S. 170 (1993)." *Post*, at 953. Section 1962(c), however, states only that one may not "conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." Whatever businesslike characteristics the dissent has in mind, we do not see them in § 1962(c). Furthermore, *Reves* v. *Ernst & Young*, 507 U. S. 170 (1993), is inapposite because that case turned on our interpretation of the participation requirement of § 1962, not the definition of "enterprise." See *id.*, at 184–185. In any case, it would be an interpretive stretch to deduce from the requirement that an enterprise must be "directed" to impose the much broader, amorphous requirement that it be "businesslike."

and "[t]he interrelation or arrangement of parts in a complex entity." American Heritage Dictionary 1718 (4th ed. 2000); see also Random House Dictionary of the English Language 1410 (1967) (defining structure to mean, among other things, "the pattern of relationships, as of status or friendship, existing among the members of a group or society").

From the terms of RICO, it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. As we succinctly put it in *Turkette*, an association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U. S., at 583.

That an "enterprise" must have a purpose is apparent from the meaning of the term in ordinary usage, *i. e.*, a "venture," "undertaking," or "project." Webster's Third New International Dictionary 757 (1976). The concept of "associat[ion]" requires both interpersonal relationships and a common interest. See *id.*, at 132 (defining "association" as "an organization of persons having a common interest"); Black's Law Dictionary 156 (rev. 4th ed. 1968) (defining "association" as a "collection of persons who have joined together for a certain object"). Section 1962(c) reinforces this conclusion and also shows that an "enterprise" must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had "affairs" of sufficient duration to permit an associate to "participate" in those affairs through "a pattern of racketeering activity."

Although an association-in-fact enterprise must have these structural features, it does not follow that a district court must use the term "structure" in its jury instructions. A trial judge has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed.

"*Ascertainable.*" Whenever a jury is told that it must find the existence of an element beyond a reasonable doubt, that element must be "ascertainable" or else the jury could not find that it was proved. Therefore, telling the members of the jury that they had to ascertain the existence of an "ascertainable structure" would have been redundant and potentially misleading.

"*Beyond that inherent in the pattern of racketeering activity.*" This phrase may be interpreted in at least two different ways, and its correctness depends on the particular sense in which the phrase is used. If the phrase is interpreted to mean that the existence of an enterprise is a separate element that must be proved, it is of course correct. As we explained in *Turkette*, the existence of an enterprise is an element distinct from the pattern of racketeering activity and "proof of one does not necessarily establish the other."[4] 452 U. S., at 583.

On the other hand, if the phrase is used to mean that the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity, it is incorrect. We recognized in *Turkette* that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise "may in particular cases coalesce." *Ibid.*

C

The crux of petitioner's argument is that a RICO enterprise must have structural features in addition to those that

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[4] It is easy to envision situations in which proof that individuals engaged in a pattern of racketeering activity would not establish the existence of an enterprise. For example, suppose that several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates—for example, bribery or extortion. Proof of these patterns would not be enough to show that the individuals were members of an enterprise.

we think can be fairly inferred from the language of the statute. Although petitioner concedes that an association-in-fact enterprise may be an "'informal'" group and that "not 'much'" structure is needed, Reply Brief for Petitioner 24, he contends that such an enterprise must have at least some additional structural attributes, such as a structural "hierarchy," "role differentiation," a "unique *modus operandi*," a "chain of command," "professionalism and sophistication of organization," "diversity and complexity of crimes," "membership dues, rules and regulations," "uncharged or additional crimes aside from predicate acts," an "internal discipline mechanism," "regular meetings regarding enterprise affairs," an "enterprise 'name,'" and "induction or initiation ceremonies and rituals," *id.*, at 31–35; see also Brief for Petitioner 26–28, 33; Tr. of Oral Arg. 6, 8, 17.

We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. As we said in *Turkette*, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

The breadth of the "enterprise" concept in RICO is highlighted by comparing the statute with other federal statutes that target organized criminal groups. For example, 18 U. S. C. § 1955(b), which was enacted together with RICO as part of the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922, defines an "illegal gambling business" as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." A "continuing criminal enterprise," as defined in 21 U. S. C. § 848(c), must involve more than five persons who act in concert and must have an "organizer," supervisor, or other manager. Congress included no such requirements in RICO.

III

A

Contrary to petitioner's claims, rejection of his argument regarding these structural characteristics does not lead to a merger of the crime proscribed by 18 U. S. C. § 1962(c) (participating in the affairs of an enterprise through a pattern of racketeering activity) and any of the following offenses: operating a gambling business, § 1955; conspiring to commit one or more crimes that are listed as RICO predicate offenses, § 371; or conspiring to violate the RICO statute, § 1962(d).

Proof that a defendant violated § 1955 does not necessarily establish that the defendant conspired to participate in the affairs of a gambling enterprise through a pattern of racketeering activity. In order to prove the latter offense, the prosecution must prove either that the defendant committed a pattern of § 1955 violations or a pattern of state-law gambling crimes. See § 1961(1). No such proof is needed to establish a simple violation of § 1955.

Likewise, proof that a defendant conspired to commit a RICO predicate offense—for example, arson—does not necessarily establish that the defendant participated in the af-

fairs of an arson enterprise through a pattern of arson crimes. Under § 371, a conspiracy is an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy. See *United States* v. *Feola*, 420 U. S. 671, 694 (1975). Section 1962(c) demands much more: the creation of an "enterprise"—a group with a common purpose and course of conduct—and the actual commission of a pattern of predicate offenses.[5]

Finally, while in practice the elements of a violation of §§ 1962(c) and (d) are similar, this overlap would persist even if petitioner's conception of an association-in-fact enterprise were accepted.

B

Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity. In prior cases, we have rejected similar arguments in favor of the clear but expansive text of the statute. See *National Organization for Women*, 510 U. S., at 262 ("The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (quoting *Sedima*, 473 U. S., at 499; brackets and internal quotation marks omitted)); see also *Turkette*, 452 U. S., at 589–591. "We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 660 (2008); see also, *e. g.*, *National Organization for Women*, *supra*, at 252 (rejecting the argument that "RICO requires proof that either the racketeering enterprise

[5] The dissent states that "[o]nly if proof of the enterprise element . . . requires evidence of activity or organization beyond that inherent in the pattern of predicate acts will RICO offenses retain an identity distinct from § 371 offenses." *Post*, at 957. This is incorrect: Even if the same evidence may prove two separate elements, this does not mean that the two elements collapse into one.

or the predicate acts of racketeering were motivated by an economic purpose"); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U. S. 229, 244 (1989) (declining to read "an organized crime limitation into RICO's pattern concept"); *Sedima*, *supra*, at 481 (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury' ").

IV

The instructions the District Court Judge gave to the jury in this case were correct and adequate. These instructions explicitly told the jurors that they could not convict on the RICO charges unless they found that the Government had proved the existence of an enterprise. See App. 111. The instructions made clear that this was a separate element from the pattern of racketeering activity. *Ibid.*

The instructions also adequately told the jury that the enterprise needed to have the structural attributes that may be inferred from the statutory language. As noted, the trial judge told the jury that the Government was required to prove that there was "an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives" and that "the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose." *Id.*, at 112.

Finally, the trial judge did not err in instructing the jury that "the existence of an association-in-fact is oftentimes more readily proven by what is *[sic]* does, rather than by abstract analysis of its structure." *Id.*, at 111–112. This instruction properly conveyed the point we made in *Turkette* that proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise.

We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

In my view, Congress intended the term "enterprise" as it is used in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, to refer only to businesslike entities that have an existence apart from the predicate acts committed by their employees or associates. The trial judge in this case committed two significant errors relating to the meaning of that term. First, he instructed the jury that "an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts" can constitute an enterprise. App. 112. And he allowed the jury to find that element satisfied by evidence showing a group of criminals with no existence beyond its intermittent commission of racketeering acts and related offenses. Because the Court's decision affirming petitioner's conviction is inconsistent with the statutory meaning of the term enterprise and serves to expand RICO liability far beyond the bounds Congress intended, I respectfully dissent.

I

RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." § 1962(c). The statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." § 1961(4).

It is clear from the statute and our earlier decisions construing the term that Congress used "enterprise" in these provisions in the sense of "a business organization," Webster's Third New International Dictionary 757 (1976), rather than "a 'venture,' 'undertaking,' or 'project,'" *ante*, at 946

(quoting Webster's Third New International Dictionary, at 757). First, the terms "individual, partnership, corporation, association, or other legal entity" describe entities with formal legal structures most commonly established for business purposes. § 1961(4). In context, the subsequent reference to any "union or group of individuals associated in fact *although not a legal entity*" reflects an intended commonality between the legal and nonlegal entities included in the provision. *Ibid.* (emphasis added). "The juxtaposition of the two phrases suggests that 'associated in fact' just means structured without the aid of legally defined structural forms such as the business corporation." *Limestone Development Corp.* v. *Lemont*, 520 F. 3d 797, 804–805 (CA7 2008).[1]

That an enterprise must have businesslike characteristics is confirmed by the text of § 1962(c) and our decision in *Reves* v. *Ernst & Young*, 507 U. S. 170 (1993). Section 1962(c) creates liability for "conduct[ing] or participat[ing] . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." In *Reves*, we examined that provision's meaning and held that, "[i]n order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Id.*, at 179 (quoting § 1962(c)). It is not enough for a defendant to

[1] To be sure, we have read RICO's enterprise term broadly to include entities with exclusively noneconomic motives or wholly unlawful purposes. See *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 252 (1994) *(NOW); United States* v. *Turkette*, 452 U. S. 576, 580–581 (1981). But those holdings are consistent with the conclusion that an enterprise is a businesslike entity. Indeed, the examples of qualifying associations cited in *Turkette*—including loan-sharking, property-fencing, drug-trafficking, and counterfeiting operations—satisfy that criterion, as each describes an organization with continuing operations directed toward providing goods or services to its customers. See *id.*, at 589–590 (citing 84 Stat. 923; 116 Cong. Rec. 592 (1970)). Similarly, the enterprise at issue in *NOW* was a nationwide network of antiabortion groups that had a leadership counsel and regular conferences and whose members undertook an extensive pattern of extortion, arson, and other racketeering activity for the purpose of "shut[ting] down abortion clinics." 510 U. S., at 253.

"carry on" or "participate in" an enterprise's affairs through a pattern of racketeering activity; instead, evidence that he operated, managed, or directed those affairs is required. See *id.*, at 177–179. This requirement confirms that the enterprise element demands evidence of a certain quantum of businesslike organization—*i. e.*, a system of processes, dealings, or other affairs that can be "directed."

Our cases also make clear that an enterprise "is an entity separate and apart from the pattern of activity in which it engages." *United States* v. *Turkette*, 452 U. S. 576, 583 (1981). As with the requirement that an enterprise have businesslike characteristics, that an enterprise must have a separate existence is confirmed by § 1962(c) and *Reves*. If an entity's existence consisted solely of its members' performance of a pattern of racketeering acts, the "enterprise's affairs" would be synonymous with the "pattern of racketeering activity." Section 1962(c) would then prohibit an individual from conducting or participating in "the conduct of [a pattern of racketeering activity] through a pattern of racketeering activity"—a reading that is unbearably redundant, particularly in a case like this one in which a single pattern of activity is alleged. The only way to avoid that result is to require that an "enterprise's affairs" be something other than the pattern of racketeering activity undertaken by its members.[2]

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[2] The other subsections of 18 U. S. C. § 1962 further demonstrate the businesslike nature of the enterprise element and its necessary distinctness from the pattern of racketeering activity. Subsection (a) prohibits anyone who receives income derived from a pattern of racketeering activity from "us[ing] or invest[ing], directly or indirectly, any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise." And subsection (b) prohibits anyone from "acquir[ing] or maintain[ing]" any interest in or control of an enterprise through a pattern of racketeering activity. We noted in *NOW* that the term enterprise "plays a different role in the structure" of those subsections than it does in subsection (c) because the enterprise in those subsections is the victim. 510 U. S., at 258–259. We did not, however, suggest

Recognizing an enterprise's businesslike nature and its distinctness from the pattern of predicate acts, however, does not answer the question of what proof each element requires. In cases involving a legal entity, the matter of proving the enterprise element is straightforward, as the entity's legal existence will always be something apart from the pattern of activity performed by the defendant or his associates. Cf. *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158, 163 (2001). But in the case of an association-in-fact enterprise, the Government must adduce other evidence of the entity's "separate" existence and "ongoing organization." *Turkette*, 452 U. S., at 583. There may be cases in which a jury can infer that existence and continuity from the evidence used to establish the pattern of racketeering activity. *Ibid.* But that will be true only when the pattern of activity is so complex that it could not be performed in the absence of structures or processes for planning or concealing the illegal conduct beyond those inherent in performing the predicate acts. More often, proof of an enterprise's separate existence will require different evidence from that used to establish the pattern of predicate acts.

Precisely what proof is required in each case is a more difficult question, largely due to the abundant variety of RICO predicates and enterprises. Because covered enterprises are necessarily businesslike in nature, however, proof of an association-in-fact enterprise's separate existence will generally require evidence of rules, routines, or processes through which the entity maintains its continuing operations and seeks to conceal its illegal acts. As petitioner suggests, this requirement will usually be satisfied by evidence that

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that the term has a substantially different meaning in each subsection. To the contrary, our observation that the enterprise in subsection (c) is "the vehicle through which the unlawful pattern of racketeering activity is committed," *id.*, at 259, indicates that, as in subsections (a) and (b), the enterprise must have an existence apart from the pattern of racketeering activity.

the association has an "ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." Pet. for Cert. i. Examples of such structure include an organizational hierarchy, a "framework for making decisions," an "internal discipline mechanism," "regular meetings," or a practice of "reinvest[ing] . . . proceeds to promote and expand the enterprise." Reply Brief for Petitioner 31–34. In other cases, the enterprise's existence might be established through evidence that it provides goods or services to third parties, as such an undertaking will require organizational elements more comprehensive than those necessary to perform a pattern of predicate acts. Thus, the evidence needed to establish an enterprise will vary from case to case, but in every case the Government must carry its burden of proving that an alleged enterprise has an existence separate from the pattern of racketeering activity undertaken by its constituents.

II

In some respects, my reading of the statute is not very different from that adopted by the Court. We agree that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Ante*, at 946. But the Court stops short of giving content to that requirement. It states only that RICO "demands proof that the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through 'a pattern of racketeering activity,' " before concluding that "[a] trial judge has considerable discretion in choosing the language of an instruction" and need not use the term "structure." *Ibid.* While I agree the word "structure" is not talismanic, I would hold that the instructions must convey the requirement that the alleged enterprise have an existence apart from the alleged pattern of predicate acts.

The Court's decision, by contrast, will allow juries to infer the existence of an enterprise in every case involving a pattern of racketeering activity undertaken by two or more associates.

By permitting the Government to prove both elements with the same evidence, the Court renders the enterprise requirement essentially meaningless in association-in-fact cases. It also threatens to make that category of § 1962(c) offenses indistinguishable from conspiracies to commit predicate acts, see § 371, as the only remaining difference is § 1962(c)'s pattern requirement. The Court resists this criticism, arguing that § 1962(c) "demands much more" than the inchoate offense defined in § 371. *Ante*, at 950. It states that the latter "may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy," whereas the former requires the creation of "a group with a common purpose and course of conduct—and the actual commission of a pattern of predicate offenses." *Ibid.* Given that it is also unlawful to conspire to violate § 1962(c), see § 1962(d), this comment provides no assurance that RICO and § 371 offenses remain distinct. Only if proof of the enterprise element—the "group with a common purpose and course of conduct"—requires evidence of activity or organization beyond that inherent in the pattern of predicate acts will RICO offenses retain an identity distinct from § 371 offenses.

This case illustrates these concerns. The trial judge instructed the jury that an enterprise need have only the degree of organization necessary "for carrying out its objectives" and that it could "find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts." App. 112.[3] These instructions were plainly deficient, as they did not require the Government to prove that

[3] For the full text of the relevant portion of the instructions, see *ante*, at 942–943, n. 1.

the alleged enterprise had an existence apart from the pattern of predicate acts. Instead, they permitted the Government's proof of the enterprise's structure and continuing nature—requirements on which all agree—to consist only of evidence that petitioner and his associates performed a pattern of racketeering activity.

Petitioner's requested instruction would have required the jury to find that the alleged enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." *Id.*, at 95. That instruction does not precisely track my understanding of the statute; although evidence of "structural hierarchy" can evidence an enterprise, it is not necessary to establish that element. Nevertheless, the proposed instruction would have better directed the jury to consider whether the alleged enterprise possessed the separate existence necessary to expose petitioner to liability under § 1962(c), and the trial judge should have considered an instruction along those lines.

The trial judge also erred in finding the Government's evidence in this case sufficient to support petitioner's RICO convictions. Petitioner was alleged to have participated and conspired to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity consisting of one act of bank robbery and three acts of interstate transportation of stolen funds. *Id.*, at 15–19. The "primary goals" of the alleged enterprise "included generating money for its members and associates through the commission of criminal activity, including bank robberies, bank burglaries and interstate transportation of stolen money." *Id.*, at 14. And its *modus operandi* was to congregate periodically when an associate had a lead on a night-deposit box that the group could break into. Whoever among the associates was available would bring screwdrivers, crowbars, and walkie-talkies to the location. Some acted as lookouts, while others retrieved the money. When the endeavor was successful, the par-

ticipants would split the proceeds. Thus, the group's purpose and activities, and petitioner's participation therein, were limited to sporadic acts of taking money from bank deposit boxes. There is no evidence in RICO's text or history that Congress intended it to reach such ad hoc associations of thieves.

III

Because the instructions and evidence in this case did not satisfy the requirement that an alleged enterprise have an existence separate and apart from the pattern of activity in which it engages, I respectfully dissent.

Per Curiam

INDIANA STATE POLICE PENSION TRUST ET AL. *v.* CHRYSLER LLC ET AL.

ON APPLICATIONS FOR STAY

No. 08A1096. Decided June 9, 2009*

Held: The applications for stay are denied, and the temporary stay entered June 8, 2009, is vacated. Based on the record and proceedings, applicants have not carried the burden of showing that the circumstances here justify an exercise of the Court's discretion to grant a stay.

Applications for stay denied; temporary stay vacated.

PER CURIAM.

The applications for stay presented to JUSTICE GINSBURG and by her referred to the Court are denied. The temporary stay entered by JUSTICE GINSBURG on June 8, 2009, is vacated.

A denial of a stay is not a decision on the merits of the underlying legal issues. In determining whether to grant a stay, we consider instead whether the applicant has demonstrated "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Conkright* v. *Frommert*, *post*, at 1402 (GINSBURG, J., in chambers) (internal quotation marks and alteration omitted). In addition, "in a close case it may be appropriate to balance the equities," to assess the relative harms to the parties, "as well as the interests of the public at large." *Ibid.* (internal quotation marks omitted).

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*Together with No. 08A1099 (08–1513), *Center for Auto Safety et al.* v. *Chrysler LLC et al.*, and No. 08A1100, *Pascale* v. *Chrysler LLC et al.*, also on applications for stay.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken* v. *Holder*, *ante*, at 433 (2009) (internal quotation marks omitted). It is instead an exercise of judicial discretion, and the "party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Ante*, at 433–434. The applicants have not carried that burden.

"[T]he propriety of [a stay] is dependent upon the circumstances of the particular case," and the "traditional stay factors contemplate individualized judgments in each case." *Ibid.* (internal quotation marks omitted). Our assessment of the stay factors here is based on the record and proceedings in these cases alone.

Reporter's Note

The next page is purposely numbered 1101. The numbers between 961 and 1101 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 9 THROUGH JUNE 8, 2009

March 9, 2009

Certiorari Granted—Vacated and Remanded

No. 07–822. Pennsylvania Employees Benefit Trust Fund et al. *v.* Zeneca, Inc., et al. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wyeth* v. *Levine*, 555 U. S. 555 (2009). Reported below: 499 F. 3d 239.

No. 08–437. Colacicco, Individually and as Executor of the Estate of Colacicco, Deceased, et al. *v.* Apotex, Inc., et al. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wyeth* v. *Levine*, 555 U. S. 555 (2009). The Chief Justice took no part in the consideration or decision of this petition. Reported below: 521 F. 3d 253.

Certiorari Dismissed

No. 08–8007. Waters *v.* Parker, Warden. Ct. Crim. App. Tenn. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8056. Myron *v.* Schwarzenegger, Governor of California, et al. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. Justice Stevens dissents. See *id.*, at 4, and cases cited therein.

No. 08–8067. BOYD *v.* STATE FARM INSURANCE CO. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 285 Fed. Appx. 864.

No. 08–8107. COGGINS *v.* KEYS. 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. 08–8108. DOLENZ *v.* FAHEY 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. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 298 Fed. Appx. 380.

No. 08–8129. SEARLES *v.* WEST HARTFORD BOARD OF EDUCATION ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8453. CHURCH *v.* UNITED STATES ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 293 Fed. Appx. 975.

Miscellaneous Orders

No. 08M65. CALLAHAN *v.* DAVIS CORRECTIONAL FACILITY ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 08–295. TRAVELERS INDEMNITY CO. ET AL. *v.* BAILEY ET AL.; and

No. 08–307. COMMON LAW SETTLEMENT COUNSEL *v.* BAILEY ET AL. C. A. 2d Cir. [Certiorari granted, 555 U. S. 1083.] Motion of Chubb Indemnity Insurance Company for divided argument granted and time divided as follows: 20 minutes to Cascino Asbestos Claimants, and 10 minutes to Chubb Indemnity Insurance Company.

No. 08–441. GROSS *v.* FBL FINANCIAL SERVICES, INC. C. A. 8th Cir. [Certiorari granted, 555 U. S. 1066.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–730. AMERICAN BANKERS ASSN. ET AL. *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 08–8012. MIERZWA ET UX. *v.* UNITED STATES ET AL. C. A. 3d Cir.;

No. 08–8014. BURKE *v.* BARRISTER LAW GROUP ET AL. C. A. 2d Cir.;

No. 08–8015. BURKE *v.* WEINER ET AL. C. A. 2d Cir.;

No. 08–8032. BURKE *v.* ALSO CORNERSTONE ET AL. C. A. 2d Cir.;

No. 08–8033. BURKE *v.* STANDARD OIL OF CONNECTICUT, INC., DBA STANDARD SECURITY SYSTEM, ET AL. C. A. 2d Cir.;

No. 08–8048. BURKE *v.* CONNECTICUT ET AL. C. A. 2d Cir.;

No. 08–8137. BURKE *v.* CONNECTICUT ET AL. C. A. 2d Cir.;

No. 08–8138. BURKE *v.* APT FOUNDATION ET AL. C. A. 2d Cir.;

No. 08–8139. BURKE *v.* ALSO CORNERSTONE ET AL. C. A. 2d Cir.; and

No. 08–8586. RANSOM *v.* UNITED STATES. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 30, 2009, 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. 08–8642. IN RE HNATKOVICH; and

No. 08–8716. IN RE LITTLE BEY. Petitions for writs of habeas corpus denied.

No. 08–8088. IN RE PEKER; and

No. 08–8576. IN RE COSGROVE. Petitions for writs of mandamus denied.

No. 08–835. IN RE CHRISTOPHER, AKA CHRISTOPHER BEY. Petition for writ of mandamus and/or prohibition denied.

No. 08–8025. IN RE PUNCHARD; and

No. 08–8026. IN RE PUNCHARD. Motions of petitioner for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 08–586. JONES ET AL. *v.* HARRIS ASSOCIATES L. P. C. A. 7th Cir. Certiorari granted. Reported below: 527 F. 3d 627.

Certiorari Denied

No. 08–530. CITY OF NEW YORK, NEW YORK, ET AL. *v.* BERETTA U. S. A. CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 524 F. 3d 384.

No. 08–545. LAWSON ET AL. *v.* BERETTA U. S. A. CORP. ET AL. Ct. App. D. C. Certiorari denied. Reported below: 940 A. 2d 163.

No. 08–596. WILSON *v.* HOGSTEN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 269 Fed. Appx. 193.

No. 08–648. BREWER, SECRETARY OF STATE OF ARIZONA *v.* NADER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 3d 1028.

No. 08–723. ROYAL ATLANTIC CORP. ET AL. *v.* ROBERTS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 542 F. 3d 363.

No. 08–734. SZYMANSKI *v.* FLETCHER-HARLEE CORP. Super. Ct. Pa. Certiorari denied. Reported below: 936 A. 2d 87.

No. 08–825. MCFARLAND *v.* SALAZAR, SECRETARY OF INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 3d 1106.

No. 08–831. LANGLEY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 08–832. MITCHELL *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 08–834. CHRISTOPHER, AKA BEY *v.* NORTH CAROLINA STATE UNIVERSITY ET AL. Sup. Ct. N. C. Certiorari denied.

No. 08–838. JAIN ET UX. *v.* J. P. MORGAN SECURITIES, INC., ET AL. Ct. App. Wash. Certiorari denied. Reported below: 142 Wash. App. 574, 177 P. 3d 117.

No. 08–839. HORNOT *v.* CARDENAS. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 986 So. 2d 258.

No. 08–841. M. H. ET UX., ON BEHALF OF THEIR MINOR CHILD, L. H. *v.* MONROE-WOODBURY CENTRAL SCHOOL DISTRICT. C. A. 2d Cir. Certiorari denied. Reported below: 296 Fed. Appx. 126.

No. 08–842. FELDERHOF *v.* JENKENS & GILCHRIST ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 3d 114.

No. 08–845. SKONIECZNY *v.* KATEKOVICH ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 953 A. 2d 611.

No. 08–847. MUNIAUCTION, INC., DBA GRANT STREET GROUP *v.* THOMSON CORP., T/A AND DBA THOMSON FINANCIAL LLC ET AL., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 532 F. 3d 1318.

No. 08–851. GRYNBERG ET AL. *v.* TOTAL S. A. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 538 F. 3d 1336.

No. 08–855. FOWLER *v.* CRAWFORD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 3d 931.

No. 08–857. BROWN ET AL. *v.* TURNER ET AL. Ct. App. Ga. Certiorari denied. Reported below: 291 Ga. App. 719, 662 S. E. 2d 721.

No. 08–867. APOTEX CORP. ET AL. *v.* ASTRAZENECA AB ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 536 F. 3d 1361.

No. 08–877. SANEH *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 283 Fed. Appx. 320.

No. 08–879. VUKSICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 587.

No. 08–912. BRAUS *v.* BOWEN ET AL. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 08–918. R. J. REYNOLDS TOBACCO CO. *v.* STAR SCIENTIFIC, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 537 F. 3d 1357.

No. 08–926. RISTROPH *v.* PIPELINE TECHNOLOGY VI, LLC. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 991 So. 2d 1.

No. 08–1003. CASTELLAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 Fed. Appx. 773.

No. 08–6320. SORROW *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–6890. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 282 Fed. Appx. 200.

No. 08–7013. GRAY *v.* BRANKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 3d 220.

No. 08–7103. DIGGS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 597 Pa. 28, 949 A. 2d 873.

No. 08–7122. GARCIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 888.

No. 08–7172. WILLIAMS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 529 F. 3d 1.

No. 08–7402. CONTRERAS-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 721.

No. 08–7460. ARMSTRONG *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 218 Ariz. 451, 189 P. 3d 378.

No. 08–7466. VALLE-MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 169.

No. 08–7650. AREF *v.* UNITED STATES; and
No. 08–7651. HOSSAIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 3d 72 and 285 Fed. Appx. 784.

No. 08–7969. KING *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 537 F. 3d 1062.

No. 08–7995. MAXWELL *v.* SMITH. C. A. 6th Cir. Certiorari denied.

No. 08–7996. MALCOM *v.* WOODBRIDGE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 309.

No. 08–7998. WOOTEN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1164, 966 N. E. 2d 616.

No. 08–8002. MARTIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–8003. JOHNSON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 927.

No. 08–8006. TROUTT *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 452.

No. 08–8011. MCDONNELL ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 981 So. 2d 585.

No. 08–8019. COCHRAN *v.* ADAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8020. MORALES *v.* ABT, LLC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 08–8021. VICK *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 08–8022. JORDAN *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 08–8023. MOENING *v.* MICHIGAN. Cir. Ct. Saginaw County, Mich. Certiorari denied.

No. 08–8027. O'CONNOR *v.* ST. JOHN'S COLLEGE, SANTA FE CAMPUS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 137.

No. 08–8031. TURNBOW *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8039. WATSON *v.* HANLON ET AL. C. A. 1st Cir. Certiorari denied.

No. 08–8047. THREADGILL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8053. MUNGUIA *v.* DEXTER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8055. PRATT *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 08–8057. MCMANUS *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 546.

No. 08–8060. HERNANDEZ *v.* LAMARQUE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 235.

No. 08–8065. ACOSTA TREJO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–8066. WARD *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 990 So. 2d 1068.

No. 08–8069. BRIONES *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8071. BAILUM *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied. Reported below: 2008-Ohio-2999.

No. 08–8073. WEAVER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 993 So. 2d 533.

No. 08–8074. VERDI *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–8075. WILLIAMS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 951 A. 2d 1220.

No. 08–8077. WITHERSPOON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 379 Ill. App. 3d 298, 883 N. E. 2d 725.

No. 08–8083. FAN *v.* ROE ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 08–8092. MINOR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8094. OSUMI *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 23.

No. 08–8098. SMITH *v.* BRUNSMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8100. BROWN *v.* GIURBINO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8101. BROWN *v.* METRISH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8104. AKERS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 378 Ill. App. 3d 1137, 955 N. E. 2d 191.

No. 08–8105. ALLEN *v.* WINE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 524.

No. 08–8111. MARIN *v.* TILTON & SOLOT LAW OFFICES. C. A. 9th Cir. Certiorari denied.

No. 08–8113. KIRSCH *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 2d & 11th Jud. Dists. Certiorari denied. Reported below: 19 Misc. 3d 133(A), 859 N. Y. S. 2d 905.

No. 08–8114. GORBY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 530 F. 3d 1363.

No. 08–8116. POINTER *v.* LUCE, JUDGE, CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8127. MCCALL *v.* WOODS, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8133. LEE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 08–8134. JACKSON *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8135. SIMS *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 08–8144. WOODALL *v.* TEETER. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 08–8145. AL-GHIZZAWI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 08–8155. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 272.

No. 08–8161. CARSON *v.* COOPER, SUPERINTENDENT, AVERY MITCHELL CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 656.

No. 08–8175. VETA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 08–8225. BROWN *v.* HALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 674.

No. 08–8238. UMALI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 10 N. Y. 3d 417, 888 N. E. 2d 1046.

No. 08–8326. WILLIAMS *v.* DAMRELL, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8339. RAMOS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 3d 984, 851 N. Y. S. 2d 724.

No. 08–8470. LATOS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied.

No. 08–8490. HOWARD, AKA MILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8496. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 412.

No. 08–8500. SPAULDING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–8503. GARVIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 279.

No. 08–8504. GOMEZ-ASTORGA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 734.

No. 08–8507. RICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 260.

No. 08–8510. HAYS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 271 Fed. Appx. 390.

No. 08–8511. HARRISON *v.* HERBEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 281 Fed. Appx. 236.

No. 08–8514. FELICIANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–8519. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 3d 915.

No. 08–8523. MAGANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 154.

No. 08–8524. OCAMPO-ZUNIGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 400.

No. 08–8525. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8526. MOREIRA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 08–8529. BARAJAS-BECERRIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 627.

No. 08–8530. BRAME *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 284 Fed. Appx. 815.

No. 08–8531. BALSAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 449.

No. 08–8532. AJAJ *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 575.

No. 08–8534. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–8535. JIMENEZ-HERNANDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 578.

No. 08–8536. GALDAMEZ-FUNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 309.

No. 08–8538. INFANTE-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 394.

No. 08–8540. WANIGASINGHE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 545 F. 3d 595.

No. 08–8541. TRIUMPH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 266 Fed. Appx. 53.

No. 08–8544. COOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 625.

No. 08–8545. DECARLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8551. ERCKERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 45.

No. 08–8552. DE JESUS-CHALA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–8554. MOORE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 541 F. 3d 1323.

No. 08–8555. MCCAULEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 3d 440.

No. 08–8562. SCHWEICKERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 857.

No. 08–8567. ARROYO-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 620.

No. 08–8569. BARCLAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 952.

No. 08–8572. VALDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 927.

No. 08–8574. TAMPICO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8579. CALHOUN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 276 Fed. Appx. 114.

No. 08–8581. CHAVEZ MUNOZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–8582. MCCOY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 513.

No. 08–8583. WOLFE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 301 Fed. Appx. 134.

No. 08–8587. FULLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 3d 1020.

No. 08–8588. GRIST *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 770.

No. 08–8593. MANLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–8594. CABANISS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 196.

No. 08–8596. CALDWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 313 Fed. Appx. 459.

No. 08–8599. FREEMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 249.

No. 08–8600. VALADEZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 71.

No. 08–8601. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 604.

No. 08–8602. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8624. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8627. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 3d 364.

No. 08–8630. AMOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 452.

No. 08–8631. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–8637. VARGAS-CASTANEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 541.

No. 08–551. BRANKER, WARDEN *v.* GRAY. C. A. 4th Cir. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 529 F. 3d 220.

No. 08–7369. THOMPSON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 517 F. 3d 1279.

Statement of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Last Term, in my opinion in *Baze* v. *Rees*, 553 U. S. 35 (2008), I suggested that the "time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived." *Id.*, at 81 (opinion concurring in judgment). This petition for certiorari describes costs that merit consideration in any such study.

In June 1976, having been advised by counsel that he would not receive the death penalty if he accepted responsibility for his crime, petitioner pleaded guilty to a capital offense. The advice was erroneous, and he was sentenced to death. Since that time, two state-court judgments have set aside his death sentence. See *Thompson* v. *State*, 351 So. 2d 701 (Fla. 1977); *Thompson* v. *Dugger*, 515 So. 2d 173 (Fla. 1987). At a third penalty hearing—after petitioner presented mitigation evidence about his limited

mental capacity and dysfunctional childhood that had previously been barred—five members of the advisory jury voted against a death sentence, but the court again imposed a sentence of death.

Thirty-two years have passed since petitioner was first sentenced to death. In prior cases, both JUSTICE BREYER and I have noted that substantially delayed executions arguably violate the Eighth Amendment's prohibition against cruel and unusual punishment. See, *e. g.*, *Smith* v. *Arizona*, 552 U. S. 985, 986 (2007) (BREYER, J., dissenting from denial of certiorari); *Foster* v. *Florida*, 537 U. S. 990, 991 (2002) (same); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (same); *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (STEVENS, J., respecting denial of certiorari). Petitioner's case involves a longer delay than any of those earlier cases.

As he awaits execution, petitioner has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6- by 9-foot cell. Two death warrants have been signed against him and stayed only shortly before he was scheduled to be put to death. The dehumanizing effects of such treatment are undeniable. See *People* v. *Anderson*, 6 Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972) ("[T]he process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture"); *Furman* v. *Georgia*, 408 U. S. 238, 288 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"). Moreover, as I explained in *Lackey*, delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death. It would therefore be appropriate to conclude that a punishment of death after significant delay is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.).

While the length of petitioner's confinement under sentence of death is extraordinary, the concerns his case raises are not unique. Clarence Allen Lackey had spent 17 years on death row when this Court reviewed his petition for certiorari. Today, condemned inmates await execution for an average of nearly 13 years. See Dept. of Justice, Bureau of Justice Statistics, Capital Punishment, 2007 (Table 11) (2008), online at http://

www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st11.htm (all Internet materials as visited Feb. 20, 2009, and available in Clerk of Court's case file). To my mind, this figure underscores the fundamental inhumanity and unworkability of the death penalty as it is administered in the United States.

Some respond that delays in carrying out executions are the result of this Court's insistence on excessive process. But delays have multiple causes, including "the States' failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing." *Knight*, 528 U. S., at 998 (BREYER, J., dissenting from denial of certiorari). The reversible error rate in capital trials is staggering. More than 30 percent of death verdicts imposed between 1973 and 2000 have been overturned,[1] and 129 inmates sentenced to death during that time have been exonerated, often more than a decade after they were convicted.[2] Judicial process takes time, but the error rate in capital cases illustrates its necessity. We are dutybound to "insure that every safeguard is observed" when "a defendant's life is at stake." *Gregg*, 428 U. S., at 187 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

In sum, our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions "to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process." *Baze*, 553 U. S., at 78, 86 (STEVENS, J., concurring in judgment).

JUSTICE THOMAS, concurring.

I remain "unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition

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[1] Dept. of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment, 2005, p. 14 (Dec. 2006) (App. Table 2), online at http:/www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf. This figure is underinclusive, as it does not account for the fact that many condemned inmates' convictions and sentences are still under review.

[2] See Death Penalty Information Center, Innocence: List of Those Freed from Death Row (Sept. 18, 2008), http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (showing that an average of nearly 10 years elapsed between an inmate's conviction and his exoneration).

that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Knight* v. *Florida*, 528 U. S. 990 (1999) (THOMAS, J., concurring in denial of certiorari). Petitioner William Lee Thompson has pleaded guilty to this murder—twice. *Thompson* v. *State*, 759 So. 2d 650, 654 (Fla. 2000) *(per curiam)*. Having confessed, petitioner could have accepted "what the people of Florida have deemed him to deserve: execution." *Foster* v. *Florida*, 537 U. S. 990, 991 (2002) (THOMAS, J., concurring in denial of certiorari). But because petitioner chose to challenge his death sentence, JUSTICE STEVENS and JUSTICE BREYER suggest that the subsequent delay caused by petitioner's 32 years of litigation creates an Eighth Amendment problem. *Ante*, at 1115–1116 (STEVENS, J., statement respecting denial of certiorari); *post*, at 1119–1121 (BREYER, J., dissenting from denial of certiorari). I disagree. It makes "a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional." *Turner* v. *Jabe*, 58 F. 3d 924, 933 (CA4 1995) (Luttig, J., concurring in judgment).

JUSTICE BREYER replies that a death-row inmate's Eighth Amendment challenge to "a delay of more than 30 years" between sentencing and execution should not be "automatically waive[d]" because he chooses to exercise his appellate rights. See *post*, at 1120. But framing the issue in this way obscures the central question. The issue is not whether a death-row inmate's appeals "waive" any Eighth Amendment right; the issue instead is whether the death-row inmate's litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right. It does not. See *Knight*, *supra*, at 992 (opinion of THOMAS, J.) ("Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. . . . It is incongruous to arm capital defendants with an arsenal of 'constitutional' claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed").

I also disagree with JUSTICE STEVENS that other aspects of the criminal justice system in this country require the fresh examination of the costs and benefits of retaining the death penalty

that he seeks. *Ante*, at 1115–1116. For example, JUSTICE STEVENS criticizes the "dehumanizing effects" of the manner in which petitioner has been confined, *ante*, at 1115, but he never pauses to consider whether there is a legitimate penological reason for keeping certain inmates in restrictive confinement. See, *e. g.*, Kocieniewski, Death Row Inmate Said to Beat and Kick Another to Death in New Jersey Prison, New York Times, Sept. 8, 1999, p. B5. Indeed, the disastrous consequences of this Court's recent foray into prison management, *Johnson* v. *California*, 543 U. S. 499 (2005), should have suppressed any urge to second-guess these difficult institutional decisions, *Beard* v. *Banks*, 548 U. S. 521, 536–537 (2006) (THOMAS, J., concurring in judgment) (noting that after the Court invalidated California's policy of racially segregating prisoners in its reception centers, the State "subsequently experienced several instances of severe race-based prison violence, including a riot that resulted in 2 fatalities and more than 100 injuries, and significant fighting along racial lines between newly arrived inmates, the very inmates that were subject to the policy invalidated by the Court in *Johnson*").

JUSTICE STEVENS also points to the 129 death-row inmates that have been "exonerated" since 1973. *Ante*, at 1116. These inmates may have been freed from prison, but that does not necessarily mean that they were declared innocent of the crime for which they were convicted. *Kansas* v. *Marsh*, 548 U. S. 163, 180, and n. 7 (2006). Many were merely the beneficiaries of "this Court's Byzantine death penalty jurisprudence." *Knight*, *supra*, at 991 (opinion of THOMAS, J.). Moreover, by citing these statistics, JUSTICE STEVENS implies "that the death penalty can only be just in a system that does not permit error." *Marsh*, 548 U. S., at 181. But no criminal justice system operates without error. There is no constitutional basis for prohibiting Florida "from authorizing the death penalty, even in our imperfect system." *Ibid.*

Finally, JUSTICE STEVENS altogether refuses to take into consideration the gruesome nature of the crimes that legitimately lead States to authorize the death penalty and juries to impose it. The facts of this case illustrate the point. On March 30, 1976, petitioner and his codefendant were in a motel room with the victim and another woman. They instructed the women to contact their families to obtain money. The victim made the mistake of promising that she could obtain $200 to $300; she was able to secure only $25. Enraged, petitioner's codefendant ordered her

into the bedroom, removed his chain belt, forced her to undress, and began hitting her in the face while petitioner beat her with the belt. They then rammed a chair leg into her vagina, tearing its inner wall and causing internal bleeding; they repeated the process with a nightstick. Petitioner and his codefendant then tortured her with lit cigarettes and lighters and forced her to eat her sanitary napkin and to lick spilt beer off the floor. All the while, they continued to beat her with the chain belt, the club, and the chair leg. They stopped the attack once to force the victim to again call her mother to ask for money. After the call, petitioner and his codefendant resumed the torture until the victim died. *Thompson*, *supra*, at 653–654.*

Three juries recommended that petitioner receive the death penalty for this heinous murder, and petitioner has received judicial review of his sentence on at least 17 occasions. The decision to sentence petitioner to death is not "'the product of habit and inattention rather than an acceptable deliberative process.'" *Ante*, at 1116 (STEVENS, J., concurring in judgment) (quoting and citing *Baze* v. *Rees*, 553 U. S. 35, 78, 86 (2008)). It represents the considered judgment of the people of Florida that a death sentence, which is expressly contemplated by the Constitution, see Amdts. 5, 14, is warranted in this case. It is the crime—and not the punishment imposed by the jury or the delay in petitioner's execution—that was "unacceptably cruel." *Ante*, at 1116.

JUSTICE BREYER, dissenting.

This petition asks us to determine whether the Eighth Amendment's prohibition on "cruel and unusual punishments" precludes the execution of a prisoner who has spent over 30 years on death row. JUSTICE STEVENS and I have previously written that this

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*JUSTICE BREYER suggests that petitioner "may be significantly less culpable than his codefendant, who did not receive the death penalty" principally because Barbara Garritz, the woman who witnessed the murder, averred at petitioner's third sentencing that he was dominated by his codefendant. *Post*, at 1120. JUSTICE BREYER ignores, however, that petitioner "testified [at his codefendant's retrial] and took credit for the entire incident" and that Ms. Garritz had previously testified that petitioner "left the bedroom and told" her that he "was so angry he 'felt like killing Sally [the victim].'" *Thompson* v. *State*, 389 So. 2d 197, 199–200 (Fla. 1980) *(per curiam)*. In any event, JUSTICE BREYER's factual recitation is entirely beside the point: He concedes that the jury's decision to sentence petitioner to death was "[r]easonable." *Post*, at 1121.

is a question that merits the Court's attention, see, *e. g.*, *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (STEVENS, J., respecting denial of certiorari); *Foster* v. *Florida*, 537 U. S. 990, 991 (2002) (BREYER, J., dissenting from denial of certiorari); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (same), and the delay here is even longer than the delay in those prior cases. Here, petitioner has been on death row for 32 years, well over half his life. For the reasons we have set forth in the past and for many of those added in JUSTICE STEVENS' separate statement, I would grant this petition.

JUSTICE THOMAS suggests that petitioner cannot now challenge the constitutionality of the delay because much of that delay is his own fault—he caused it by choosing to challenge the sentence that the people of Florida deemed appropriate. See *ante*, at 1116–1117 (opinion concurring in denial of certiorari). I do not believe that petitioner's decision to exercise his right to seek appellate review of his death sentence automatically waives a claim that the Eighth Amendment proscribes a delay of more than 30 years. See *Gregg* v. *Georgia*, 428 U. S. 153, 198 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (automatic appeal of all death sentences is "an important additional safeguard against arbitrariness and caprice"). But in any event the delay here resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible. See *Knight*, *supra*, at 993.

In particular, the delay was partly caused by the sentencing judge's failure to allow the presentation and jury consideration of nonstatutory mitigating circumstances, an approach which we have unanimously held constitutionally forbidden, see *Hitchcock* v. *Dugger*, 481 U. S. 393, 398–399 (1987). As a result of this error, the Florida Supreme Court remanded for resentencing. See *Thompson* v. *Dugger*, 515 So. 2d 173 (1987).

At petitioner's resentencing, he presented substantial mitigating evidence, not previously presented, that suggested that he may be significantly less culpable than his codefendant, who did not receive the death penalty. Petitioner, for example, introduced an affidavit of Barbara Garritz, who witnessed the crime for which petitioner was sentenced to death. She described petitioner's codefendant Rocky Surace as "an evil man" and "the devil, himself" and explained that he "manipulate[d] people . . . [into] follow[ing] his orders." Tr. 2473 (May 31, 1989). By contrast, she described petitioner as "a big, easy-going child who would do just about

anything to please" and who "never seemed to have an idea of his own." *Id.*, at 2474; see also *ibid.* ("He would do just about anything he was told"). She described the relationship between petitioner and Rocky as follows: "Bill was completely under Rocky's spell. He hung on every word Rocky said and would do and say everything Rocky did and said. He was like Rocky's dog. Rocky would give an order and Bill would do it, no questions asked." *Id.*, at 2475. With respect to the night in question, she explained that, "[e]verything Bill did, he did at Rocky's direction, just like he always did when I was around the two. I saw what happened and I know that Rocky started and finished the whole thing." *Ibid.*

Garritz's testimony was consistent with the picture of petitioner painted by other witnesses. For example, one of petitioner's teachers testified that while in elementary school petitioner consistently scored in the mid-70's on IQ tests; those scores qualified him for classes for the educable mentally retarded. *Id.*, at 2178 (May 30, 1989). His teachers also described him as "slow," a "follower" who was "always . . . eager to please." *Id.*, at 2185, 2186; see also *id.*, at 2191–2192. A psychologist and a psychiatrist who examined him both described him as showing signs of brain damage, *id.*, at 2510, 2513, 2516, 2523 (June 1, 1989); see also *id.*, at 2570–2571, 2577, and a psychiatrist testified that "the kind of disorder [petitioner] has, he's easily led and felt very threatened by the co-defendant," *id.*, at 2564; see also *id.*, at 2602 ("There is no doubt in the world that this man basically appeared to be a rather—rather dependent person who tends to follow the leader. He is not a leader himself. So, whatever Mr. Surace says, he probably goes along with it"). After hearing this evidence, the jury recommended a death sentence by a vote of 7 to 5.

I refer to the evidence only to point out that it is fair, not unfair, to take account of the delay the State caused when it initially refused to allow Thompson to present it at the punishment phase of his trial. I would add that it is the punishment, not the gruesome nature of the crime, which is at issue. Reasonable jurors might, and did, disagree about the appropriateness of executing Thompson for his role in that crime. The question here, however, is whether the Constitution permits that execution after a delay of 32 years—a delay for which the State was in significant part responsible.

I believe we should grant the writ to consider that question.

Rehearing Denied

No. 08–498. DALTON *v.* TILLER ET AL., 555 U. S. 1099;

No. 08–597. DUMORANGE *v.* CITY OF MIAMI, FLORIDA, 555 U. S. 1101;

No. 08–657. MARVIN *v.* FRATERNAL ORDER OF EAGLES AERIE #200, 555 U. S. 1138;

No. 08–6420. SPOTTSVILLE *v.* TERRY, WARDEN, 555 U. S. 1051;

No. 08–6559. DASISA *v.* UNIVERSITY OF THE DISTRICT OF COLUMBIA BOARD OF TRUSTEES, 555 U. S. 1105;

No. 08–6683. BULINGTON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 555 U. S. 1074; and

No. 08–7343. ANDREWS-WILLMANN *v.* PAULSON, SECRETARY OF THE TREASURY, 555 U. S. 1117. Petitions for rehearing denied.

No. 08–510. IVALDY *v.* LORAL SPACE & COMMUNICATIONS LTD. ET AL., 555 U. S. 1126. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 08–7001. MUCKLE ET AL. *v.* FREEMONT INVESTMENTS & LOANS ET AL., 555 U. S. 1110. Motion for leave to file petition for rehearing denied.

MARCH 10, 2009

Dismissal Under Rule 46

No. 08–8345. HARRIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari dismissed under this Court's Rule 46. Reported below: 382 Ill. App. 3d 1206, 967 N. E. 2d 495.

Certiorari Denied

No. 08–9060 (08A784). MARTINEZ *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.

No. 08–9115 (08A797). NEWLAND *v.* GEORGIA. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

March 13, 2009

Miscellaneous Order

No. 08A759. Allen, Commissioner, Alabama Department of Corrections, et al. *v.* Hallford. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on February 11, 2009, presented to Justice Thomas, and by him referred to the Court, denied.

March 18, 2009

Dismissal Under Rule 46

No. 08–8612. Mills *v.* Lempke, Superintendent, Five Points Correctional Facility, et al. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.

March 20, 2009

Miscellaneous Orders

No. 08–22. Caperton et al. *v.* A. T. Massey Coal Co., Inc., et al. Sup. Ct. App. W. Va. [Certiorari granted, 555 U. S. 1028.] Motion of respondents for leave to file a supplemental brief after argument denied.

No. 08–295. Travelers Indemnity Co. et al. *v.* Bailey et al.; and

No. 08–307. Common Law Settlement Counsel *v.* Bailey et al. C. A. 2d Cir. [Certiorari granted, 555 U. S. 1083.] Motion of Future Claimants Representatives for leave to participate in oral argument as *amici curiae* and for divided argument denied.

March 23, 2009

Certiorari Granted—Vacated and Remanded

No. 08–6944. Covington *v.* United States. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Nelson* v. *United States*, 555 U. S. 350 (2009) *(per curiam)*. Reported below: 284 Fed. Appx. 579.

Certiorari Dismissed

No. 08–8203. SWINSON *v.* HART. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8212. BERRYHILL *v.* EVANS, WARDEN. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8258. BROADES *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8456. COX *v.* MCDANIEL ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 08–8610. MCGOWAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8846. IVEY *v.* DEPARTMENT OF THE TREASURY. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 285 Fed. Appx. 763.

No. 08–8926. DEERING BEY *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. 08A683. GALDAMEZ-SANCHEZ *v.* HOLDER, ATTORNEY GENERAL. Sup. Ct. Haw. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 08A699 (08–1108). HAEG *v.* ALASKA. Ct. App. Alaska. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 08A708 (08–1029). IN RE JOHNSON. C. A. 5th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 08A728 (08–8961). RODRIGUEZ *v.* WESTBANK ET AL. App. Ct. Ill., 1st Dist. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 08M66. TELASCO *v.* FLORIDA BAR;
No. 08M68. DRAPER *v.* HOBBS ET AL.;
No. 08M69. BROWN *v.* KELLY ET AL.; and
No. 08M70. BILLINGS ET AL. *v.* CAJUN CONSTRUCTORS, INC. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 08M67. MCNEESE *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 08M71. BROWDER *v.* ANDERSON ET AL. Motion for leave to proceed as a veteran denied.

No. 08–626. LEVEL 3 COMMUNICATIONS, LLC *v.* CITY OF ST. LOUIS, MISSOURI. C. A. 8th Cir.;
No. 08–759. SPRINT TELEPHONY PCS, L. P. *v.* SAN DIEGO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir.; and
No. 08–6261. ROBERTSON *v.* UNITED STATES EX REL. WATSON. Ct. App. D. C. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 08–7709. NGHIEM *v.* FUJITSU MICROELECTRONICS, INC., ET AL. Ct. App. Cal., 6th App. Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1151] denied.

No. 08–8300. RING *v.* ESTATE OF WREZIC ET AL. Ct. App. Wis.;
No. 08–7349. FINCHER *v.* DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES. Ct. App. Ohio, Hamilton County; and
No. 08–8756. RANSOM *v.* UNITED STATES. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 13, 2009, 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. 08–8904. IN RE SALAS;
No. 08–8973. IN RE BRUGGEMAN; and
No. 08–9009. IN RE MYERS. Petitions for writs of habeas corpus denied.

No. 08–8793. IN RE TWITTY. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 08–900. IN RE RUIZ RIVERA;
No. 08–8675. IN RE SIMPSON; and
No. 08–8721. IN RE HILL. Petitions for writs of mandamus denied.

No. 08–8194. IN RE MINNFEE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of prohibition dismissed. See this Court's Rule 39.8.

Certiorari Denied

No. 08–432. THOMPSON ET AL. *v.* GLADES COUNTY BOARD OF COMMISSIONERS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 532 F. 3d 1179.

No. 08–497. AMERISOURCE CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 525 F. 3d 1149.

No. 08–583. ENERGIZER HOLDINGS, INC., ET AL. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 275 Fed. Appx. 969.

No. 08–630. MASHBURN, TRUSTEE *v.* SCRIVNER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 535 F. 3d 1258.

No. 08–656. JEZIERSKI *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 543 F. 3d 886.

No. 08–672. EQUITY IN ATHLETICS, INC. *v.* DEPARTMENT OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 517.

No. 08–673. CLARK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 3d 803.

No. 08–742. JESENSKY ET VIR *v.* DUQUESNE LIGHT CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 287 Fed. Appx. 968.

No. 08–750. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 206.

No. 08–752. BRENNAN'S, INC. *v.* BRENNAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 706.

No. 08–755. RAMOS *v.* UNITED STATES; and
No. 08–756. COMPEAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 3d 439.

No. 08–764. PORTER *v.* NATIONSCREDIT CONSUMER DISCOUNT CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 285 Fed. Appx. 871.

No. 08–773. SWINDLE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 373 Ark. 519, 285 S. W. 3d 200.

No. 08–774. ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, ET AL. *v.* MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 543 F. 3d 275.

No. 08–814. ELLIS *v.* BRADLEY COUNTY, TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 387 Fed. Appx. 516.

No. 08–858. CALDWELL *v.* CALDWELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 3d 1126.

No. 08–862. UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES, AFL–CIO *v.* PICHLER ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 3d 380.

No. 08–869. WOGAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WOGAN *v.* KUNZE ET AL. Sup.

Ct. S. C. Certiorari denied. Reported below: 379 S. C. 581, 666 S. E. 2d 901.

No. 08–882. O'DWYER ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 277 Fed. Appx. 512.

No. 08–883. FAIRLEY *v.* STALDER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 805.

No. 08–886. PAVEY *v.* CONLEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 3d 739.

No. 08–888. STOYANOV *v.* WINTER, SECRETARY OF THE NAVY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 636.

No. 08–892. BRAUN *v.* DENALI BOROUGH. Sup. Ct. Alaska. Certiorari denied. Reported below: 193 P. 3d 719.

No. 08–896. MCGILLS GLASS WAREHOUSE ET AL. *v.* VENTURE TAPE CORP. C. A. 1st Cir. Certiorari denied. Reported below: 540 F. 3d 56.

No. 08–898. SHAW *v.* PFEIFFER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 735.

No. 08–899. MONTOYA ET AL. *v.* TECOLOTE LAND GRANT, BY AND THROUGH TECOLOTE BOARD OF TRUSTEES. Ct. App. N. M. Certiorari denied. Reported below: 143 N. M. 413, 176 P. 3d 1145.

No. 08–901. ATLAS VAN LINES, INC. *v.* LEWIS ET UX. C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 3d 403.

No. 08–903. FORGITRON LLC *v.* ACCURIDE CORP. C. A. 6th Cir. Certiorari denied.

No. 08–913. OYENUGA *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied.

No. 08–915. MINER ET AL. *v.* CLINTON COUNTY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 3d 464.

No. 08–936. TAYLOR *v.* NEGLEY PARK HOMEOWNERS ASSOCIATION COUNCIL ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 945 A. 2d 782.

No. 08–943. RICH *v.* KENNY ET AL. Ct. App. Utah. Certiorari denied. Reported below: 186 P. 3d 989.

No. 08–949. HILLMAN ET AL. *v.* OHIO. Ct. App. Ohio, Wayne County. Certiorari denied. Reported below: 2008-Ohio-3204.

No. 08–950. FREDERICKSON *v.* COOP. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 3d 652.

No. 08–958. BALLY TOTAL FITNESS CORP. ET AL. *v.* BUTCHER. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 08–959. APOTEX, INC. *v.* JANSSEN PHARMACEUTICA, N. V., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 540 F. 3d 1353.

No. 08–979. FLORANCE *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 08–982. TORRES REYES *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 195 P. 3d 662.

No. 08–986. HILL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 383 Ill. App. 3d 1150, 968 N. E. 2d 220.

No. 08–1001. ENERGEN RESOURCES CORP. *v.* JOLLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF STAPLETON, DECEASED. Ct. App. N. M. Certiorari denied. Reported below: 145 N. M. 350, 198 P. 3d 376.

No. 08–1014. CORNERSTONE AMERICA ET AL. *v.* HOPKINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 3d 335.

No. 08–1015. CALDWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 689.

No. 08–1024. ZIADEH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 282 Fed. Appx. 227.

No. 08–1025. PHELPS *v.* SABOL, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied.

No. 08–1035. SALAS *v.* DEPARTMENT OF HOMELAND SECURITY. C. A. Fed. Cir. Certiorari denied. Reported below: 296 Fed. Appx. 28.

No. 08–1040. TORZALA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 545 F. 3d 517.

No. 08–1044. MATHIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 252.

No. 08–1060. GOLDEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 3d 487.

No. 08–1062. YANNOTTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 3d 112.

No. 08–1064. MILBURN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 455.

No. 08–1071. PAL *v.* DEPARTMENT OF COMMERCE. C. A. Fed. Cir. Certiorari denied. Reported below: 301 Fed. Appx. 984.

No. 08–1075. MCGRIFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 287 Fed. Appx. 916.

No. 08–1077. MEYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 541 F. 3d 1331.

No. 08–1080. POSADA CARRILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 3d 344.

No. 08–6652. CEBALLOS-LLANOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–6804. STAHL *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Sup. Ct. S. C. Certiorari denied.

No. 08–6904. DIAS ET AL. *v.* ELIQUE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 276 Fed. Appx. 596.

No. 08–6995. TYREE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 942 A. 2d 629.

No. 08–7046. VASQUEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 555.

No. 08–7121. GOODRUM *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITU-

TIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 3d 249.

No. 08–7200. POWELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 598 Pa. 224, 956 A. 2d 406.

No. 08–7231. CARPENTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 3d 1050, 860 N. Y. S. 2d 671.

No. 08–7373. PURSLEY *v.* ESTEP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 651.

No. 08–7423. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 767.

No. 08–7440. DUNCAN *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 3d 1222.

No. 08–7453. CONE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 212.

No. 08–7544. PRUITT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 597 Pa. 307, 951 A. 2d 307.

No. 08–7620. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 284 Fed. Appx. 943.

No. 08–7726. MENDEZ-GARCIA, AKA ALARCON-MUNIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 366.

No. 08–7778. GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 417.

No. 08–7856. THOMPSON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 277.

No. 08–7875. BROWN *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 531 F. 3d 433.

No. 08–7899. POWELL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 3d 325.

No. 08–7920. GODWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 88.

No. 08–8141. RIPPY *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 569.

No. 08–8146. PEPIN *v.* PEPIN. Sup. Ct. N. H. Certiorari denied.

No. 08–8150. BRETZING *v.* HART, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–8151. BROWN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8153. PEREZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 980 So. 2d 1126.

No. 08–8156. SOLARIO *v.* RYAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8157. EDWARDS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 993.

No. 08–8158. MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8164. MATIN *v.* NEW YORK STATE POLICE ET AL. C. A. 2d Cir. Certiorari denied.

No. 08–8166. KRUPP *v.* SINGER ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–8167. KING *v.* KING. Ct. App. Colo. Certiorari denied.

No. 08–8171. ROBENSON *v.* MCCOLLUM, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8173. WILSON *v.* STOVALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8181. BOUNNAM *v.* CARLTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8182. DAVIS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–8183. ERVIN *v.* PURKETT, SUPERINTENDENT, EASTERN RECEPTION, DIAGNOSTIC AND CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 08–8184. CARR *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1134, 966 N. E. 2d 603.

No. 08–8185. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 08–8187. PRIMUS *v.* PADULA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 236.

No. 08–8195. BUTLER *v.* MOLINAR ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–8198. GARZA DELGADO *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8204. DUNBAR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8209. MCCREARY *v.* MCQUIGGIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8213. BOWERS *v.* JONES. Ct. App. Utah. Certiorari denied.

No. 08–8218. MASS *v.* DEXTER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8219. LATTIMORE *v.* WESTCHESTER COUNTY OFFICE OF THE MEDICAL EXAMINER ET AL. C. A. 2d Cir. Certiorari denied.

No. 08–8220. LEGERE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 157 N. H. 746, 958 A. 2d 969.

No. 08–8221. ADAMS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 406 Md. 240, 958 A. 2d 295.

No. 08–8223. BARTYLLA *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 755 N. W. 2d 8.

No. 08–8226. BERNAL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8232. HOUSTON ET AL. *v.* ENCINITAS UNION SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8239. CESAR *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 533.

No. 08–8250. CONWAY *v.* GONZALEZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 198.

No. 08–8253. DIGIUSTO *v.* FARWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 119.

No. 08–8255. MCMURRY *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8260. BRYANT *v.* DEPARTMENT OF DEFENSE. C. A. 8th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 910.

No. 08–8262. BROWNING *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 124 Nev. 517, 188 P. 3d 60.

No. 08–8264. CALDWELL *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–8268. VALE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 993 So. 2d 514.

No. 08–8269. LASH *v.* HOLLIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 3d 636.

No. 08–8271. LAUGAND *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–8278. METALLO *v.* HUMANA MEDICAL PLAN, INC., ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 992 So. 2d 271.

No. 08–8279. MCCORMICK *v.* HANOVER INSURANCE GROUP INC. ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–8281. THOMPSON *v.* UNITED STATES MARINE CORPS ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8283. PERRY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 994 So. 2d 1105.

No. 08–8286. POTEAT *v.* CHATMAN, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 08–8288. STOVER *v.* BEARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 536 F. 3d 198.

No. 08–8289. RANALLI *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8290. SCOTT-EL *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 08–8291. SINGH *v.* MARSHALL, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8295. BATTLE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–8297. BROWN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8298. BUCHANAN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8299. EBEH *v.* ST. PAUL TRAVELERS ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 993 So. 2d 525.

No. 08–8301. KNISLEY *v.* VASQUEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8302. HILDEBRAND *v.* STECK MANUFACTURING CO., INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 292 Fed. Appx. 921.

No. 08–8303. MANLEY *v.* CAMPBELL. C. A. 9th Cir. Certiorari denied.

No. 08–8304. MORALES *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8313. WILSON *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8340. BLAKELY *v.* NAGY ET AL. Sup. Ct. Miss. Certiorari denied.

No. 08–8342. HANKERSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 987 So. 2d 768.

No. 08–8343. GUMAN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 312 Wis. 2d 812, 754 N. W. 2d 254.

No. 08–8353. STARR *v.* CATTELL, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied.

No. 08–8356. GUTIERREZ *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 99.

No. 08–8359. MIZE *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 532 F. 3d 1184.

No. 08–8370. MATTHEWS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 08–8377. SMITH *v.* ROWLAND, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 464.

No. 08–8378. SANTIAGO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 996 So. 2d 862.

No. 08–8380. COTRICH *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 300 Fed. Appx. 930.

No. 08–8383. MORRIS *v.* NEW MEXICO. Dist. Ct. N. M., Dona Ana County. Certiorari denied.

No. 08–8385. BOYLE *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 544 F. 3d 1132.

No. 08–8386. BRUNSTING *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 08–8403. BELTRAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1133, 966 N. E. 2d 602.

No. 08–8404. BANKS-BENNETT *v.* O'BRIEN. C. A. 3d Cir. Certiorari denied. Reported below: 293 Fed. Appx. 108.

No. 08–8413. BENNETT *v.* MILLS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–8425. DURANT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 379 Ill. App. 3d 1073, 957 N. E. 2d 588.

No. 08–8427. OGUNDIPE *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 541 F. 3d 257.

No. 08–8430. LEUCHTMANN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 08–8432. MICKENS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–8449. GOWAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8477. HALLAM *v.* HOLLAND AMERICA LINE, INC., ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 180 P. 3d 955.

No. 08–8481. MORFIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1138, 966 N. E. 2d 605.

No. 08–8502. PAYNE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 275.

No. 08–8517. CORAL *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 72 Mass. App. 222, 890 N. E. 2d 146.

No. 08–8563. POWELL *v.* PIERCE, WARDEN. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 367 Ill. App. 3d 1118, 929 N. E. 2d 179.

No. 08–8568. BOATFIELD *v.* MORROW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8598. CLARK *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 954 A. 2d 1066.

No. 08–8619. D'ADDABBO *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 722.

No. 08–8638. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 295.

No. 08–8641. GEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 997.

No. 08–8646. HOLLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 08–8648. CHANEY, AKA BRADLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 390.

No. 08–8649. DUKES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8651. FASCIANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 540 F. 3d 153.

No. 08–8652. GORDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 638.

No. 08–8654. TURNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8660. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 3d 397.

No. 08–8662. GWATHNEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 616.

No. 08–8665. NJAKA *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 281 Fed. Appx. 624.

No. 08–8666. GOODMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 634.

No. 08–8667. HILANO, AKA HICIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 300 Fed. Appx. 35.

No. 08–8671. HANEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8673. RHYMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 378.

No. 08–8674. STEWARD *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 299 Fed. Appx. 203.

No. 08–8678. HERRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 302.

No. 08–8680. FUTCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8681. FLOWERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 77.

No. 08–8684. SAINT-JEAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 08–8685. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 186.

No. 08–8686. CHRISTIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8688. ELLIOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 283 Fed. Appx. 101.

No. 08–8690. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–8692. PULLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 229.

No. 08–8693. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 455.

No. 08–8694. MOSES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 3d 263.

No. 08–8695. MINERD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 299 Fed. Appx. 110.

No. 08–8699. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 204.

No. 08–8701. BUIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 3d 401.

No. 08–8702. AGUIRRE-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 395.

No. 08–8705. HERNANDEZ-CONDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 372.

No. 08–8706. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 283 Fed. Appx. 95.

No. 08–8708. GRIFFITHS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 244.

No. 08–8711. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 202.

No. 08–8714. JACKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8715. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 294 Fed. Appx. 624.

No. 08–8717. HOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 524.

No. 08–8718. GONZALES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8719. FARMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8720. FILPO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–8723. MULLICAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–8724. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 361.

No. 08–8725. DIPIETRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 274 Fed. Appx. 53.

No. 08–8730. BARRAZA-MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 404.

No. 08–8731. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 295 Fed. Appx. 460.

No. 08–8733. ROMERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 14.

No. 08–8734. TYREE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 292 Fed. Appx. 207.

No. 08–8739. RAMIREZ CAMPOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–8743. LAINES-FUNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 471.

No. 08–8744. JONES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 551 F. 3d 19.

No. 08–8746. VILLEGAS-ORTIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 718.

No. 08–8747. BELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 178.

No. 08–8748. OJO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–8749. OSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 896.

No. 08–8751. MENA-VALERINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8752. VEDIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 941.

No. 08–8755. RIOS-REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 600.

No. 08–8757. MOSCOL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 568.

No. 08–8759. PARRISH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 880.

No. 08–8762. JUDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8764. WADE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8769. BONNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8770. ALLEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 638.

No. 08–8775. DORMER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 08–8777. DEPACK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–8781. SUBLET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8782. SHEPPARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8783. RUBALCAVA-ROACHO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 792.

No. 08–8787. LAOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 269 Fed. Appx. 65.

No. 08–8789. WEBSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 226.

No. 08–8792. WILSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 962 A. 2d 943.

No. 08–8794. CRUTCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 226.

No. 08–8796. RAYSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–8797. SPRINGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 339.

No. 08–8800. ALTINE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 179.

No. 08–8805. HODGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 292 Fed. Appx. 143.

No. 08–8806. GRIFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 470.

No. 08–8809. ENNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8810. CASH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 251.

No. 08–8811. CHANEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 447.

No. 08–8815. LUCKEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 933.

No. 08–8819. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 546 F. 3d 1223.

No. 08–8822. STEPHENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 315.

No. 08–8824. OCHOA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–8825. PONCE-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 410.

No. 08–8827. FRAZIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 801.

No. 08–8838. DUMONDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8839. HAFED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–8841. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 303.

No. 08–8843. FLANNERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8847. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 663.

No. 08–8849. HOANG NGUYEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 325 Fed. Appx. 724.

No. 08–8850. NIX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8854. CONFREDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 528 F. 3d 143.

No. 08–8856. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8859. RESTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 3d 565.

No. 08–8860. ROCHA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 328.

No. 08–8863. BERTHELOT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8865. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 548 F. 3d 1366.

No. 08–8866. LEVY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–8870. DARNALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 Fed. Appx. 835.

No. 08–8872. PERSING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 152.

No. 08–8874. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 681.

No. 08–8877. KNOCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8881. SINCLAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 251.

No. 08–8883. LOWE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8887. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 3d 819.

No. 08–8888. WARREN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–8889. TORRES-CORTES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–8892. SWANSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 561.

No. 08–8893. MOON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 246.

No. 08–8895. ANDREWS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8905. OLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 740.

No. 08–8909. GONZALEZ SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 555 F. 3d 910.

No. 08–8915. VALDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8919. BALLESTEROS-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8920. BLUE BIRD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 3d 641.

No. 08–8921. AVILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 868.

No. 08–8923. ALLEVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 176.

No. 08–8924. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 22.

No. 08–8925. BERNARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 151 Fed. Appx. 76.

No. 08–463. N. C. P. MARKETING GROUP, INC. *v.* BG STAR PRODUCTIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 279 Fed. Appx. 561.

Statement of JUSTICE KENNEDY, with whom JUSTICE BREYER joins, respecting the denial of certiorari.

The object of Chapter 11 of the Bankruptcy Code is to empower a debtor with going concern value to reorganize its operations to become solvent once more. In a typical case, the debtor takes on the role of "debtor in possession," 11 U. S. C. § 1101(1), allowing it to retain possession and control of its business. A debtor-in-possession operates its business and performs many functions that would fall to the trustee under other chapters of the Bankruptcy Code. § 1107(a).

At issue in this petition is the power of a debtor-in-possession to assume executory contracts held by the debtor before bankruptcy. § 365(a). Section 365 gives the debtor-in-possession the power to assume—that is, to continue to receive the benefits of, while also continuing to perform its obligations under—the debtor's leases, ongoing performance contracts, and licenses to use the property of others. This power is withdrawn, however, if

> "applicable law excuses a party, other than the debtor, to [an executory contract] from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and . . . such party does not consent to such assumption or assignment . . . ." §§ 365(c)(1)(A)–(B).

According to the Court of Appeals for the Ninth Circuit, this language means that a debtor-in-possession may assume an executory contract only if hypothetically it might assign that contract to a third party. That is to say, if the debtor-in-possession lacks hypothetical authority to assign a contract, then it may not assume it—even if the debtor-in-possession has no *actual* intention of assigning the contract to another. *In re Catapult Entertainment, Inc.*, 165 F. 3d 747 (CA9 1999). The so-called "hypothetical test" is preferred by a majority of the other Courts of Appeals that have addressed this question. See *In re Sunterra Corp.*, 361 F. 3d 257 (CA4 2004); *In re James Cable Partners, L. P.*, 27 F. 3d 534 (CA11 1994) *(per curiam); In re West Electronics, Inc.*, 852 F. 2d 79 (CA3 1988).

The hypothetical test is not, however, without its detractors. One arguable criticism of the hypothetical approach is that it purchases fidelity to the Bankruptcy Code's text by sacrificing

sound bankruptcy policy. For one thing, the hypothetical test may prevent debtors-in-possession from continuing to exercise their rights under nonassignable contracts, such as patent and copyright licenses. Without these contracts, some debtors-in-possession may be unable to effect the successful reorganization that Chapter 11 was designed to promote. For another thing, the hypothetical test provides a windfall to nondebtor parties to valuable executory contracts: If the debtor is outside of bankruptcy, then the nondebtor does not have the option to renege on its agreement; but if the debtor seeks bankruptcy protection, then the nondebtor obtains the power to reclaim—and resell at the prevailing, potentially higher market rate—the rights it sold to the debtor.

To prevent § 365(c) from engendering unwise policy, one Court of Appeals, and a number of Bankruptcy Courts, reject the hypothetical test in favor of an "actual test," under which a Chapter 11 debtor-in-possession may assume an executory contract provided it has no actual intent to assign the contract to a third party. See *Institut Pasteur* v. *Cambridge Biotech Corp.*, 104 F. 3d 489, 493 (CA1 1997) (applying the actual test); *In re Catapult*, 165 F. 3d, at 749, n. 2 (collecting Bankruptcy Court decisions favoring the actual test). Of course, the actual test may present problems of its own. It may be argued, for instance, that the actual test aligns § 365(c) with sound bankruptcy policy only at the cost of departing from at least one interpretation of the plain text of the law. See *id.*, at 751–755.

The division in the courts over the meaning of § 365(c)(1) is an important one to resolve for bankruptcy courts and for businesses that seek reorganization. This petition for certiorari, however, is not the most suitable case for our resolution of the conflict. Addressing the issue here might first require us to resolve issues that may turn on the correct interpretation of antecedent questions under state law and trademark-protection principles. For those and other reasons, I reluctantly agree with the Court's decision to deny certiorari. In a different case the Court should consider granting certiorari on this significant question.

No. 08–571. ELKO COUNTY, NEVADA *v.* WILDERNESS SOCIETY ET AL. C. A. 9th Cir. Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 526 F. 3d 1237.

No. 08–770. DELL MARKETING L. P., FKA DELL CATALOG SALES L. P. *v.* NEW MEXICO TAXATION AND REVENUE DEPARTMENT. Ct. App. N. M. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 145 N. M. 419, 199 P. 3d 863.

No. 08–975. CLEMENTS *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Rehearing Denied

No. 07–11412. BANEY *v.* DEPARTMENT OF JUSTICE, 555 U. S. 867;

No. 08–543. POLINER *v.* TEXAS HEALTH SYSTEMS, DBA PRESBYTERIAN HOSPITAL OF DALLAS, ET AL., 555 U. S. 1149;

No. 08–702. WADHWA *v.* MERIT SYSTEMS PROTECTION BOARD, 555 U. S. 1103;

No. 08–5287. BULLARD *v.* NORTH CAROLINA, 555 U. S. 906;

No. 08–6064. VAUGHN *v.* UNITED STATES, 555 U. S. 1139;

No. 08–6556. WELCH *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 555 U. S. 1054;

No. 08–6780. SCHMIDT *v.* BODIN ET AL., 555 U. S. 1105;

No. 08–6843. IN RE DIEHL, 555 U. S. 1096;

No. 08–6934. DAIAK *v.* FLORIDA, 555 U. S. 1108;

No. 08–6935. JONES *v.* OHIO STATE UNIVERSITY ET AL., 555 U. S. 1109;

No. 08–6972. CHEADLE *v.* DINWIDDIE, WARDEN, 555 U. S. 1109;

No. 08–7053. DOE *v.* AMERICAN AIRLINES, 555 U. S. 1140;

No. 08–7160. SALERNO *v.* NEW JERSEY ET AL., 555 U. S. 1114;

No. 08–7169. EL BEY *v.* MCMASTER, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL., 555 U. S. 1114;

No. 08–7224. JAMES *v.* CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL., 555 U. S. 1141;

No. 08–7265. TAYLOR *v.* INDIANA, 555 U. S. 1142;

No. 08–7292. PETTY *v.* MERCK & CO., INC., 555 U. S. 1143;

No. 08–7296. PATTERSON *v.* VANDERVER ET AL., 555 U. S. 1115;

No. 08–7298. TAVARES *v.* MEYERS ET AL., 555 U. S. 1116;

No. 08–7421. BRALEY *v.* CALIFORNIA ET AL., 555 U. S. 1157;

No. 08–7434. WARREN *v.* GARTMAN, WARDEN, ET AL., 555 U. S. 1120;

No. 08–7519. BRUNSON *v.* UNITED STATES, 555 U. S. 1122;

No. 08–7598. IN RE DRYER, 555 U. S. 1096;

No. 08–7855. THOMPSON *v.* DEPARTMENT OF THE AIR FORCE, 555 U. S. 1158; and

No. 08–8000. IN RE WHITMILL, 555 U. S. 1152. Petitions for rehearing denied.

No. 08–7294. MAVITY *v.* FRAAS ET AL., 555 U. S. 1149. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 08–6486. LLANOS-AGOSTADERO *v.* UNITED STATES, 555 U. S. 1105. Motion for leave to file petition for rehearing denied.

MARCH 25, 2009

Miscellaneous Orders

No. 08A794. DEPARTMENT OF HEALTH AND HUMAN SERVICES *v.* ALLEY ET AL. Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, granted. Permanent injunction issued by the United States District Court for the Northern District of Alabama, No. CV–07–BE–0096–E, on May 8, 2008, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Eleventh Circuit.

No. 08A795. FLORIDA *v.* RIGTERINK. Application to recall and stay the mandate of the Florida Supreme Court, No. SC05–2162, issued February 26, 2009, presented to JUSTICE THOMAS, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application.

MARCH 26, 2009

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1293; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1309; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1343; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1365.)

March 27, 2009

Miscellaneous Order

No. 07–1529. Montejo *v.* Louisiana. Sup. Ct. La. [Certiorari granted, 554 U. S. 944.] Parties are directed to file supplemental briefs addressing the following question: Should *Michigan* v. *Jackson*, 475 U. S. 625 (1986), be overruled? Briefs, not to exceed 6,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Tuesday, April 14, 2009. *Amicus* briefs, not to exceed 4,500 words, may be filed with the Clerk and served upon counsel to the parties on or before 2 p.m., Tuesday, April 14, 2009. Reply briefs, not to exceed 3,000 words, may be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, April 24, 2009.

March 30, 2009

Certiorari Granted—Vacated and Remanded

No. 08–5564. Brown *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chambers* v. *United States*, 555 U. S. 122 (2009). Reported below: 526 F. 3d 691.

Certiorari Dismissed

No. 08–8224. Burke *v.* Aniskovich et al. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8307. Burke *v.* Universal Health Care et al. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8355. Struck *v.* Cook County Public Guardian. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8388. Wardell *v.* Saum et al. Dist. Ct. Colo., Lincoln County. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8773. DOLENZ *v.* DALLAS CENTRAL APPRAISAL DISTRICT ET AL. Ct. App. Tex., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 259 S. W. 3d 331.

Miscellaneous Orders

No. 08M72. JOHNSON ET UX. *v.* WILBUR ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 138, Orig. SOUTH CAROLINA *v.* NORTH CAROLINA. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 555 U. S. 1091.]

No. 08–7848. PEABODY *v.* ALLSTATE INSURANCE CO. Ct. App. Ariz. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1166] denied.

No. 08–8336. IN RE WILLIAMS;
No. 08–8445. IN RE MCCREARY; and
No. 08–8951. IN RE TULL. Petitions for writs of mandamus denied.

No. 08–8963. IN RE YUK RUNG TSANG. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 07–9756. REYES-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 222.

No. 07–11001. DE LA GARZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 516 F. 3d 1266.

No. 08–567. AGRIPOST, LLC, ET AL. *v.* MIAMI-DADE COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 525 F. 3d 1049.

No. 08–683. CANNON ET AL. *v.* GATES, SECRETARY OF DEFENSE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 538 F. 3d 1328.

No. 08–696. Southern Scrap Material Co., L. L. C., as Owner of the Southern Scrap Drydock *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 3d 584.

No. 08–697. Gjidoda *v.* Baker, Field Office Director, San Diego, Immigration and Customs Enforcement. C. A. 6th Cir. Certiorari denied.

No. 08–704. Bolton *v.* City of Dallas, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 3d 545.

No. 08–765. Virginia *v.* Jaynes. Sup. Ct. Va. Certiorari denied. Reported below: 276 Va. 443, 666 S. E. 2d 303.

No. 08–812. APA Transportation Corp. *v.* Teamsters Local Union No. 560 et al. C. A. 3d Cir. Certiorari denied. Reported below: 541 F. 3d 233.

No. 08–909. Yong Li *v.* Raytheon Co. et al. App. Ct. Mass. Certiorari denied. Reported below: 71 Mass. App. 1115, 883 N. E. 2d 342.

No. 08–920. Bryan Media, Inc. *v.* City of St. Petersburg, Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 717.

No. 08–921. McClain *v.* Attorney Grievance Commission of Maryland. Ct. App. Md. Certiorari denied. Reported below: 406 Md. 1, 956 A. 2d 135.

No. 08–923. Kramer *v.* Von Yokely et al. Ct. App. Ga. Certiorari denied. Reported below: 291 Ga. App. 375, 662 S. E. 2d 208.

No. 08–928. Diaz *v.* McNeil, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 589.

No. 08–932. DiCenzo et al. *v.* A-Best Products Co., Inc., et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 120 Ohio St. 3d 149, 897 N. E. 2d 132.

No. 08–934. Columbia Iron & Metal Co. *v.* Lincoln Electric Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 3d 517.

No. 08–935. COOK *v.* GEORGIA BOARD TO DETERMINE FITNESS OF BAR APPLICANTS ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 284 Ga. 575, 668 S. E. 2d 667.

No. 08–940. ZHUK *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 08–947. BANDER FAMILY PARTNERSHIP, L. P. *v.* TOWERHILL WEALTH MANAGEMENT, LLC, ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 962 A. 2d 256.

No. 08–952. TAVORY *v.* NTP, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 297 Fed. Appx. 976.

No. 08–962. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND, ET AL. *v.* GENERAL MATERIALS, INC., DBA WHOLESALE MATERIALS CO. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 3d 506.

No. 08–967. AMERICAN NATIONAL INSURANCE CO. *v.* CITIBANK N. A. C. A. 7th Cir. Certiorari denied. Reported below: 543 F. 3d 907.

No. 08–977. GREEN *v.* DEPARTMENT OF LABOR ET AL. C. A. 1st Cir. Certiorari denied.

No. 08–995. AZADPOUR *v.* SUN MICROSYSTEMS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 454.

No. 08–1000. WILLIAMS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 106 Conn. App. 323, 941 A. 2d 985.

No. 08–1046. MOORE ET AL., AS CO-ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF GRADY, DECEASED *v.* TULEJA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 546 F. 3d 423.

No. 08–1090. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–1091. BROWN *v.* POTTER, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 421.

No. 08–1092. ZIEGLER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 282 Fed. Appx. 869.

No. 08–6026. FRANKLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 279 Fed. Appx. 874.

No. 08–7163. JOHNSON *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 525 F. 3d 466.

No. 08–7405. SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 3d 139.

No. 08–7441. VALLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 3d 341.

No. 08–7468. JONES *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 540 F. 3d 1277.

No. 08–7764. CRUZ-FRANCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–7972. UPHAUS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 278 Mich. App. 174, 748 N. W. 2d 899.

No. 08–7980. STRONG *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 263 S. W. 3d 636.

No. 08–7989. TAYLOR *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 262 S. W. 3d 231.

No. 08–8320. STEGEMAN *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 320.

No. 08–8323. HALL *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 08–8324. SHEARING *v.* GONZALEZ. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–8327. JACKSON *v.* HINES, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 268 Fed. Appx. 773.

No. 08–8329. CARBONELL *v.* ANDY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 973 So. 2d 1139.

No. 08–8330. EDWARDS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 71 Mass. App. 716, 886 N. E. 2d 722.

No. 08–8334. WILLIAMS *v.* KUSNAIRS BAR & TAVERN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 288 Fed. Appx. 847.

No. 08–8338. HILL *v.* NCO PORTFOLIO MANAGEMENT. Sup. Ct. Ind. Certiorari denied.

No. 08–8344. GONZALEZ *v.* OLLISON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8346. GOODEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 27 So. 3d 625.

No. 08–8347. GREEN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8348. GOODIE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8350. GOOSBY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 08–8352. STOGNER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–8354. SMYTHE *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA. C. A. 9th Cir. Certiorari denied.

No. 08–8360. PULLEN-WALKER *v.* ROOSEVELT UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–8367. AKINWAMIDE *v.* TRANSPORTATION INSURANCE CO. ET AL. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 08–8368. BURTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 383 Ill. App. 3d 1142, 968 N. E. 2d 217.

No. 08–8375. WHITE *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8379. COOKSEY *v.* MCELROY ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–8381. DELANEY *v.* JETT ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 379 Ill. App. 3d 1087, 957 N. E. 2d 593.

No. 08–8382. CORDERO *v.* DELANO ET UX. C. A. 2d Cir. Certiorari denied.

No. 08–8387. BOHANNAN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8390. MORGAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 3d 703, 852 N. Y. S. 2d 328.

No. 08–8392. MILLER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–8393. SMITH *v.* BOBBIE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8394. SUTTON *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8401. PERRY *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–8402. BANKS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 271 S. W. 3d 90.

No. 08–8409. EVANS *v.* DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 08–8410. CORNEALUS *v.* JACQUEZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8411. SPEARS *v.* FORNISS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8412. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 08–8414. STEWART *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 08–8415. SANCHEZ *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–8416. POWERS *v.* SARKO, ADMINISTRATOR OF THE EXXON QUALIFIED SETTLEMENT FUND, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 202.

No. 08–8418. TIFFER *v.* WORKER'S COMPENSATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 240.

No. 08–8419. SCOTT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 08–8422. CROSBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 367 Ill. App. 3d 1089, 929 N. E. 2d 167.

No. 08–8426. CAMPBELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 378 Ill. App. 3d 1119, 955 N. E. 2d 183.

No. 08–8431. WHITMORE *v.* SCRIBNER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8434. WASHINGTON *v.* BURNS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 217.

No. 08–8435. MERIWETHER *v.* CHATMAN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 806.

No. 08–8437. SARR *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8438. STAMPS *v.* WHITE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–8442. BARNES *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–8446. PITTIER *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 08–8459. NORRIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 993 So. 2d 527.

No. 08–8460. ANDERSON *v.* COURT OF APPEALS OF WISCONSIN, DISTRICT II. Sup. Ct. Wis. Certiorari denied.

No. 08–8461. DEXTER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8484. HURD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 145 Wash. App. 10, 188 P. 3d 510.

No. 08–8491. HOY *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8493. HERNDON *v.* UPTON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–8497. WAGNER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 08–8506. RINCKER *v.* OREGON DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 720.

No. 08–8508. ROMAN *v.* HAGGETT, SUPERINTENDENT, MT. MCGREGOR CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8546. CLARK *v.* DENNY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–8559. LOMBARDI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1137, 966 N. E. 2d 604.

No. 08–8571. TEXIDOR *v.* LIEBMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–8603. WELLS *v.* HOUSTON. C. A. 8th Cir. Certiorari denied.

No. 08–8604. THOMAS *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 473.

No. 08–8633. REEDOM *v.* TARRANT COUNTY COMMUNITY COLLEGE DISTRICT ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–8640. JIAYANG HUA *v.* UNIVERSITY OF UTAH ET AL. Ct. App. Utah. Certiorari denied.

No. 08–8663. OLIVEIRA *v.* ERCOLE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8677. HALL *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.; and HALL *v.* WHITMORE. C. A. 4th Cir. Certiorari denied.

No. 08–8691. PERRY *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–8795. SALEEM, AKA ANTHONY *v.* RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 306 Fed. Appx. 739.

No. 08–8814. KOLOSKY *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA. C. A. 8th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 548.

No. 08–8828. FRANCO *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 08–8878. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 305 Fed. Appx. 38.

No. 08–8885. CRAWFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 466.

No. 08–8894. PITERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–8910. SHAW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 728.

No. 08–8929. DANGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8931. GONZALEZ-CARVAJAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 269 Fed. Appx. 657.

No. 08–8934. HASARAFALLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–8935. HAHN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 3d 977.

No. 08–8936. HUNT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 08–8937. FLOYD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 881.

No. 08–8945. SHAW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–8947. ANSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 1.

No. 08–8948. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–8949. PARKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 549 F. 3d 5.

No. 08–8955. FRANKLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 477.

No. 08–8956. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–8958. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 428.

No. 08–8960. O'NEILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–8964. TORRES-SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 328.

No. 08–8967. SHY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 3d 933.

No. 08–8968. KENNEDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 309.

No. 08–8977. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–8978. LALIBERTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 295.

No. 08–8981. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 871.

No. 08–8982. WELLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–914. KINGDOM *v.* LAMARQUE, WARDEN, ET AL. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 268 Fed. Appx. 671.

No. 08–942. RODRIGUEZ *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 08–8913. JAMES *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

Rehearing Denied

No. 07–513. HERRING *v.* UNITED STATES, 555 U. S. 135;

No. 08–5769. HAYES *v.* ANDERSON, WARDEN, 555 U. S. 951;

No. 08–6670. BOOK *v.* TOBIN ET AL., 555 U. S. 1105;

No. 08–6799. SMITH *v.* CLERK OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE ET AL., 555 U. S. 1037;

No. 08–7022. LAWTON *v.* PERRY TOWNSHIP POLICE DEPARTMENT ET AL., 555 U. S. 1110;

No. 08–7093. YODER *v.* BARTOS, WARDEN, ET AL., 555 U. S. 1112;

No. 08–7198. YODER *v.* NAPOLITANO, 555 U. S. 1141;

No. 08–7315. WESLEY *v.* JANECKA, WARDEN, 555 U. S. 1116;

No. 08–7385. MITCHELL *v.* ALMAGER, WARDEN, 555 U. S. 1156;

No. 08–7698. GRAY *v.* ILLINOIS, 555 U. S. 1158; and

No. 08–7797. MCCLAIN *v.* UNITED STATES, 555 U. S. 1147. Petitions for rehearing denied.

APRIL 2, 2009

Miscellaneous Orders

No. 08–103. REED ELSEVIER, INC., ET AL. *v.* MUCHNICK ET AL. C. A. 2d Cir. [Certiorari granted, 555 U. S. 1211.] Deborah Jones Merritt, Esq., of Columbus, Ohio, is invited to brief and

argue this case as *amicus curiae* in support of the judgment below.

No. 08–1175 (08A834). FLORIDA *v.* POWELL. Sup. Ct. Fla. Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, granted. Issuance of the mandate of the Florida Supreme Court, No. SC07–2295, stayed pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

APRIL 3, 2009

Miscellaneous Orders

No. 07–1090. REPUBLIC OF IRAQ *v.* BEATY ET AL.; and

No. 08–539. REPUBLIC OF IRAQ ET AL. *v.* SIMON ET AL. C. A. D. C. Cir. [Certiorari granted, 555 U. S. 1092.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondents for divided argument denied.

No. 07–1428. RICCI ET AL. *v.* DESTEFANO ET AL.; and

No. 08–328. RICCI ET AL. *v.* DESTEFANO ET AL. C. A. 2d Cir. [Certiorari granted, 555 U. S. 1091.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Time is divided as follows: 30 minutes for petitioners, 30 minutes for respondents, and 10 minutes for the Solicitor General.

No. 08–289. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION *v.* FLORES ET AL.; and

No. 08–294. SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES ET AL. *v.* FLORES ET AL. C. A. 9th Cir. [Certiorari granted, 555 U. S. 1092.] Motion of petitioners for divided argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of 30 Recognized Leaders of Education Research for leave to file a brief as *amici curiae* out of time granted.

No. 08–305. FOREST GROVE SCHOOL DISTRICT *v.* T. A. C. A. 9th Cir. [Certiorari granted, 555 U. S. 1130.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–322. NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE *v.* HOLDER, ATTORNEY GENERAL, ET AL. D. C. D. C. [Probable jurisdiction noted *sub nom. Northwest Austin Municipal Util. Dist. No. One* v. *Mukasey*, 555 U. S. 1091.] Motion of the Solicitor General for divided argument granted.

No. 08–453. CUOMO, ATTORNEY GENERAL OF NEW YORK *v.* CLEARING HOUSE ASSN., L. L. C., ET AL. C. A. 2d Cir. [Certiorari granted, 555 U. S. 1130.] Motion of the Solicitor General for divided argument granted.

No. 08–479. SAFFORD UNIFIED SCHOOL DISTRICT #1 ET AL. *v.* REDDING. C. A. 9th Cir. [Certiorari granted, 555 U. S. 1130.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–660. UNITED STATES EX REL. EISENSTEIN *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, 555 U. S. 1131.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General to permit Jeffrey B. Wall, Esq., to present argument *pro hac vice* granted.

APRIL 6, 2009

Certiorari Granted—Vacated and Remanded

No. 08–5641. MOSLEY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harbison* v. *Bell*, *ante*, p. 180. Reported below: 325 Fed. Appx. 394.

Certiorari Dismissed

No. 08–8570. ANGEL *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8697. MAKAS *v.* MIRAGLIA ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 300 Fed. Appx. 9.

No. 08–8831. BAILEY *v.* RENDELL ET AL. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8832. BAILEY *v.* WAKEFIELD. Commw. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 958 A. 2d 1158.

No. 08–9123. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 08M73. TRIMBLE *v.* FLORIDA. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 08–7449. ROLLE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1163] denied.

No. 08–7614. TAYLOR *v.* SMITH, DBA PLATINUM PROPERTY MANAGEMENT. Ct. App. Ohio, Hamilton County. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1168] denied.

No. 08–8465. HAUN *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 27, 2009, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 08–9144. IN RE BLOOMFIELD;
No. 08–9214. IN RE KERSHNER; and

No. 08–9269. IN RE GARRETT. Petitions for writs of habeas corpus denied.

No. 08–9103. IN RE SZAREWICZ. 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. 08–8463. IN RE DUNLAP. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 08–1115. IN RE MARZETT; and

No. 08–9041. IN RE DANOU. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 08–970. PERDUE, GOVERNOR OF GEORGIA, ET AL. *v.* KENNY A., BY HIS NEXT FRIEND WINN, ET AL. C. A. 11th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 532 F. 3d 1209.

Certiorari Denied

No. 08–818. ADENA REGIONAL MEDICAL CENTER ET AL. *v.* JOHNSON, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 527 F. 3d 176.

No. 08–822. MCLAUGHLIN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 265 S. W. 3d 257.

No. 08–948. ANDERSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 996 So. 2d 973.

No. 08–955. CYGNUS TELECOMMUNICATIONS TECHNOLOGY, LLC *v.* TELESYS COMMUNICATIONS, LLC, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 536 F. 3d 1343.

No. 08–957. RHONE *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 08–963. YINGLONG YANG ET AL. *v.* CARTERET REDEVELOPMENT AGENCY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–965. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE *v.* PETTY. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 3d 431.

No. 08–966. OHIO MIDLAND, INC., ET AL. *v.* PROCTOR, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 905.

No. 08–971. RICCI ET AL. *v.* PATRICK, GOVERNOR OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 544 F. 3d 8.

No. 08–973. TOWNSEND *v.* UNIVERSITY OF ALASKA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 3d 478.

No. 08–976. KENNEDY *v.* GRATTAN TOWNSHIP, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–984. CATSKILL DEVELOPMENT, L. L. C., ET AL. *v.* HARRAH'S OPERATING CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 3d 115.

No. 08–985. COUSHATTA TRIBE OF LOUISIANA *v.* MEYER & ASSOCIATES, INC. Sup. Ct. La. Certiorari denied. Reported below: 992 So. 2d 446.

No. 08–988. HARRELL *v.* CITY AND COUNTY OF HONOLULU, HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 283 Fed. Appx. 509.

No. 08–989. LEONARD, DBA THE LEONARD CLINIC OF CHIROPRACTIC *v.* EDUCATORS MUTUAL LIFE INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 298 Fed. Appx. 204.

No. 08–990. MAHER *v.* RETIREMENT BOARD OF QUINCY ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 452 Mass. 517, 895 N. E. 2d 1284.

No. 08–991. WHITE ET AL. *v.* COCA-COLA CO. C. A. 11th Cir. Certiorari denied. Reported below: 542 F. 3d 848.

No. 08–994. BIKKANI *v.* LEE ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 119 Ohio St. 3d 1429, 892 N. E. 2d 919.

No. 08–997. DELON *v.* NEWS & OBSERVER PUBLISHING COMPANY OF RALEIGH, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 277 Fed. Appx. 278.

No. 08–1002. WEISSBURG *v.* LOS ANGELES COUNTY CIVIL SERVICE COMMISSION ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–1012. KAY, PARENT OF KAY, A MINOR *v.* JOHNSON, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 298 Fed. Appx. 985.

No. 08–1013. KELLOGG *v.* ENERGY SAFETY SERVICES, INC., DBA OILIND SAFETY LLC. C. A. 10th Cir. Certiorari denied. Reported below: 544 F. 3d 1121.

No. 08–1026. HAHN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 582.

No. 08–1028. MESSER ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES (two judgments). C. A. 9th Cir. Certiorari denied.

No. 08–1031. EGYPTIAN GODDESS, INC. *v.* SWISA, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 543 F. 3d 665.

No. 08–1055. WEI ZHOU *v.* MARQUETTE UNIVERSITY. C. A. 7th Cir. Certiorari denied.

No. 08–1057. CHAPLAINCY OF FULL GOSPEL CHURCHES ET AL. *v.* DEPARTMENT OF THE NAVY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 534 F. 3d 756.

No. 08–1058. KRAMER ET AL. *v.* THOMAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 555.

No. 08–1063. ROWLEY *v.* CITY OF NORTH MYRTLE BEACH, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 08–1111. BURTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–1126. MCBEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 796.

No. 08–6504. FIELDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 516 F. 3d 923.

No. 08–6836. DUNCAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 08–7139. CERNO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 529 F. 3d 926.

No. 08–7465. SMULLS *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 3d 853.

No. 08–7512. GABRION *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 3d 839.

No. 08–7634. MITCHELL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 170.

No. 08–7741. HARDY *v.* BENNETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 806.

No. 08–7785. HALE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 119 Ohio St. 3d 118, 892 N. E. 2d 864.

No. 08–8455. EDWARDS *v.* TOWNSEL-MUNDAY. C. A. 6th Cir. Certiorari denied.

No. 08–8457. CARREON *v.* DEXTER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8462. CAESAR *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8473. WRIGHT *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8475. HILL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 979 So. 2d 1134.

No. 08–8478. FULLER *v.* HARRIS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 167.

No. 08–8479. PANG *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 08–8482. BATSHEVER *v.* OKIN. Ct. App. N. Y. Certiorari denied. Reported below: 11 N. Y. 3d 807, 897 N. E. 2d 1066.

No. 08–8483. ABU-JAMAL *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 520 F. 3d 272.

No. 08–8492. GREEN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 08–8495. GRATE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 198.

No. 08–8498. THOMPSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–8499. HISCOX *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 08–8501. MERCADO *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8505. HERNANDEZ *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 08–8509. GRUNDY *v.* DAILEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8512. HOEFS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 218 Ore. App. 736, 180 P. 3d 763.

No. 08–8513. GRIFFIN *v.* KELLY. C. A. 10th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 760.

No. 08–8516. ECHEVARRIA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 995 So. 2d 502.

No. 08–8520. STEPPE *v.* HOOPS, SHERIFF, SAN BERNARDINO COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 501.

No. 08–8522. LOSH *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 755 N. W. 2d 736.

No. 08–8527. BURGESS *v.* HARTFORD LIFE INSURANCE. C. A. 9th Cir. Certiorari denied.

No. 08–8528. BURGESS *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–8533. EL BEY *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 223.

No. 08–8539. YOUNG *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 205, 890 N. E. 2d 972.

No. 08–8542. MANDANAPU *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–8547. COOPER *v.* DALLAS POLICE ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 278 Fed. Appx. 318.

No. 08–8548. ECHENDU *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8550. DENEM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–8556. PELLENZ *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 981 So. 2d 1207.

No. 08–8557. MATTOX *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8558. JAMES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 992 So. 2d 268.

No. 08–8561. SWANSON *v.* BOY SCOUTS OF AMERICA ET AL. Ct. App. Ohio, Vinton County. Certiorari denied.

No. 08–8564. PEREZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 954 A. 2d 40.

No. 08–8565. BLUFF *v.* UTAH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 46.

No. 08–8566. BRANDY *v.* EVANS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8578. CAMPBELL *v.* NELSON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 864.

No. 08–8589. WILSON *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 533 F. 3d 208.

No. 08–8625. SMALLS *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8632. BOLUS *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8634. NESBITT ET AL. *v.* NEBRASKA BOARD OF PAROLE ET AL. Sup. Ct. Neb. Certiorari denied.

No. 08–8657. SLOVINEC *v.* AMERICAN UNIVERSITY. C. A. D. C. Cir. Certiorari denied.

No. 08–8703. ACOSTA *v.* UNITED STATES MARSHALS SERVICE ET AL. C. A. 1st Cir. Certiorari denied.

No. 08–8707. FRANCIS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8736. CARTER *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8753. RIDLING *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 860.

No. 08–8760. JACKSON *v.* FRIEL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 537.

No. 08–8776. DURAN *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 08–8780. WATFORD *v.* RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–8818. JACOBS *v.* COLLINS, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–8834. SIMS *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied.

No. 08–8852. PLAYER *v.* REESE. C. A. 5th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 310.

No. 08–8867. BASSETT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 895 N. E. 2d 1201.

No. 08–8903. STOUT *v.* WAGNER, ACTING WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 750.

No. 08–8954. MCGEE *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–8989. PENA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 453.

No. 08–8990. MELARA-GUZMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 567.

No. 08–8994. THOMAS *v.* UNITED STATES; and
No. 08–9011. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 548 F. 3d 311.

No. 08–8998. SAMUELS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 543 F. 3d 1013.

No. 08–8999. REINHART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 275 Fed. Appx. 156.

No. 08–9014. BARTLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 272 Fed. Appx. 239.

No. 08–9015. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 08–9016. MORRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9018. HARDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 420.

No. 08–9021. DOE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 295 Fed. Appx. 425.

No. 08–9022. SANCHEZ-GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 3d 328.

No. 08–9023. REYES-DE LEON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 541 F. 3d 19.

No. 08–9024. CAPEHART *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 301 Fed. Appx. 74.

No. 08–9028. DIAZ *v.* PASTRANA, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–9030. GRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 64.

No. 08–9031. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9036. ALEXANDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 540 F. 3d 494.

No. 08–9037. BRIMM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 588.

No. 08–9039. SMALLWOOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9042. MCKNIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 3d 585.

No. 08–9046. FUTCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9049. FASHEWE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–9050. HOLBDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–9051. FLORENCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 865.

No. 08–9055. RODRIGUEZ-RAMOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9057. LOFTUS *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–9058. MARTIN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 301 Fed. Appx. 975.

No. 08–9065. WOODBERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 221.

No. 08–9068. PICKENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 556.

No. 08–9069. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 544 F. 3d 1176.

No. 08–9073. BACHILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 868.

No. 08–9079. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9082. RODRIGUEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 206.

No. 08–9088. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 558.

No. 08–9089. CLAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 857.

No. 08–9091. LEVY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 541 F. 3d 1331.

No. 08–9092. MAYS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 735.

No. 08–9093. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 210.

No. 08–9094. OWENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 318.

No. 08–9095. OHONME *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 706.

No. 08–9097. NEWCOMB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 585.

No. 08–9098. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9105. MCGURN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 305 Fed. Appx. 879.

No. 08–9106. PEDRON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 284 Fed. Appx. 598.

No. 08–9107. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 08–9108. TATUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 328.

No. 08–9117. BEDFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 615.

No. 08–9119. BERMUDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9124. SISK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9129. ZAMARRON-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 328.

No. 08–9135. SAENZ-RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 353.

No. 08–9136. SAMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 301 Fed. Appx. 89.

No. 08–9138. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9140. PAGE-BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9142. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 310 Fed. Appx. 444.

No. 08–9146. ESPARZA-MEDRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 324.

No. 08–9147. DEFILIPPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 3d 123.

No. 08–9148. CARABALLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 552 F. 3d 6.

No. 08–9151. MULDROW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 427.

No. 08–9153. SHELBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9155. TYKARSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 295 Fed. Appx. 498.

No. 08–9158. ADKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–1022. VENTAS FINANCE I, LLC *v.* CALIFORNIA FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. Motion of Council on State Taxation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 165 Cal. App. 4th 1207, 81 Cal. Rptr. 3d 823.

No. 08–8471. TILLMAN *v.* NEW LINE CINEMA ET AL. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 295 Fed. Appx. 840.

No. 08–9087. CUAUHTEMOC COVARRUBIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 302 Fed. Appx. 702.

Rehearing Denied

No. 08–727. PATRICK *v.* DEPARTMENT OF VETERANS AFFAIRS, 555 U. S. 1139;

No. 08–795. BISTAWROS *v.* LICEA, 555 U. S. 1173;

No. 08–6879. FULLER *v.* BASAL ET AL., 555 U. S. 1107;

No. 08–6895. BROWN *v.* SHERROD, 555 U. S. 1107;

No. 08–7219. RICHARDS *v.* THOMPSON, WARDEN, 555 U. S. 1141;

No. 08–7353. PERRY *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., 555 U. S. 1155;

No. 08–7864. WILLIS *v.* DISTRICT OF COLUMBIA HOUSING AUTHORITY, 555 U. S. 1189;

No. 08–7992. JANOSSY *v.* WASHINGTON MUTUAL BANK, 555 U. S. 1215; and

No. 08–8087. OLIVO *v.* GREGOIRE, GOVERNOR OF WASHINGTON, 555 U. S. 1197. Petitions for rehearing denied.

APRIL 15, 2009

Certiorari Denied

No. 08–9788 (08A895). ROSALES *v.* QUARTERMAN, 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: 565 F. 3d 308.

April 16, 2009

Certiorari Denied

No. 08–9807 (08A902). Dill *v.* Alabama. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied.

April 17, 2009

Miscellaneous Order

No. 07–1090. Republic of Iraq *v.* Beaty et al.; and

No. 08–539. Republic of Iraq et al. *v.* Simon et al. C. A. D. C. Cir. [Certiorari granted, 555 U. S. 1092.] Motion of petitioners to strike respondents' supplemental brief granted.

April 20, 2009

Certiorari Dismissed

No. 08–8618. Cardwell *v.* Grigsby et al. Ct. App. Ind. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8687. Davis *v.* Morrow et al. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8689. Daniel *v.* Colee 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. 08–8826. Parker *v.* Louisiana. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 997 So. 2d 554.

No. 08–8830. Bailey *v.* Wakefield et al. 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.

No. 08–8906. Ellis *v.* Emery, Trustee, et al. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 301 Fed. Appx. 697.

No. 08–9045. HUNDLEY *v.* ZIEGLER ET AL. 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.

Miscellaneous Orders

No. 08A598. MOONEY *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. 08A692. BAUMGARTEN *v.* SUFFOLK COUNTY, NEW YORK, ET AL. D. C. E. D. N. Y. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 08A783. ROSENTHAL *v.* COMMITTEE ON PROFESSIONAL STANDARDS, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 08A829. ADAMS ET AL. *v.* SCHMITT ET AL. Luzerne County Ct., Pa. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 08M74. MITCHELL *v.* YPSILANTI POLICE DEPARTMENT ET AL.; and

No. 08M75. BOROUGH OF CARLSTADT, NEW JERSEY *v.* POTTERS INDUSTRIES, INC., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 138, Orig. SOUTH CAROLINA *v.* NORTH CAROLINA. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of defendant North Carolina and intervenors for divided argument denied. Time divided as follows: 10 minutes to defendant and 20 minutes to intervenors. [For earlier order herein, see, *e. g.*, *ante*, p. 1151.]

No. 08–598. BOBBY, WARDEN *v.* BIES. C. A. 6th Cir. [Certiorari granted, 555 U. S. 1131.] Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 08–7433. IN RE ROLLE. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1152] denied.

No. 08–7546. CARLTON *v.* SMITH ET AL. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1163] denied.

No. 08–7570. LEAPHART *v.* STEPHENS. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1164] denied.

No. 08–7640. GRETHEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1164] denied.

No. 08–8014. BURKE *v.* BARRISTER LAW GROUP ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8015. BURKE *v.* WEINER ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8032. BURKE *v.* ALSO CORNERSTONE ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8033. BURKE *v.* STANDARD OIL OF CONNECTICUT, INC., DBA STANDARD SECURITY SYSTEM, ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8046. CREVELING *v.* WASHINGTON DEPARTMENT OF FISH AND WILDLIFE. Ct. App. Wash. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1166] denied.

No. 08–8048. BURKE *v.* CONNECTICUT ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8137. BURKE *v.* CONNECTICUT ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8138. BURKE *v.* APT FOUNDATION ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8139. BURKE *v.* ALSO CORNERSTONE ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–8142. DIX *v.* UNITED PARCEL SERVICE, INC. C. A. 11th Cir.;

No. 08–9112. MURRAY ET UX. *v.* TOWN OF MANSURA, LOUISIANA, ET AL. Sup. Ct. La.; and

No. 08–9159. HOWARD *v.* INOVA HEALTH CARE SERVICES. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 11, 2009, 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. 08–8374. IN RE SIMON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1211] denied.

No. 08–9342. IN RE BROOKS;

No. 08–9434. IN RE BERRYMAN; and

No. 08–9477. IN RE FENNELL. Petitions for writs of habeas corpus denied.

No. 08–9328. IN RE DARNELL. 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. 08–8767. IN RE MORALES; and

No. 08–8802. IN RE FISHER. Petitions for writs of mandamus denied.

No. 08–9110. IN RE WARD. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 08–1029. IN RE JOHNSON. Petition for writ of mandamus and/or prohibition denied.

No. 08–8837. IN RE CARLTON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

No. 08–8774. IN RE ESTRADA. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 08–728. BLOATE *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Reported below: 534 F. 3d 893.

No. 08–769. UNITED STATES *v.* STEVENS. C. A. 3d Cir. Certiorari granted. Reported below: 533 F. 3d 218.

No. 08–1065. POTTAWATTAMIE COUNTY, IOWA, ET AL. *v.* MCGHEE ET AL. C. A. 8th Cir. Motion of National Association of Assistant United States Attorneys et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 547 F. 3d 922.

Certiorari Denied

No. 08–605. GONZALEZ-MESIAS *v.* HOLDER, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 529 F. 3d 62.

No. 08–636. GENERAL AUTO SERVICE STATION ET AL. *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 526 F. 3d 991.

No. 08–719. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSN., INC. *v.* ASBESTOSIS CLAIMANTS. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 3d 151.

No. 08–757. PARR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 545 F. 3d 491.

No. 08–779. WITTIG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 528 F. 3d 1280.

No. 08–833. OLIVER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 3d 329.

No. 08–836. WELCH *v.* CHAO, SECRETARY OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 536 F. 3d 269.

No. 08–849. KIGHT ET AL. *v.* TURNER. Ct. App. Md. Certiorari denied. Reported below: 406 Md. 167, 957 A. 2d 984.

No. 08–860. GWYNN *v.* WALKER. C. A. 11th Cir. Certiorari denied. Reported below: 532 F. 3d 1304.

No. 08–873. GRUBB *v.* SOUTHWEST AIRLINES. C. A. 5th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 383.

No. 08–889. TRI-UNION SEAFOODS, L. L. C., DBA CHICKEN OF THE SEA *v.* FELLNER. C. A. 3d Cir. Certiorari denied. Reported below: 539 F. 3d 237.

No. 08–895. O&G INDUSTRIES, INC. *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 3d 153.

No. 08–931. CALIFORNIA ET AL. *v.* CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 3d 962.

No. 08–999. ESTILL ET UX. *v.* COOL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 25.

No. 08–1005. ADAMS *v.* GOLDSMITH. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 994 So. 2d 307.

No. 08–1007. WIDTFELDT *v.* VILSACK, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 963.

No. 08–1019. HILAO ET AL. *v.* REVELSTOKE INVESTMENT CORP., INC. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 3d 980.

No. 08–1020. FRIEDMAN *v.* MARYLAND INSURANCE ADMINISTRATION ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 180 Md. App. 764, 768.

No. 08–1021. GILEAD SCIENCES, INC., ET AL. *v.* ST. CLARE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 536 F. 3d 1049.

No. 08–1030. SCHWARZENEGGER, GOVERNOR OF CALIFORNIA, ET AL. *v.* RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION. C. A. 9th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 60.

No. 08–1033. 5634 EAST HILLSBOROUGH AVENUE, INC., ET AL. *v.* HILLSBOROUGH COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 435.

No. 08–1036. SHAW *v.* BEAUFORT COUNTY SHERIFF'S OFFICE. C. A. 4th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 260.

No. 08–1037. ROBERTS ET AL. *v.* TORRES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 3d 1197.

No. 08–1038. SNYDER *v.* SWANSON ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 181 Md. App. 747.

No. 08–1041. ZOLOTAREV ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 3d 1044.

No. 08–1042. ERNST & YOUNG ET AL. *v.* BANKRUPTCY SERVICES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 529 F. 3d 432.

No. 08–1045. TAYLOR *v.* TODD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 567.

No. 08–1047. CLEMENT *v.* MONTANA DEPARTMENT OF LABOR AND INDUSTRY. Sup. Ct. Mont. Certiorari denied. Reported below: 348 Mont. 370, 211 P. 3d 203.

No. 08–1049. KREPPEIN *v.* CRANE ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–1056. CHADWICK *v.* HOLM, WARDEN, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 08–1070. SYCAMORE INDUSTRIAL PARK ASSOCIATES *v.* ERICSSON, INC. C. A. 7th Cir. Certiorari denied. Reported below: 546 F. 3d 847.

No. 08–1073. THOMPSON *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 979 So. 2d 917.

No. 08–1074. ZACHARY *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 973 So. 2d 176.

No. 08–1079. SINGH *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 600.

No. 08–1083. LINDSEY *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 72 Mass. App. 485, 893 N. E. 2d 52.

No. 08–1094. SUMMIT NATIONAL, INC. *v.* DAIMLERCHRYSLER SERVICES NORTH AMERICA, LLC, FKA MERCEDES-BENZ CREDIT CORP. C. A. 6th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 916.

No. 08–1095. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 546 F. 3d 801.

No. 08–1099. JOY BUILDERS, INC. *v.* TOWN OF CLARKSTOWN, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 54 App. Div. 3d 761, 864 N. Y. S. 2d 86.

No. 08–1112. W. R. HUFF ASSET MANAGEMENT CO., LLC *v.* DELOITTE & TOUCHE, LLP, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 549 F. 3d 100.

No. 08–1141. PETERSON *v.* JACKSON ET UX. Sup. Ct. Kan. Certiorari denied. Reported below: 287 Kan. 590, 196 P. 3d 1180.

No. 08–1142. MILLER-WAGENKNECHT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 285 Fed. Appx. 956.

No. 08–1147. GIRAGOSIAN *v.* RYAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 547 F. 3d 59.

No. 08–1153. BENJAMIN *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 296 Fed. Appx. 37.

No. 08–1160. JONES *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 164 Cal. App. 4th 1072, 79 Cal. Rptr. 3d 817.

No. 08–1171. ARLEDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 3d 881.

No. 08–1183. ANTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 546 F. 3d 1355.

No. 08–6816. BIRKETT *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 252 Fed. Appx. 516.

No. 08–7048. HERRERA AGUILAR *v.* UNITED STATES; and

No. 08–8036. SANCHEZ-SALAZAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 716.

No. 08–7058. HYDE ET UX. *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied.

No. 08–7215. HAYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 3d 907.

No. 08–7395. JENKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 537 F. 3d 894.

No. 08–7609. NADER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 3d 713.

No. 08–7613. BIGBY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–7760. PARSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 44 Cal. 4th 332, 187 P. 3d 1.

No. 08–7832. SPEED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 272 Fed. Appx. 88.

No. 08–7881. BUSH *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 193 P. 3d 203.

No. 08–8143. DEL REAL-HURTADO, AKA SANCHEZ-HERNANDEZ *v.* UNITED STATES (Reported below: 295 Fed. Appx. 679); and GUTIERREZ-MEDINA, AKA ROCHA *v.* UNITED STATES (296 Fed. Appx. 421). C. A. 5th Cir. Certiorari denied.

No. 08–8148. MAHDI, AKA SMITH *v.* BOBBY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 522 F. 3d 631.

No. 08–8163. EATON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 889 N. E. 2d 297.

No. 08–8165. LAND *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8227. TORRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 541 F. 3d 48.

No. 08–8452. FROGGE *v.* BRANKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 51.

No. 08–8518. DEARDORFF *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 6 So. 3d 1235.

No. 08–8573. WALDEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 27 So. 3d 626.

No. 08–8575. DENBOW *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8577. CHANG *v.* IARIA. C. A. 9th Cir. Certiorari denied. Reported below: 286 Fed. Appx. 415.

No. 08–8580. MATOS MONTALVO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 598 Pa. 263, 956 A. 2d 926.

No. 08–8584. TRUONG *v.* AMERICAN BIBLE SOCIETY. C. A. 2d Cir. Certiorari denied. Reported below: 295 Fed. Appx. 421.

No. 08–8586. RANSOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–8590. STRACUZZI *v.* ESTATE OF LEE. Ct. App. D. C. Certiorari denied. Reported below: 959 A. 2d 1146.

No. 08–8591. NOBLE *v.* SECURITAS SECURITY SERVICES USA. Ct. App. D. C. Certiorari denied. Reported below: 962 A. 2d 943.

No. 08–8592. DIXON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 974 So. 2d 793.

No. 08–8595. DAVIS *v.* RICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 834.

No. 08–8606. WARREN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8607. STOKES *v.* STOKES. Sup. Ct. Va. Certiorari denied.

No. 08–8608. LOUMENA *v.* LOUMENA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 08–8609. MEEKS *v.* TENNESSEE DEPARTMENT OF CORRECTION. Ct. App. Tenn. Certiorari denied.

No. 08–8613. MITCHELL, AKA ALI *v.* BYRD, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–8615. CASTRO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8616. CASTRO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8617. CRISTINI *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 526 F. 3d 888.

No. 08–8620. SKILLERN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 08–8621. SOCK *v.* TROMBLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 107.

No. 08–8622. SOLOMON *v.* CAMERON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON. C. A. 3d Cir. Certiorari denied.

No. 08–8623. ROWE *v.* REGISTER ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–8629. ANTHONY *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8635. MCNEILL *v.* KINNEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 538.

No. 08–8636. MACIAS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 371 Ill. App. 3d 632, 863 N. E. 2d 776.

No. 08–8643. GOMEZ *v.* FIGUEROA. Sup. Ct. Okla. Certiorari denied.

No. 08–8644. HARRIS *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8645. HICKS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–8647. GLOVER *v.* MCMASTER, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 279 Fed. Appx. 246.

No. 08–8650. HARDISON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–8656. RISLEY *v.* OWOSU ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–8658. ROBINSON *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8659. SMITH *v.* CSK AUTO, INC. C. A. 9th Cir. Certiorari denied. Reported below: 284 Fed. Appx. 510.

No. 08–8661. LAGIORGIA *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–8669. BATES *v.* BURATTI ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–8670. GREEN *v.* HORNBECK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8676. FRANCIS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 108 Conn. App. 901, 947 A. 2d 19.

No. 08–8679. GEIGER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 3d 303.

No. 08–8683. MENDOZA *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 3d 650.

No. 08–8698. MARTIN *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8700. HAVEN *v.* WORTH. C. A. 1st Cir. Certiorari denied.

No. 08–8704. SERRANO *v.* GARCIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 712.

No. 08–8709. GRAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 362 Ill. App. 3d 1232, 919 N. E. 2d 523.

No. 08–8710. FOWLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 379 Ill. App. 3d 1074, 957 N. E. 2d 588.

No. 08–8712. LISENKO *v.* OSADCHUK. Sup. Ct. Vt. Certiorari denied. Reported below: 184 Vt. 645, 957 A. 2d 405.

No. 08–8722. PAIGE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–8727. ESQUIBEL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 166 Cal. App. 4th 539, 82 Cal. Rptr. 3d 803.

No. 08–8728. SHAW *v.* COWART ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 640.

No. 08–8729. BURDIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–8732. PORTER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 276 Va. 203, 661 S. E. 2d 415.

No. 08–8737. CAMPBELL *v.* LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8738. DELPH *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 3d 940.

No. 08–8740. CUMMINGS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 08–8741. MORTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 995 So. 2d 233.

No. 08–8742. JEFFERSON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8745. KISHOR *v.* SHELTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8750. MORGAN *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 786.

No. 08–8754. SALES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 374 Ark. 222, 289 S. W. 3d 423.

No. 08–8758. MUKES *v.* ADDISON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 760.

No. 08–8761. JACOBS *v.* SHERMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 463.

No. 08–8763. SIMMONS *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8766. MORRISON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–8768. BAILEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–8771. MEZA-SAYAS *v.* CONWAY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8772. MORENO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8778. MOORE *v.* GREYHOUND LINES CORP. Ct. App. Wis. Certiorari denied.

No. 08–8779. WEAVER *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–8784. WILCOX *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 08–8785. MURRELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 362 N. C. 375, 665 S. E. 2d 61.

No. 08–8786. JOHNSON *v.* LEHMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 295 Fed. Appx. 548.

No. 08–8788. JACKSON *v.* HENSE. C. A. 9th Cir. Certiorari denied.

No. 08–8790. MCCOY *v.* ROSENBLATT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 175.

No. 08–8799. BARFIELD *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8801. BURLISON *v.* ROGERS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 207.

No. 08–8803. FOUCHE *v.* HOLDER, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. Reported below: 296 Fed. Appx. 74.

No. 08–8804. HALL *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8807. SNYDER *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–8808. SHELTON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Va. Certiorari denied.

No. 08–8813. CARTER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 861 A. 2d 957.

No. 08–8816. KENNEMUR *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied. Reported below: 280 S. W. 3d 305.

No. 08–8817. JORDAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8820. WOOD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 27 So. 3d 628.

No. 08–8821. HUNTER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 998 So. 2d 516.

No. 08–8829. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 998 So. 2d 516.

No. 08–8833. BOGGAN *v.* CHANDLER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–8835. RUSSELL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 953 A. 2d 838.

No. 08–8836. POTTER *v.* DEROSE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 24.

No. 08–8842. GALVAN GOMEZ *v.* RYAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8858. WARREN *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 165 Wash. 2d 17, 195 P. 3d 940.

No. 08–8869. COOPER *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 08–8875. MURPHY *v.* SCHROEDER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 329.

No. 08–8880. THOMAS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. 11th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 317.

No. 08–8884. JACKSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 08–8897. ATKINSON *v.* KEMP, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–8912. SAYERS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–8916. BRENDLIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 45 Cal. 4th 262, 195 P. 3d 1074.

No. 08–8938. REEVES *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 987 So. 2d 103.

No. 08–8941. MARTINEZ *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 992 So. 2d 271.

No. 08–8943. MORGAN *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8965. CUMMINS *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 280 Fed. Appx. 634.

No. 08–8966. COLEMAN *v.* HULICK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–8969. BANKS *v.* BLADES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8971. BUI *v.* BERHARDSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–8979. WRIGHT *v.* BUTTERWORTH. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 2 So. 3d 279.

No. 08–8985. CASEY-BEICH *v.* UNITED PARCEL SERVICE, INC. C. A. 7th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 92.

No. 08–8987. COLEMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 08–8995. TANIELIAN *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8996. ALEXANDER *v.* PALAKOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–8997. BLACKWELL *v.* GLICK. C. A. 9th Cir. Certiorari denied.

No. 08–9001. SUTTON *v.* NORTH CAROLINA DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 245.

No. 08–9002. DOUCETTE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 10 So. 3d 117.

No. 08–9005. YANCEY *v.* THOMAS ET UX. Ct. Civ. App. Okla. Certiorari denied.

No. 08–9020. BROOKS *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 08–9029. SHOMO *v.* ZON, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–9032. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 296 Fed. Appx. 179.

No. 08–9038. WILLIAMS *v.* DENNEY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–9040. RIVERA *v.* FIRETOG, JUSTICE, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DISTRICT, KINGS COUNTY,

ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 11 N. Y. 3d 501, 900 N. E. 2d 952.

No. 08–9053. HINDMAN *v.* HEALY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 278 Fed. Appx. 893.

No. 08–9056. REY *v.* UNITED STATES; and
No. 08–9228. WEBB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 3d 673.

No. 08–9062. MURPHY *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–9076. TEEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 387.

No. 08–9086. CANNON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 3d 601.

No. 08–9099. VARGAS-RANGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 199.

No. 08–9101. SELF *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 08–9111. METTLE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 08–9114. ANTHONY *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 994.

No. 08–9127. SMITH *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 08–9134. UECKER *v.* ROMERO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 154.

No. 08–9137. SCHLAGER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 953 A. 2d 606.

No. 08–9154. RICHARDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 3d 641.

No. 08–9161. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9162. HIGGINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 301 Fed. Appx. 169.

No. 08–9163. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 262.

No. 08–9164. GONZALEZ-GONZALEZ *v.* UNITED STATES (Reported below: 302 Fed. Appx. 294); and GONZALEZ-BAUTISTA *v.* UNITED STATES (302 Fed. Appx. 294). C. A. 5th Cir. Certiorari denied.

No. 08–9167. HUNT *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 383 Ill. App. 3d 1159, 968 N. E. 2d 224.

No. 08–9168. GONZALEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 874.

No. 08–9169. HOLMES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 156.

No. 08–9170. GOLDBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 538 F. 3d 280.

No. 08–9173. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 08–9174. HUGHEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9175. SPINDLE *v.* EXECUTIVE BRANCH OF THE UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 318 Fed. Appx. 50.

No. 08–9176. STEELE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9178. MCCALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 3d 821.

No. 08–9182. RIGGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 08–9183. SMITH *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 308 Fed. Appx. 451.

No. 08–9189. WAGNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9190. MURPHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 552 F. 3d 405.

No. 08–9195. BULLARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–9199. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9201. FLETCHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 756.

No. 08–9202. HARVEY *v.* GALLEGOS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 142.

No. 08–9203. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 587.

No. 08–9207. FORTEZA-GARCIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9208. CISNEROS FLETES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 233.

No. 08–9212. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 524.

No. 08–9213. MANLEY-SALAAM *v.* DIARRA. Ct. App. Ga. Certiorari denied.

No. 08–9217. SERVIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 3d 542.

No. 08–9218. REYNOLDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 931.

No. 08–9219. MENDOZA *v.* LANE ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 08–9222. VELASCO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 282 Fed. Appx. 500.

No. 08–9223. RICHMOND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9226. QUINTANA-NAVARETTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 742.

No. 08–9231. DICKEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 16.

No. 08–9232. SOUN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 753.

No. 08–9233. SYKES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 10.

No. 08–9234. GONZALEZ REYNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 263.

No. 08–9235. SARPONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 309 Fed. Appx. 464.

No. 08–9237. PEREZ-CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 460.

No. 08–9238. KENNY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 307.

No. 08–9240. LONG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 982.

No. 08–9245. BOYD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 298 Fed. Appx. 25.

No. 08–9247. OLIVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 886.

No. 08–9252. BOONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 276.

No. 08–9255. BURKHART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9256. BIELEWICZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 302 Fed. Appx. 81.

No. 08–9257. LIGHTFOOT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9259. LIGHTY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 357.

No. 08–9261. DEWITT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 365.

No. 08–9262. DE LA SIERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 260.

No. 08–9273. GUTIERREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 555 F. 3d 105.

No. 08–9275. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 392.

No. 08–9277. HERRERA-CORTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 513.

No. 08–9279. WASHINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9280. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 784.

No. 08–9281. GUZMAN-TLASECA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 546 F. 3d 571.

No. 08–9283. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 08–9284. BARTHELEMY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 663.

No. 08–9287. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9288. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9290. PIERRE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9291. DOLL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 275 Fed. Appx. 735.

No. 08–9295. DODD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 16.

No. 08–9301. GALLANT ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 537 F. 3d 1202.

No. 08–9302. SANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9307. COCHRAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 2.

No. 08–9309. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 280 Fed. Appx. 409.

No. 08–9310. PEARSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 571.

No. 08–9312. MORTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9313. MATERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 298 Fed. Appx. 61.

No. 08–9315. DEL SOL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 461.

No. 08–9317. TURAY *v.* RICHARDS ET AL. Ct. App. Wash. Certiorari denied.

No. 08–9322. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 311 F. 3d 886.

No. 08–9323. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 256.

No. 08–9330. KIMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 45.

No. 08–9332. HELTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 842.

No. 08–9333. DUNKLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9334. CAMPOS-SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 222.

No. 08–9335. FAVELA CORRAL *v.* SAMUELS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 293 Fed. Appx. 844.

No. 08–9337. DANIELS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 658.

No. 08–9338. BRANCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 995.

No. 08–9340. WHEELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 3d 446.

No. 08–9341. BUDD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 3d 1140.

No. 08–9344. ESPINOSA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 141.

No. 08–9346. ANDRADE DEL SOL *v.* JORGENSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9347. SANCHEZ-VALLADARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 261.

No. 08–9349. HUBBARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 534.

No. 08–9350. HOLDER *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 784.

No. 08–9351. MCNEESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 547 F. 3d 1307.

No. 08–9352. HERNANDEZ-SAINZ, AKA HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 214.

No. 08–9353. HERRERA-GONZALEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 694.

No. 08–9356. ENRIQUEZ-ORNELAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 236.

No. 08–9357. CRUZ-DIAZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 550 F. 3d 169.

No. 08–9358. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9361. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–9362. JAMES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 632.

No. 08–9363. KYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 268.

No. 08–9365. VIEIRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 280 Fed. Appx. 26.

No. 08–9366. THORNTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–9367. THREADGILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 688.

No. 08–9368. BUSTOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 656.

No. 08–9375. CLINTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9379. CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9380. MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 439.

No. 08–9381. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 746.

No. 08–9384. LEGUEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 298 Fed. Appx. 78.

No. 08–9386. REDDICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 819.

No. 08–9389. ZUBIA-TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 3d 1202.

No. 08–9390. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 270.

No. 08–9396. HORSFALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 552 F. 3d 1275.

No. 08–9397. JAMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 464 F. 3d 699.

No. 08–9399. JACOBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 293 Fed. Appx. 884.

No. 08–9404. HAWKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9407. HERNANDEZ *v.* HOLINKA, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9409. DUNLEA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9411. DUVERGE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9416. DURGA *v.* TOWNSHIP OF FRANKLIN, NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–9420. HANEIPH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 201.

No. 08–9424. LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 279 Fed. Appx. 78.

No. 08–9427. MUNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 297.

No. 08–9428. NADROSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 209.

No. 08–9433. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 386.

No. 08–9435. BOLDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 83.

No. 08–9442. FULLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 297.

No. 08–9445. GOODWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 727.

No. 08–9446. GANOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 3d 1117.

No. 08–9450. SCOTT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 08–9455. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 331.

No. 08–9456. HOLZ *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 08–9462. MEADOWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 204.

No. 08–9464. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 683.

No. 08–9472. SIMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 3d 394.

No. 08–8765. WHITAKER *v.* ELECTRONIC DATA SYSTEMS CORP. ET AL. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 291 Fed. Appx. 764.

No. 08–9177. SCIPPIO *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 306 Fed. Appx. 682.

Rehearing Denied

No. 08–710. THEUSCH ET UX. *v.* BERG ET AL., 555 U. S. 1212;

No. 08–733. SAHA *v.* LEHMAN ET AL., 555 U. S. 1171;

No. 08–885. BETANCUR *v.* FLORIDA DEPARTMENT OF HEALTH ET AL., 555 U. S. 1213;

No. 08–980. WHITNEY *v.* UNITED STATES, 555 U. S. 1213;

No. 08–5999. SCOTT *v.* UNITED STATES, 555 U. S. 1104;

No. 08–6905. PRATHER *v.* HUDSON, WARDEN, 555 U. S. 1108;

No. 08–6915. PHILLIPS *v.* WASHINGTON, WARDEN, 555 U. S. 1108;

No. 08–6958. JONES *v.* ST. LUCIE COUNTY, FLORIDA, ET AL., 555 U. S. 1155;

No. 08–6989. MIRANDA *v.* UNIVERSITY OF MARYLAND AT COLLEGE PARK, 555 U. S. 1177;

No. 08–7260. RAMIREZ *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 555 U. S. 1142;

No. 08–7288. QUINN *v.* BATHEJA ET AL., 555 U. S. 1142;

No. 08–7505. PITCHFORD *v.* TURBITT, ADMINISTRATIVE JUDGE, MERIT SYSTEMS PROTECTION BOARD, 555 U. S. 1144;

No. 08–7530. IN RE WESTON, 555 U. S. 1168;

No. 08–7541. MOORE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 555 U. S. 1158;

No. 08–7584. MATEO, AKA FELICIANO *v.* UNITED STATES, 555 U. S. 1124;

No. 08–7635. CRISSUP *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 555 U. S. 1182;

No. 08–7645. SPURLOCK *v.* DEFENSE FINANCE AND ACCOUNTING SERVICE, 555 U. S. 1182;

No. 08–7661. RAGEN *v.* OREGON, 555 U. S. 1183;

No. 08–7667. HERRERA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 555 U. S. 1183;

No. 08–7689. BERNARD *v.* UNITED STATES, 555 U. S. 1145;

No. 08–7740. HENDRICKS *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, 555 U. S. 1185;

No. 08–7772. DAVIDSON *v.* TEXAS, 555 U. S. 1187;

No. 08–7773. COPE *v.* UNITED STATES, 555 U. S. 1147;

No. 08–7809. SIBLEY *v.* FLORIDA BAR, 555 U. S. 1188;

No. 08–7810. SIMON *v.* GEORGIA ET AL., 555 U. S. 1188;

No. 08–7834. PHOX *v.* LEE'S SUMMIT SCHOOL DISTRICT, 555 U. S. 1189;

No. 08–7854. UCAK *v.* TILLMAN, WARDEN, 555 U. S. 1189;

No. 08–7860. EDMUND *v.* SMALL, WARDEN, 555 U. S. 1189;

No. 08–7861. EMOJEVWE *v.* UNITED STATES, 555 U. S. 1149;

No. 08–7870. TURNER, AKA GREENE *v.* CIVIL SERVICE EMPLOYEES ASSOCIATION LOCAL UNION, 555 U. S. 1190;

No. 08–7913. SIMON *v.* CITY OF ATLANTA, GEORGIA, ET AL., 555 U. S. 1191;

No. 08–7951. BRONAKOWSKI *v.* BOULDER VALLEY SCHOOL DISTRICT, 555 U. S. 1193;

No. 08–7999. VILLA *v.* AYERS, WARDEN, 555 U. S. 1195;

No. 08–8029. MAHONE *v.* UNITED STATES, 555 U. S. 1195;

No. 08–8050. BAPTISTE *v.* RUNNELL, 555 U. S. 1215;

No. 08–8052. MCKOY *v.* UNITED STATES, 555 U. S. 1196;

No. 08–8088. IN RE PEKER, *ante*, p. 1104;

No. 08–8216. SCHIPKE *v.* UNITED STATES, 555 U. S. 1200;

No. 08–8371. ZUNIE *v.* UNITED STATES, 555 U. S. 1203; and
No. 08–8485. GAGLIARDI *v.* UNITED STATES, 555 U. S. 1217. Petitions for rehearing denied.

APRIL 27, 2009

Certiorari Granted—Vacated and Remanded

No. 07–7670. BALL *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gall* v. *United States*, 552 U. S. 38 (2007). Reported below: 499 F. 3d 890.

No. 08–693. TESFAGABER *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Nken* v. *Holder*, *ante*, p. 418.

No. 08–8109. GUNTER *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Spears* v. *United States*, 555 U. S. 261 (2009) *(per curiam)*. Reported below: 527 F. 3d 282.

Certiorari Dismissed

No. 08–8791. PETERSEN *v.* GARRETT ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–8876. KING *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 963 A. 2d 140.

No. 08–8940. KORNAFEL *v.* THOMAS. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1

(1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 08–9035. PICKERING-GEORGE *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 285 Fed. Appx. 762.

No. 08–9081. WATERFIELD *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 1 So. 3d 235.

No. 08–9443. HARRELL *v.* RIVERA, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 309 Fed. Appx. 701.

Miscellaneous Orders

No. 132, Orig. ALABAMA ET AL. *v.* NORTH CAROLINA. Reports of the Special Master are received and ordered filed. Exceptions to the Reports, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Surreply briefs, if any, may be filed within 30 days. [For earlier order herein, see 549 U. S. 1202.]

No. 07–1529. MONTEJO *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 554 U. S. 944.] Motion of petitioner for reargument denied.

No. 08–7683. PATTON *v.* HARRIS ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 08–8012. MIERZWA ET UX. *v.* UNITED STATES ET AL. C. A. 3d Cir. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1103] denied.

No. 08–9568. IN RE PAUL;
No. 08–9645. IN RE CARDEN; and
No. 08–9653. IN RE MARTINEZ. Petitions for writs of habeas corpus denied.

No. 08–8862. IN RE RATCLIFF; and
No. 08–8952. IN RE TWILLEY. 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. 08–538. SCHWAB *v.* REILLY. C. A. 3d Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 534 F. 3d 173.

No. 08–674. NRG POWER MARKETING, LLC, ET AL. *v.* MAINE PUBLIC UTILITIES COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 520 F. 3d 464.

No. 08–911. KUCANA *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari granted. Reported below: 533 F. 3d 534.

Certiorari Denied

No. 08–17. MERCIER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 117 Ohio St. 3d 1253, 885 N. E. 2d 942.

No. 08–712. MCELROY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–731. MAGLUTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 201.

No. 08–807. LIEBERMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 379 Ill. App. 3d 585, 884 N. E. 2d 160.

No. 08–916. VFJ VENTURES, INC. *v.* SURTEES, COMMISSIONER, ALABAMA DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 8 So. 3d 983.

No. 08–919. ANDROS *v.* GROSS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 294 Fed. Appx. 731.

No. 08–922. JACKSON ET AL. *v.* BOARD OF ZONING APPEALS OF FAIRFAX COUNTY ET AL. Sup. Ct. Va. Certiorari denied.

No. 08–927. S. E. ET AL. *v.* GRANT COUNTY BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 3d 633.

No. 08–937. AVENTIS PHARMA S. A. ET AL. *v.* AMPHASTAR PHARMACEUTICALS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 525 F. 3d 1334.

No. 08–938. PHAR-MOR, INC. *v.* MCKESSON CORP. C. A. 6th Cir. Certiorari denied. Reported below: 534 F. 3d 502.

No. 08–953. ROLLAND *v.* TEXTRON, INC. C. A. 11th Cir. Certiorari denied.

No. 08–1050. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–1054. HODGE *v.* NAVY YARD SUNOCO, INC., ET AL. Ct. App. D. C. Certiorari denied.

No. 08–1061. FAUGHT *v.* STEVENS ET AL. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 08–1066. NEW MEXICO COMMISSIONER OF PUBLIC LANDS *v.* NEW MEXICO EX REL. STATE ENGINEER ET AL. Ct. App. N. M. Certiorari denied. Reported below: 145 N. M. 433, 200 P. 3d 86.

No. 08–1067. HAYES *v.* GENESEE COUNTY EMPLOYEES' RETIREMENT SYSTEM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 317.

No. 08–1069. BROWN *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF CHESTER, PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 946 A. 2d 1154.

No. 08–1076. CLARK, INDIVIDUALLY AND AS CANDIDATE FOR MINNESOTA SUPREME COURT ASSOCIATE JUSTICE, SEAT #4, ET AL. *v.* PAWLENTY, GOVERNOR OF MINNESOTA, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 755 N. W. 2d 293.

No. 08–1108. HAEG *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 08–1110. B. T. PRODUCE CO., INC., ET AL. *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 296 Fed. Appx. 78.

No. 08–1145. QUIK PAYDAY, INC. *v.* STORK, ACTING BANK COMMISSIONER, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 549 F. 3d 1302.

No. 08–1148. MITRANO *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 952 A. 2d 901.

No. 08–1150. ABE *v.* MICHIGAN STATE UNIVERSITY. Cir. Ct. Ingham County, Mich. Certiorari denied.

No. 08–1168. DRACH *v.* BRUCE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 514.

No. 08–7940. VASQUEZ-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 222.

No. 08–8034. SANTANA-AGUIRRE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 537 F. 3d 929.

No. 08–8093. MINER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 188.

No. 08–8110. HERNANDEZ DOBLE *v.* PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 08–8249. CARASI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 44 Cal. 4th 1263, 190 P. 3d 616.

No. 08–8284. VALLE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8294. BLACKMON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 7 So. 3d 397.

No. 08–8318. RHODES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 549 F. 3d 833.

No. 08–8322. PRIETO *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 372.

No. 08–8335. JENNINGS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8363. KING *v.* LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 77.

No. 08–8429. LOTT *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 569 F. 3d 547.

No. 08–8840. HAMMONDS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 7 So. 3d 1055.

No. 08–8845. GARCIA ET UX. *v.* MICHIGAN CHILDREN'S INSTITUTE. Ct. App. Mich. Certiorari denied.

No. 08–8851. DEY *v.* BARNES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–8853. CARDOSO *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 72 Mass. App. 1118, 893 N. E. 2d 1285.

No. 08–8855. UHURU *v.* KHAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 401.

No. 08–8861. RAIHALA *v.* CASS COUNTY DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 08–8868. BUGADO *v.* WAGATSUMA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8873. OFUME *v.* DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 1st Cir. Certiorari denied.

No. 08–8882. LOCONTE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 990 So. 2d 1065.

No. 08–8886. WALKER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–8896. ASEMANI *v.* GREEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 166.

No. 08–8898. ASEMANI *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 291.

No. 08–8899. PIZANO *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 08–8900. OSCAR *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 995 So. 2d 506.

No. 08–8901. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 2 So. 3d 278.

No. 08–8907. DELOZIER *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 531 F. 3d 1306.

No. 08–8908. COLEMAN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8911. SOSA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8914. MIDDLETON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–8917. AVILES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 08–8918. ANTONSSON *v.* KAST. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 08–8922. BROWN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 270 S. W. 3d 564.

No. 08–8927. MYERS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Sup. Ct. Mich. Certiorari denied.

No. 08–8928. COOPER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 990 So. 2d 1072.

No. 08–8930. CASTELLANO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 08–8939. SHOATS *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8942. JOHNSON *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 3d 933.

No. 08–8946. BOWERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 1204, 967 N. E. 2d 494.

No. 08–8950. OWENS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 996 So. 2d 85.

No. 08–8953. WRIGHT *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8959. KISHOR *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8961. RODRIGUEZ *v.* WESTBANK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 1212, 967 N. E. 2d 497.

No. 08–8962. WILLIAMS *v.* ZAMUDIO ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–8972. ACHAN *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 08–9017. CURRY *v.* CITY OF MANSFIELD, OHIO, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9054. SALE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 8 So. 3d 330.

No. 08–9075. WHITE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 08–9083. SANTOS *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 645.

No. 08–9085. CSECH *v.* IGNACIO ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9090. DORSEY *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 159.

No. 08–9125. SMITH *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 652.

No. 08–9126. STEWART *v.* CHANDLER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9143. LOMAX *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–9149. COLLIER *v.* BAYER. C. A. 9th Cir. Certiorari denied.

No. 08–9166. HULL *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9171. HOWARD *v.* CAMPBELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 442.

No. 08–9186. JACKSON *v.* MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE. C. A. 9th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 476.

No. 08–9221. DUTIL *v.* MURPHY, SUPERINTENDENT, MASSACHUSETTS TREATMENT CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 550 F. 3d 154.

No. 08–9270. GARBER *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 204.

No. 08–9305. STACKHOUSE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 945 A. 2d 770.

No. 08–9306. CRAVER *v.* FELKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9385. LEE *v.* CERULLO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 287 Fed. Appx. 145.

No. 08–9392. VASQUEZ *v.* UNITED STATES; and
No. 08–9466. PERCEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 3d 903.

No. 08–9402. FIELDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 774.

No. 08–9414. SPENCER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9429. SHERMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 551 F. 3d 45.

No. 08–9431. ZYOUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 282 Fed. Appx. 592.

No. 08–9436. BOGDAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 818.

No. 08–9439. GRANDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 104.

No. 08–9440. LORA *v.* PEARSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9457. VAN DANIELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9460. HAMBERG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 251.

No. 08–9465. MIDDLETON *v.* EBBERT, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 302 Fed. Appx. 68.

No. 08–9467. BURWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 185.

No. 08–9468. BARCLAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9469. BRADSHAW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9470. BEARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 323.

No. 08–9471. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 202.

No. 08–9473. REYES-HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9474. GORBEY *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 08–9476. FUSELIER *v.* MENIFEE, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 110.

No. 08–9485. GALVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 546 F. 3d 1179.

No. 08–9490. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 194.

No. 08–9497. HOLLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9498. HART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 544 F. 3d 911.

No. 08–9501. SHARPE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–9505. HENDRIX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 284 Fed. Appx. 733.

No. 08–9506. HOWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9508. ADJEI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–9509. BUCHANAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9514. CASILLAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 561.

No. 08–9515. WILFONG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 3d 1182.

No. 08–9516. MENDEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 736.

No. 08–9517. TOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9520. KIRTMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 278.

No. 08–9521. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 460.

No. 08–9523. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 551 F. 3d 381.

No. 08–9525. THOMAS *v.* TAMEZ, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 847.

No. 08–9526. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9528. JEFFERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 2.

No. 08–9533. GARCIA SEDANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 463.

No. 08–9536. PARKER *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. 6th Cir. Certiorari denied.

No. 08–9542. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9546. RICCARDI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 99.

No. 08–9549. ALLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 842.

No. 08–9556. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 130.

No. 08–9557. VO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 431.

No. 08–9564. PALOS-LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 149.

No. 08–9566. SOTO-HINOJOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 472.

No. 08–790. DELMARVA POWER & LIGHT CO. ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Motion of National Association of Regulatory Utility Commissioners for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 542 F. 3d 889.

No. 08–1072. GOLDEN BRIDGE TECHNOLOGY INC. *v.* MOTOROLA INC. ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 547 F. 3d 266.

No. 08–8337. YOUNG *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 284 Fed. Appx. 958.

No. 08–8879. WILSON *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 315 Fed. Appx. 27.

Rehearing Denied

No. 08–6800. SMITH *v.* FLORIDA DEPARTMENT OF CORRECTIONS, 555 U. S. 1106;

No. 08–7136. DUVERGE *v.* UNITED STATES, 555 U. S. 1078;

No. 08–7356. COLEMAN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 555 U. S. 1155;

No. 08–7622. BLOCKER *v.* KELLEY ET AL., 555 U. S. 1181;

No. 08–7625. SIMMONS *v.* MCWILLIAMS, WARDEN, 555 U. S. 1181;

No. 08–7666. HOLT *v.* KEO, 555 U. S. 1183;

No. 08–7751. KARNOFEL *v.* KMART CORP. ET AL., 555 U. S. 1186;

No. 08–7759. MURRAY *v.* DEPARTMENT OF THE ARMY ET AL., 555 U. S. 1146;

No. 08–7808. SCHWAB *v.* WASHINGTON, 555 U. S. 1188;

No. 08–8020. MORALES *v.* ABT, LLC, *ante,* p. 1107;

No. 08–8040. VIGLIOTTI *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, 555 U. S. 1215;

No. 08–8073. WEAVER *v.* FLORIDA, *ante,* p. 1108;

No. 08–8083. FAN *v.* ROE ET AL., *ante,* p. 1109; and

No. 08–8503. GARVIN *v.* UNITED STATES, *ante,* p. 1111. Petitions for rehearing denied.

APRIL 29, 2009

Certiorari Denied

No. 08–10076 (08A953). MIZE *v.* GEORGIA. Super. Ct. Oconee County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

APRIL 30, 2009

Certiorari Denied

No. 08–10059 (08A949). JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, pre-

sented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 4, 2009

Certiorari Granted—Vacated and Remanded

No. 07–1167. MEISTER *v.* INDIANA ET AL. Ct. App. Ind. Reported below: 864 N. E. 2d 1137; and

No. 07–1411. OWENS *v.* KENTUCKY. Sup. Ct. Ky. Reported below: 244 S. W. 3d 83. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Arizona* v. *Gant*, *ante*, p. 332.

No. 07–8944. DUNSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 251 Fed. Appx. 906;

No. 07–9504. BOOKER *v.* UNITED STATES. C. A. D. C. Cir. Reported below: 496 F. 3d 717;

No. 08–7096. QUINTANA *v.* UNITED STATES; and GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 288 Fed. Appx. 349 (first judgment); 310 Fed. Appx. 171 (second judgment);

No. 08–7228. CASPER *v.* UNITED STATES. C. A. 5th Cir. Reported below: 536 F. 3d 409; and

No. 08–8159. CARTER *v.* NORTH CAROLINA. Ct. App. N. C. Reported below: 191 N. C. App. 152, 661 S. E. 2d 895. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Arizona* v. *Gant*, *ante*, p. 332.

No. 08–653. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* CBS CORP. ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *FCC* v. *Fox Television Stations, Inc.*, *ante*, p. 502. Reported below: 535 F. 3d 167.

No. 08–820. BAIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Nelson* v. *United States*, 555 U. S. 350 (2009) *(per curiam)*. Reported below: 537 F. 3d 876.

Miscellaneous Orders

No. 08A858 (08–1121). RODRIGUEZ *v.* STANDING COMMITTEE ON ATTORNEY DISCIPLINE. C. A. 3d Cir. Application for injunction, addressed to JUSTICE GINSBURG and referred to the Court,

denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 08A874. GALDAMEZ-SANCHEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 08M76. CROSS *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 08M77. RANSON *v.* DI PAOLO. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 07–984. COEUR ALASKA, INC. *v.* SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL.; and

No. 07–990. ALASKA *v.* SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL. C. A. 9th Cir. [Certiorari granted, 554 U. S. 931.] Parties are directed to file supplemental briefs addressing the following questions: (1) If the discharge of the slurry into the lake would violate § 301 or § 306 of the Clean Water Act, would that future violation authorize a court to set aside the permits issued by the United States Army Corps of Engineers, and the Record of Decision issued by the United States Forest Service, as "not in accordance with law," 5 U. S. C. § 706(2)(A)? See *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 646 (1990). (2) If a discharge comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material, may the discharger obtain permits under both §§ 402 and 404 of the Clean Water Act? Must the discharger do so?

Briefs, not to exceed 6,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, May 15, 2009. *Amicus* briefs, not to exceed 4,500 words, may be filed with the Clerk and served upon opposing counsel to the parties on or before 2 p.m., Friday, May 15, 2009. Reply briefs, not to exceed 3,000 words, may be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, May 22, 2009.

No. 08–6912. SCHNELLER *v.* ZITOMER, EXECUTRIX OF THE ESTATE OF SCHNELLER. Super. Ct. Pa. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [555 U. S. 1093] denied.

No. 08–8129. SEARLES *v.* WEST HARTFORD BOARD OF EDUCATION ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1102] denied.

No. 08–8194. IN RE MINNFEE. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1126] denied.

No. 08–8307. BURKE *v.* UNIVERSAL HEALTH CARE ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1150] denied.

No. 08–8453. CHURCH *v.* UNITED STATES ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1102] denied.

No. 08–9783. IN RE PORTER. 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. 08–1087. IN RE JIMENA. Petition for writ of mandamus denied.

No. 08–9483. IN RE CARDONA;
No. 08–9592. IN RE TRUESDALE; and
No. 08–9657. IN RE SPEARS. 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. 08–969. HEMI GROUP, LLC, ET AL. *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari granted. Reported below: 541 F. 3d 425.

No. 08–1008. SHADY GROVE ORTHOPEDIC ASSOCIATES, P. A. *v.* ALLSTATE INSURANCE CO. C. A. 2d Cir. Certiorari granted. Reported below: 549 F. 3d 137.

No. 08–7412. GRAHAM *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 982 So. 2d 43.

No. 08–7621. SULLIVAN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 987 So. 2d 83.

Certiorari Denied

No. 08–687. HUNT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 3d 636.

No. 08–721. FIRST AMERICAN TITLE INSURANCE CO. ET AL. *v.* COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 258 S. W. 3d 627.

No. 08–777. OLSEN *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 3d 827.

No. 08–865. CONSOLIDATION COAL CO. *v.* LEVISA COAL CO. Sup. Ct. Va. Certiorari denied. Reported below: 276 Va. 44, 662 S. E. 2d 44.

No. 08–929. COOK ET UX. *v.* AVI CASINO ENTERPRISES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 3d 718.

No. 08–930. COOK ET UX. *v.* AVI CASINO ENTERPRISES, INC., ET AL. Ct. App. Ariz. Certiorari denied.

No. 08–939. MACKAY *v.* AIRCRAFT MECHANICS FRATERNAL ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 695.

No. 08–944. LATIMER, INDIVIDUALLY AND AS SURVIVING SPOUSE OF LATIMER, DECEASED, ET AL. *v.* LAUGHLIN, DBA RIVERSIDE RESORT & CASINO. Ct. App. Ariz. Certiorari denied.

No. 08–956. WINGET ET AL. *v.* JPMORGAN CHASE BANK, N. A., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 537 F. 3d 565.

No. 08–1088. GLASSEY *v.* AMANO CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 426.

No. 08–1096. TAYLOR *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 268 S. W. 3d 752.

No. 08–1101. LOUISIANA, THROUGH THE LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT *v.* TASSIN ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 989 So. 2d 217.

No. 08–1105. MCLEOD *v.* MICHIGAN DEPARTMENT OF TREASURY. Ct. App. Mich. Certiorari denied.

No. 08–1114. PAVLOVSKIS *v.* CITY OF EAST LANSING, MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 08–1140. ROBINSON *v.* CHASTAIN. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 08–1162. MPR GLOBAL, INC. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 620.

No. 08–1189. A. P. S. *v.* MINNESOTA DEPARTMENT OF LABOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 27.

No. 08–1210. BISHOP, EXECUTOR OF THE ESTATE OF HESTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 276.

No. 08–1215. WARNER *v.* COLUMBIA/JFK MEDICAL CENTER, LLP, DBA JFK MEDICAL CENTER. C. A. 11th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 610.

No. 08–1227. MUKHERJEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 107.

No. 08–1235. PATTERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 100.

No. 08–5298. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 517 F. 3d 1224.

No. 08–5411. WOODS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 271 Fed. Appx. 338.

No. 08–5945. SLUSHER *v.* FURLONG, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 268 Fed. Appx. 789.

No. 08–7005. BEDINGER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 08–7399. MILLER *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8005. CLEMONS *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 08–8080. DUPRE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 296 Fed. Appx. 113.

No. 08–8280. WALLACE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 44 Cal. 4th 1032, 189 P. 3d 911.

No. 08–8300. RING *v.* ESTATE OF WREZIC ET AL. Ct. App. Wis. Certiorari denied. Reported below: 314 Wis. 2d 281, 758 N. W. 2d 925.

No. 08–8976. STARKS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 226.

No. 08–8983. SMITH *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–8986. MILLER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8991. MONACELLI *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 08–9003. ROSADO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 53 App. Div. 3d 455, 862 N. Y. S. 2d 41.

No. 08–9004. OCHOA VELEZ *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–9006. MENDEZ TOBAN *v.* HEDGPETH, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9007. TRAN *v.* SAFECO INSURANCE CO. ET AL. Ct. App. Ore. Certiorari denied. Reported below: 219 Ore. App. 429, 182 P. 3d 325.

No. 08–9010. MINNICH *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 993 So. 2d 520.

No. 08–9012. BAILUM *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied.

No. 08–9013. ARRIETA *v.* WALKER, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 1220, 967 N. E. 2d 501.

No. 08–9019. WANLESS *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied. Reported below: 223 Ore. App. 495, 196 P. 3d 123.

No. 08–9026. RHYNE *v.* RILEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 247.

No. 08–9027. CARR *v.* KRAMER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 426.

No. 08–9033. MATSON *v.* LUNA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 269 Fed. Appx. 674.

No. 08–9034. WILLIAMS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9043. CABALLERO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9044. HESTER *v.* ARMSTRONG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 946.

No. 08–9047. FUDGE *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 08–9048. GARNER *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 977 So. 2d 307.

No. 08–9052. HERNANDEZ *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 08–9063. BURRIS *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 08–9066. ORTIZ *v.* FRYE ET AL. Ct. App. Ohio, Jefferson County. Certiorari denied.

No. 08–9118. BAILEY *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 297 Fed. Appx. 168.

No. 08–9150. MORALES *v.* SUBIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9172. MCCOY *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–9187. RAMBO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 401 N. J. Super. 506, 951 A. 2d 1075.

No. 08–9204. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 08–9211. MANZANO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9215. CLANTON *v.* MUIRFIELD HOLDINGS, LTD., ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 30 So. 3d 466.

No. 08–9289. RIVERA *v.* RUSSO, SUPERINTENDENT, SOUZA BARANOWSKI CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 08–9294. DONONOVAN, AKA DONOVAN *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–9308. EGAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 38.

No. 08–9345. COLLINS *v.* MISSOURI ELECTRIC COOPERATIVES EMPLOYEES CREDIT UNION. C. A. 8th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 911.

No. 08–9378. DAHM *v.* FEINERMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 542.

No. 08–9393. ANKENY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–9453. JOHNSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 08–9492. WILLIS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 319 Fed. Appx. 892.

No. 08–9507. DOWNS *v.* COLONIAL COURT APARTMENTS, INC., ET AL. Sup. Ct. Va. Certiorari denied.

No. 08–9512. KINNEY *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–9527. JARMON *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–9559. MOLSBARGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 3d 809.

No. 08–9575. PERDOMO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 298 Fed. Appx. 185.

No. 08–9576. ORTIZ-ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 700.

No. 08–9582. RODRIGUEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9583. KING *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 554 F. 3d 177.

No. 08–9588. UPSHAW *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 08–9589. PURDOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9593. TEAGUE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 62.

No. 08–9595. MACKENZIE ET AL. *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–9596. BALDRIDGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 559 F. 3d 1126.

No. 08–9599. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 300 Fed. Appx. 164.

No. 08–9601. DOWDELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 16.

No. 08–9604. TUGGLE *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied. Reported below: 2008-Ohio-5020.

No. 08–9613. STARR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9614. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 130.

No. 08–9615. ANDRADE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 551 F. 3d 103.

No. 08–9616. GOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 544.

No. 08–9620. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 23.

No. 08–9624. DEL CID-RENDON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 780.

No. 08–9627. CABAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 241.

No. 08–9628. ALGARATE-VALENCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 3d 1238.

No. 08–9630. MENDEZ-AGUILAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 305.

No. 08–9633. RIOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 284.

No. 08–9635. HINDMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 284 Fed. Appx. 694.

No. 08–9639. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 324.

No. 08–9647. PORTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 772.

No. 08–9649. MORTENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 385.

No. 08–9654. GIRALDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 868.

No. 08–9661. TORRES-ROMERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 537 F. 3d 1155.

No. 08–9663. FELICIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 795.

No. 08–9668. DAVIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9670. BISHOP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 934.

No. 08–9680. OLIVERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 552 F. 3d 34.

No. 08–9681. PERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 3d 688.

No. 08–9682. O'KANE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–9683. MOZEE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 963 A. 2d 151.

No. 08–9687. MARCOS-QUIROGA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 554 F. 3d 1150.

No. 08–9691. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 941.

No. 08–9692. ALEXANDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 543 F. 3d 819.

No. 08–9693. ARIAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9694. CRAIG *v.* UNITED STATES; and
No. 08–9695. CRAIG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 256.

No. 08–9696. COOPER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–1154. JOHNSON *v.* CLARENDON NATIONAL INSURANCE CO. ET AL. Ct. App. Ga. Motion of Truck Safety Coalition et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 293 Ga. App. 103, 666 S. E. 2d 567.

Rehearing Denied

No. 08–1028. MESSER ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ante*, p. 1167;

No. 08–1055. WEI ZHOU *v.* MARQUETTE UNIVERSITY, *ante*, p. 1167;

No. 08–7819. IN RE CAMPBELL, 555 U. S. 1168;

No. 08–7859. DOLBERRY *v.* NAPA ET AL., 555 U. S. 1189;

No. 08–7958. LOPEZ ROSIER *v.* HUNTER ET AL., 555 U. S. 1214;

No. 08–7982. RODRIGUEZ *v.* NAPOLITANO, SECRETARY OF HOMELAND SECURITY, 555 U. S. 1194;

No. 08–8072. PORTUGAL, AKA TRUJILLO *v.* COLORADO DIVISION OF INSURANCE, 555 U. S. 1215;

No. 08–8155. STEWART *v.* UNITED STATES, *ante*, p. 1110;

No. 08–8195. BUTLER *v.* MOLINAR ET AL., *ante*, p. 1133;

No. 08–8260. BRYANT *v.* DEPARTMENT OF DEFENSE, *ante*, p. 1134;

No. 08–8339. RAMOS *v.* NEW YORK, *ante*, p. 1110;

No. 08–8366. BEY *v.* UNITED STATES, 555 U. S. 1203;

No. 08–8675. IN RE SIMPSON, *ante*, p. 1126; and

No. 08–8967. SHY *v.* UNITED STATES, *ante*, p. 1160. Petitions for rehearing denied.

MAY 8, 2009

Certiorari Denied

No. 08–9971 (08A942). IVEY *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

No. 08–10196 (08A981). IVEY *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

MAY 14, 2009

Certiorari Denied

No. 08–10335 (08A1006). MCNAIR *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MAY 15, 2009

Dismissal Under Rule 46

No. 08–1228. QUALCOMM INC. *v.* BROADCOM CORP. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 548 F. 3d 1004.

MAY 18, 2009

Certiorari Granted—Vacated and Remanded

No. 07–6309. MEGGINSON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona* v. *Gant*, *ante*, p. 332. Reported below: 245 Fed. Appx. 262.

JUSTICE ALITO, dissenting.

In *Arizona* v. *Gant*, *ante*, p. 332, the Court held that a law enforcement officer who arrests a vehicle occupant may search the vehicle if the officer has reason to believe the vehicle contains evidence of the crime of arrest. *Ante*, at 351. The Court took this test from JUSTICE SCALIA's separate opinion in *Thornton* v. *United States*, 541 U. S. 615, 632 (2004) (opinion concurring in judgment), but did not provide an independent explanation of the basis for or the scope of this rule. As I observed in dissent, *Gant*, *ante*, at 364, this test creates a host of uncertainties, and this case illustrates just one of the problems.

Here, petitioner, a vehicle occupant, was arrested on a warrant for threatening to kill his wife in violation of N. C. Gen. Stat. Ann. §14–277.1 (Lexis 2007).* It does not appear that petitioner

* "(a) A person is guilty of a Class 1 misdemeanor if without lawful authority:

"(1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;

"(2) The threat is communicated to the other person, orally, in writing, or by any other means;

told his wife *how* he intended to kill her, *i. e.*, with a gun, knife, bare hands, etc. After petitioner was arrested, his car was searched, and the officer found, among other things, a loaded revolver and drugs. This case thus appears to present an important question regarding the meaning and specificity of the reasonable suspicion requirement in *Gant*. Because of the ambiguity of the new *Gant* test and the frequency of roadside arrests, I would grant certiorari in this case to provide much needed clarification.

No. 07–9086. GROOMS *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona* v. *Gant*, *ante*, p. 332. Reported below: 506 F. 3d 1088.

JUSTICE ALITO, dissenting.

In *Arizona* v. *Gant*, *ante*, p. 332, the Court held that a law enforcement officer who arrests a vehicle occupant may search the vehicle if the officer has reason to believe the vehicle contains evidence of the crime of arrest. *Ante*, at 351. The Court took this test from JUSTICE SCALIA's separate opinion in *Thornton* v. *United States*, 541 U. S. 615, 632 (2004) (opinion concurring in judgment), but did not provide an independent explanation of the basis for or the scope of this rule. As I observed in dissent, *Gant*, *ante*, at 364, this test creates a host of uncertainties, and this case illustrates one of the problems.

The petitioner in this case, after arguing with a bouncer in a bar, threatened to retrieve a gun and return to the bar. The bar called the police, who found petitioner in his car near the bar and arrested him on warrants for a moving violation and failing to secure a load. A search of petitioner's car disclosed a gun. Under these circumstances the arresting officers did not have reason to believe that the car contained evidence of the offenses for which petitioner was arrested, but it is arguable that the officers had probable cause to arrest petitioner for violating Mo.

"(3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and

"(4) The person threatened believes that the threat will be carried out.

"(b) A violation of this section is a Class 1 misdemeanor." N. C. Gen. Stat. Ann. § 14–277.1.

Rev. Stat. § 574.115 (Supp. 2008) (making a terroristic threat).* If an arrest for making a terroristic threat would have been lawful, this case presents the question whether, when a defendant is arrested pursuant to a warrant, a *Gant* evidence-gathering search may be conducted only when there is reason to believe that the vehicle contains evidence of the offense for which the warrant was issued or whether it is also permissible to search the vehicle for evidence of other offenses for which a warrantless arrest could have been made. This question may be of some importance because, prior to *Gant*, an officer who made an arrest pursuant to a warrant had little reason to inventory the applicable criminal code at the scene of the arrest in order to determine whether a warrantless arrest for another offense would also be justified.

In this case, however, uncertainty as to whether the officers had probable cause to arrest under § 574.115 makes review at this time premature.

No. 08–816. RENASANT BANK *v.* KIMBERLIN. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arthur Andersen LLP* v. *Carlisle*, *ante*, p. 624. Reported below: 295 Fed. Appx. 18.

No. 08–5316. MENDOZA-GONZALEZ *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Flores-Figueroa* v. *United States*, *ante*, p. 646. Reported below: 520 F. 3d 912.

Certiorari Dismissed

No. 08–9122. MCGOWAN *v.* CANTRELL 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: 310 Fed. Appx. 610.

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*This provision provides in relevant part that "[a] person commits the crime of making a terrorist threat if such person communicates a threat to cause an incident or condition involving danger to life:

. . . . . .

"[w]ith criminal negligence with regard to the risk of causing the evacuation . . . or closure of any portion of a building . . . ." Mo. Rev. Stat. § 574.115. It is at least arguable that petitioner was negligent with regard to the possibility that the bar would respond to his threat by closing or evacuating its facility in whole or in part.

No. 08–9227. ERICKSON *v.* CAT FANCIERS ASSN. ET AL. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–9271. GRIFFIN *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 300 Fed. Appx. 615.

No. 08–9422. AL GHASHIYAH *v.* HUIBREGTSE, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–9786. MCKINNEY *v.* UNITED STATES. C. A. 7th 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. 08M78. ABELE *v.* CITY OF BROOKSVILLE, FLORIDA. Motion for leave to proceed as a veteran denied.

No. 08M79. KOESTER *v.* LANFRANCHI ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 105, Orig. KANSAS *v.* COLORADO. Motion of the Special Master to be discharged granted, and Arthur L. Littleworth, Esq., of Riverside, Cal., the Special Master in this case, is hereby discharged with the thanks of the Court. [For earlier order herein, see, *e. g.*, 555 U. S. 1095.]

No. 08–974. LEWIS ET AL. *v.* CITY OF CHICAGO, ILLINOIS. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 08–8463. IN RE DUNLAP. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1165] denied.

No. 08–9123. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1164] denied.

No. 08–9796. IN RE SMITH;

No. 08–9937. IN RE LOPEZ;
No. 08–9949. IN RE POIRIER; and
No. 08–10004. IN RE WILHELM. Petitions for writs of habeas corpus denied.

No. 08–9883. IN RE WORD. 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. 08–9854. IN RE WILLIAMS. Petition for writ of mandamus denied.

No. 08–9265. IN RE WOERTH. Petition for writ of mandamus and/or prohibition denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Certiorari Granted

No. 08–861. FREE ENTERPRISE FUND ET AL. *v.* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 537 F. 3d 667.

No. 08–876. BLACK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. Reported below: 530 F. 3d 596.

No. 08–992. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* KINDLER. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. JUSTICE ALITO took no part in the consideration or decision of this motion and this petition. Reported below: 542 F. 3d 70.

No. 08–9156. WOOD *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th 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: 542 F. 3d 1281.

Certiorari Denied

No. 08–537. SUNRISE VALLEY, LLC, ET AL. *v.* SALAZAR, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 528 F. 3d 1251.

No. 08–622. UNITED STATES *v.* VILLANUEVA-SOTELO. C. A. D. C. Cir. Certiorari denied. Reported below: 515 F. 3d 1234.

No. 08–771. MORGORICHEV *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 274 Fed. Appx. 98.

No. 08–871. CANADIAN PACIFIC RAILWAY CO. ET AL. *v.* LUNDEEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 3d 682.

No. 08–872. DEDMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 3d 577.

No. 08–878. CRUZ-GARCIA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 285 Fed. Appx. 446.

No. 08–881. MARCEAU ET AL. *v.* BLACKFEET HOUSING AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 3d 916.

No. 08–887. SAN DIEGO COUNTY, CALIFORNIA, ET AL. *v.* SAN DIEGO NORML ET AL.; and

No. 08–897. SAN BERNARDINO COUNTY, CALIFORNIA, ET AL. *v.* CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied. Reported below: 165 Cal. App. 4th 798, 81 Cal. Rptr. 3d 461.

No. 08–960. BAXTER HEALTHCARE CORP. *v.* WHITE. C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 3d 381.

No. 08–978. HENDLEY ET AL. *v.* DOMINGUEZ. C. A. 7th Cir. Certiorari denied. Reported below: 545 F. 3d 585.

No. 08–996. BUCKLEY *v.* RACKARD. C. A. 11th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 791.

No. 08–1004. BAUDE ET AL. *v.* HEATH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 3d 608.

No. 08–1006. MAHARAJ, EXECUTRIX *v.* SOMMER, EXECUTOR, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 451 Mass. 615, 888 N. E. 2d 891.

No. 08–1011. REID *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 300 Fed. Appx. 50.

No. 08–1016. MCA ASSOCIATES, L. P. *v.* TOWNSHIP OF MONTVILLE, NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–1017. BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS *v.* LAURENDINE ET AL. Civ. Dist. Ct. La., Orleans Parish. Certiorari denied.

No. 08–1023. LASHWAY ET AL. *v.* CAREPARTNERS, LLC, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 3d 867.

No. 08–1059. JEFFERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 3d 300.

No. 08–1106. GROSS ET AL. *v.* GERMAN FOUNDATION INDUSTRIAL INITIATIVE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 3d 605.

No. 08–1116. TEHRANI *v.* POLAR ELECTRO ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 301 Fed. Appx. 959.

No. 08–1118. KONARSKI ET AL. *v.* CITY OF TUCSON, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 242.

No. 08–1124. MARCHAND, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARCHAND, DECEASED *v.* MARCHAND. Sup. Ct. N. M. Certiorari denied. Reported below: 145 N. M. 378, 199 P. 3d 281.

No. 08–1127. SENECA *v.* UNITED SOUTH AND EASTERN TRIBES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 741.

No. 08–1128. BROAD ET AL. *v.* WEIGEL ET AL., CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF WEIGEL, DECEASED. C. A. 10th Cir. Certiorari denied. Reported below: 544 F. 3d 1143.

No. 08–1132. L. A. ET VIR *v.* GRANBY BOARD OF EDUCATION. C. A. 2d Cir. Certiorari denied.

No. 08–1135. CHANEY *v.* CITY OF ORLANDO, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 291 Fed. Appx. 238.

No. 08–1136. CARLETTI *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 962 A. 2d 916.

No. 08–1138. AUREUS HOLDINGS, LTD., ET AL. *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 265.

No. 08–1139. ACTION APARTMENT ASSN. *v.* CITY OF SANTA MONICA, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 166 Cal. App. 4th 456, 82 Cal. Rptr. 3d 722.

No. 08–1143. KIVISTO *v.* GMAC LLC, FKA GENERAL MOTORS ACCEPTANCE CORP. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 978 So. 2d 283.

No. 08–1155. ROOZ *v.* KIMMEL. C. A. 9th Cir. Certiorari denied. Reported below: 324 Fed. Appx. 549.

No. 08–1157. ROOZ *v.* KIMMEL. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 518.

No. 08–1158. DIPPIN' DOTS, INC., ET AL. *v.* MOSEY ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 298 Fed. Appx. 964.

No. 08–1161. ROGERS ET UX. *v.* HESS ET AL. Ct. App. Minn. Certiorari denied.

No. 08–1163. GARRETT *v.* LISTER, FLYNN & KELLY, P. A., ET AL. Ct. App. S. C. Certiorari denied.

No. 08–1180. BATTLE *v.* WEBB. C. A. 11th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 882.

No. 08–1181. PRITZKER *v.* SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 08–1185. DUNPHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 3d 247.

No. 08–1186. BAYSHORE FORD TRUCK SALES, INC., ET AL. *v.* FORD MOTOR CO. C. A. 11th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 943.

No. 08–1187. STEVO *v.* KEITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 546 F. 3d 405.

No. 08–1190. LORDES *v.* HOLDER, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 288 Fed. Appx. 712.

No. 08–1193. AMELIO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 197 N. J. 207, 962 A. 2d 498.

No. 08–1195. OTTERSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 947 A. 2d 1239.

No. 08–1199. KREUTZER *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 166 Cal. App. 4th 306, 82 Cal. Rptr. 3d 644.

No. 08–1239. TUCKER *v.* MONTANA EX REL. BULLOCK, ATTORNEY GENERAL OF MONTANA, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 348 Mont. 372, 211 P. 3d 204.

No. 08–1246. WURZINGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 303.

No. 08–1257. CERNAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 550.

No. 08–1262. BRADDY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 536 F. 3d 1234.

No. 08–1267. GARRETT-WOODBERRY *v.* MISSISSIPPI BOARD OF PHARMACY. C. A. 5th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 289.

No. 08–1270. BURTON *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 67 M. J. 150.

No. 08–1271. BRAQUET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 345.

No. 08–1273. WAGES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 952 A. 2d 952.

No. 08–1277. LANDAVAZO *v.* TORO CO. C. A. 5th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 333.

No. 08–1293. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–7829. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 540 F. 3d 833.

No. 08–7865. GRANT *v.* DEPARTMENT OF HOMELAND SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 3d 102 and 282 Fed. Appx. 948.

No. 08–7970. MARTINEZ-DAVALOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 294.

No. 08–8012. MIERZWA ET UX. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 282 Fed. Appx. 973.

No. 08–8037. RICHARDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 537 F. 3d 951.

No. 08–8064. HUGHES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 530 F. 3d 336.

No. 08–8106. COOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 351.

No. 08–8136. SPELLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 537 F. 3d 743.

No. 08–8243. CORTES-BELTRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 684.

No. 08–8247. CLANTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 538 F. 3d 652.

No. 08–8447. DANDRIDGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 08–8537. GUTIERREZ-QUINTANILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 305.

No. 08–8549. EDWARDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 3d 903.

No. 08–8605. WRINKLES *v.* LEVENHAGEN, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 537 F. 3d 804.

No. 08–8639. GORE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–8664. MELVIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 556 F. 3d 1190.

No. 08–8668. BLANTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 3d 230.

No. 08–8696. HINCKLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 3d 926.

No. 08–8812. ENNIS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 11 N. Y. 3d 403, 900 N. E. 2d 915.

No. 08–9000. ROMAN *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 08–9059. SAEED *v.* HUDSON & KEYSE, LLC, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 08–9067. MCNEELY *v.* MCGINNESS, SHERIFF, SACRAMENTO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 602.

No. 08–9070. KING *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 472.

No. 08–9071. JOHNSON *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 08–9072. ARTIS *v.* CUNNINGHAM, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–9074. BRADLEY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1160, 966 N. E. 2d 614.

No. 08–9077. JACKSON *v.* PALACIOS. C. A. 9th Cir. Certiorari denied.

No. 08–9078. RIGGS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 44 Cal. 4th 248, 187 P. 3d 363.

No. 08–9080. VARGAS *v.* DILLARD'S DEPARTMENT STORE, INC. C. A. 6th Cir. Certiorari denied.

No. 08–9084. SIMMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–9096. PATTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9102. STEPHENS *v.* MILLER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 719.

No. 08–9104. SANCHEZ *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9109. BUTLER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9113. WATKINS *v.* WATKINS. Ct. App. Ky. Certiorari denied.

No. 08–9116. WILLIAMSON *v.* BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 194.

No. 08–9128. THOMAS *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9131. LUCAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–9132. KARNES *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 127 S. W. 3d 184.

No. 08–9133. MASHAK *v.* OAKGROVE ET AL. Ct. App. Minn. Certiorari denied.

No. 08–9139. BRADY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 119 Ohio St. 3d 375, 894 N. E. 2d 671.

No. 08–9141. LONERGAN *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 08–9145. BOYD *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–9152. MISIGARO *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 08–9157. ALLEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–9165. GORDON *v.* WALKER, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 08–9179. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 362 N. C. 511, 668 S. E. 2d 343.

No. 08–9184. LOCKMAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 08–9188. SHOEMAKER *v.* HULICK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9192. LARREA *v.* NEW YORK. Sup. Ct. N. Y., New York County. Certiorari denied.

No. 08–9193. MONTGOMERY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 08–9194. ARIOLA *v.* LACLAIR, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–9196. ABRAMS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 08–9197. FRATICELLI *v.* PIAZZA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Certiorari denied.

No. 08–9198. GREENE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–9200. FELDER *v.* INDIANA DEPARTMENT OF CORRECTIONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–9205. IRBY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1150, 966 N. E. 2d 610.

No. 08–9206. HAMPTON *v.* JINDAL, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 460.

No. 08–9209. TAYLOR ET UX. *v.* MARION COUNTY SUPERIOR COURT NUMBER SEVEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 284 Fed. Appx. 354.

No. 08–9216. WILSON *v.* MURTHA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 303 Fed. Appx. 75.

No. 08–9220. MENA *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9224. SAVOY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–9225. STONE *v.* CHASE, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–9229. BROWN *v.* RIMMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9230. BROWN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 284 Ga. 727, 670 S. E. 2d 400.

No. 08–9236. SAMAD, AKA DUNBAR *v.* ADAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 478.

No. 08–9239. KENDRICK *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 08–9241. BAILEY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 998 So. 2d 545.

No. 08–9242. A. G. N. *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 08–9244. BAUGHMAN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 166 Cal. App. 4th 1316, 83 Cal. Rptr. 3d 570.

No. 08–9248. PORTIS *v.* CARUSO, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9249. PIZANO *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 899 N. E. 2d 758.

No. 08–9250. BROUGHTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9251. ALLEN-PLOWDEN *v.* NATIONAL HEALTH CARE OF SUMTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 76.

No. 08–9253. HESTER *v.* WEST VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 109.

No. 08–9254. GIDDENS *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 256 S. W. 3d 426.

No. 08–9258. JONES *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9260. ELINE *v.* FRANK, DIRECTOR, HAWAII DEPARTMENT OF PUBLIC SAFETY. Sup. Ct. Haw. Certiorari denied.

No. 08–9263. GRAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 379 Ill. App. 3d 1074, 957 N. E. 2d 588.

No. 08–9264. HUNT *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9266. GEORGE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9267. HARRIS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9268. GONZALEZ-LORA *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 314 Fed. Appx. 447.

No. 08–9272. ELINE *v.* COUNCIL ON AMERICAN-IRANIAN RELATIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9274. FREEMAN *v.* MOORE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 285.

No. 08–9278. WALKER *v.* FELKER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 455.

No. 08–9282. CHAVEZ *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 08–9285. KING *v.* RANEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9286. JENKINS *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9292. JONES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 947 A. 2d 826.

No. 08–9293. RAMEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 378 Ill. App. 3d 1123, 955 N. E. 2d 185.

No. 08–9296. CURRY *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9299. REID *v.* MOORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9300. REYES *v.* DEXTER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9314. LANOSA *v.* FRANK, DIRECTOR, HAWAII DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 565.

No. 08–9316. BISHOP *v.* MANN. C. A. 9th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 131.

No. 08–9329. PARKER *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 81.

No. 08–9331. JACOBSEN *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9354. HARRISON *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–9355. CASSIDY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9360. SCROGGINS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9376. DOMBROWSKI *v.* MINGO, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 543 F. 3d 1270.

No. 08–9382. MARTINEZ *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 2d Cir. Certiorari denied.

No. 08–9401. GEARY *v.* GERRY, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 08–9408. GILBERT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 1205, 967 N. E. 2d 494.

No. 08–9410. DAVIS, AKA OLIVER, AKA DALTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 247.

No. 08–9412. SMITH *v.* MCCANN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9415. COLLIER *v.* LOS ANGELES COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 594.

No. 08–9423. KELLEY *v.* HUMBLE INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 641.

No. 08–9425. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 186.

No. 08–9430. SHAHIDEH *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 482 Mich. 1156, 758 N. W. 2d 536.

No. 08–9432. PARNELL *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–9438. HILLARY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 569.

No. 08–9452. LEE *v.* A & W PRITCHARD ENTERPRISES, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9458. CAMPBELL *v.* HOOKSETT SCHOOL DISTRICT ET AL.; and

No. 08–9459. CAMPBELL *v.* HOOKSETT SCHOOL DISTRICT. C. A. 1st Cir. Certiorari denied.

No. 08–9478. STEINER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 987 So. 2d 92.

No. 08–9488. FINFROCK *v.* CRIST, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9491. HUGHES *v.* OLSON, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 08–9494. PEDRAZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 3d 1218.

No. 08–9500. MCCRARY *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 08–9513. LOVALL *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9519. DILLARD *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 08–9529. TURNER *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 08–9530. ALLEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 999 So. 2d 644.

No. 08–9532. OPARAJI *v.* NORTH EAST AUTO-MARINE TERMINAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 297 Fed. Appx. 142.

No. 08–9555. COLEMAN *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–9561. HALL *v.* WILLIAMSON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–9562. HUGHES *v.* PARKER, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 08–9567. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 605.

No. 08–9569. FLYNN *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 809.

No. 08–9570. ENNIS *v.* NEVADA DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 124 Nev. 1465, 238 P. 3d 809.

No. 08–9573. DELATORRE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 08–9574. DANIEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9579. HOWELL *v.* DELAWARE. C. A. 4th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 675.

No. 08–9585. JONES *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9600. DISTASIO *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 08–9609. ISRAEL *v.* SCHNEIDER NATIONAL CARRIERS ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 756 N. W. 2d 263.

No. 08–9629. FAN *v.* ROE ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 08–9631. OLIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 298 Fed. Appx. 986.

No. 08–9637. WHATLEY *v.* TERRY, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 284 Ga. 555, 668 S. E. 2d 651.

No. 08–9644. ESPINOZA *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 08–9673. CROOK *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 301 Fed. Appx. 982.

No. 08–9679. TRAVIS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 334.

No. 08–9706. LAZARO *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 306 Fed. Appx. 592.

No. 08–9707. KENLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 299 Fed. Appx. 184.

No. 08–9708. MARTINEZ-VALDIOSERA *v.* UNITED STATES (Reported below: 307 Fed. Appx. 61); and RODRIGUEZ-VANEGAS *v.* UNITED STATES (316 Fed. Appx. 652). C. A. 9th Cir. Certiorari denied.

No. 08–9710. ARIAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9712. BARBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9713. IRVING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 161.

No. 08–9714. BROWN *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 67 M. J. 147.

No. 08–9715. QUIJADA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 986.

No. 08–9716. SPENCER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 700.

No. 08–9717. SIME *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–9719. ALEGRIA-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 95.

No. 08–9722. CHAPPELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 275.

No. 08–9724. LEVY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 311 Fed. Appx. 533.

No. 08–9732. BECK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 3d 619.

No. 08–9733. BROWN *v.* BAGLEY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9734. CUSANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–9739. CONARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 08–9741. CLARKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 411.

No. 08–9745. BRITTON *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9746. MONTGOMERY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 555 F. 3d 623.

No. 08–9747. PERONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 305 Fed. Appx. 809.

No. 08–9748. MORENO-ESPADA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9752. WOOTEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 663.

No. 08–9753. JIMENEZ VALENCIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9754. PORTILLO-ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 678.

No. 08–9757. TAFT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 256.

No. 08–9759. WIMBLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 553 F. 3d 455.

No. 08–9760. KISSI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 199.

No. 08–9763. RUIZ, AKA ARAIZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 351.

No. 08–9764. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 99.

No. 08–9765. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 746.

No. 08–9767. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 3d 449.

No. 08–9768. ALMENAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 553 F. 3d 27.

No. 08–9769. BROCK-DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 537.

No. 08–9770. ALAMA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9775. EDWARDS, AKA NORTH, AKA ENORTH, AKA DAWSON, AKA MOON, AKA MORGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 340.

No. 08–9780. PARKS *v.* MARBERRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9785. DEPUTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9791. HUGHES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 388.

No. 08–9792. BALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 549.

No. 08–9794. STRATMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9798. PEOPLES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 962 A. 2d 942.

No. 08–9799. DEJEAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 552 F. 3d 1196.

No. 08–9803. SANTOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 519.

No. 08–9809. LOWE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9811. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9813. SALINAS-RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 147.

No. 08–9817. MARQUEZ-ALVARADO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9820. BERTRAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 214.

No. 08–9824. COLON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–9829. HOLLIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 552 F. 3d 1191.

No. 08–9831. HELLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 3d 1108.

No. 08–9833. GRAHAM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 553 F. 3d 6.

No. 08–9837. DAUBERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 995.

No. 08–9842. SANTIAGO-LUGO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9843. DURAN-LUQUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 461.

No. 08–9844. KIM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 324.

No. 08–9847. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 94.

No. 08–9848. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9855. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9856. CRUZ *v.* LAMANNA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 948.

No. 08–9857. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9864. BROWNLEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9870. MATEO, AKA CARLOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9877. KILGORE *v.* DREW, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 645.

No. 08–9878. LESANE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 694.

No. 08–9889. STERLING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 3d 452.

No. 08–9890. STARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9891. SCHOTZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9896. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–9903. COMBS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 08–9904. DADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 193.

No. 08–1032. ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* WILLIAMS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 542 F. 3d 1326.

No. 08–1039. STEINBECK ET AL. *v.* PENGUIN GROUP (USA) INC. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 537 F. 3d 193.

No. 08–1121. RODRIGUEZ *v.* STANDING COMMITTEE ON ATTORNEY DISCIPLINE. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 304 Fed. Appx. 947.

No. 08–9210. OSTERHOFF *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 303 Fed. Appx. 505.

No. 08–9243. BANSAL *v.* MICROSOFT HOTMAIL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 267 Fed. Appx. 184.

Rehearing Denied

No. 07–1315. KNOWLES, WARDEN *v.* MIRZAYANCE, *ante*, p. 111;

No. 08–882. O'DWYER ET AL. *v.* UNITED STATES ET AL., *ante*, p. 1128;

No. 08–883. FAIRLEY *v.* STALDER ET AL., *ante*, p. 1128;

No. 08–936. TAYLOR *v.* NEGLEY PARK HOMEOWNERS ASSOCIATION COUNCIL ET AL., *ante*, p. 1128;

No. 08–1091. BROWN *v.* POTTER, POSTMASTER GENERAL, *ante*, p. 1153;

No. 08–6547. MILLER *v.* UNITED STATES, 555 U. S. 1176;

No. 08–7163. JOHNSON *v.* BELL, WARDEN, *ante*, p. 1154;

No. 08–7531. WILLICH *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 555 U. S. 1179;

No. 08–7647. BRANHAM *v.* CARUSO, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, 555 U. S. 1182;

No. 08–7703. FOREMAN *v.* WEINSTEIN ET AL., 555 U. S. 1184;

No. 08–7818. MILLER *v.* SMITH, WARDEN, 555 U. S. 1188;

No. 08–8092. MINOR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1109;

No. 08–8100. BROWN *v.* GIURBINO, WARDEN, ET AL., *ante*, p. 1109;

No. 08–8178. KIMMIE *v.* WILKERSON ET AL., 555 U. S. 1215;

No. 08–8182. DAVIS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL., *ante*, p. 1133;

No. 08–8213. BOWERS *v.* JONES, *ante*, p. 1133;

No. 08–8283. PERRY *v.* FLORIDA, *ante*, p. 1135;

No. 08–8289. RANALLI *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1135;

No. 08–8291. SINGH *v.* MARSHALL, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, *ante*, p. 1135;

No. 08–8324. SHEARING *v.* GONZALEZ, *ante*, p. 1154;

No. 08–8325. HOSACK *v.* INTERNAL REVENUE SERVICE, 555 U. S. 1216;

No. 08–8482. BATSHEVER *v.* OKIN, *ante*, p. 1168;

No. 08–8490. HOWARD, AKA MILES *v.* UNITED STATES, *ante*, p. 1111;

No. 08–8561. SWANSON *v.* BOY SCOUTS OF AMERICA ET AL., *ante*, p. 1170;

No. 08–8640. JIAYANG HUA *v.* UNIVERSITY OF UTAH ET AL., *ante*, p. 1159;

No. 08–8677. HALL *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL., *ante*, p. 1159; and

No. 08–8688. ELLIOTT *v.* UNITED STATES, *ante*, p. 1139. Petitions for rehearing denied.

No. 08–7243. IN RE EVANS, 555 U. S. 1068. Motion for leave to file petition for rehearing denied.

MAY 19, 2009

Miscellaneous Orders

No. 08A1030. SKILLICORN *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL FACILITY. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied.

No. 08–10442 (08A1022). IN RE SKILLICORN. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 08–1422 (08A1021). MIDDLETON ET AL. *v.* MISSOURI DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Mo. Application of Dennis J. Skillicorn for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 278 S. W. 3d 193.

No. 08–10449 (08A1029). SKILLICORN ET AL. *v.* NIXON, GOVERNOR OF MISSOURI. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

MAY 26, 2009

Certiorari Granted—Vacated and Remanded

No. 07–958. HUNTER, AKA DEMORALES, ET AL. *v.* HYDRICK ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ashcroft* v. *Iqbal*, *ante*, p. 662. Reported below: 500 F. 3d 978.

No. 08–8235. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chambers* v. *United States*, 555 U. S. 122 (2009). Reported below: 287 Fed. Appx. 845.

Certiorari Granted—Remanded

No. 07–827. HASTY *v.* IQBAL; and

No. 07–1150. HAWK SAWYER ET AL. *v.* IQBAL ET AL. C. A. 2d Cir. The Court reversed the judgment below in *Ashcroft* v. *Iqbal*, *ante*, p. 662. Therefore, certiorari granted, and cases remanded for further proceedings. Reported below: 490 F. 3d 143.

Certiorari Dismissed

No. 08–9403. HAFED *v.* STATE OF ISRAEL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–9685. VEALE ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 08–10015. IN RE KIM;

No. 08–10068. IN RE MCCORMICK; and

No. 08–10081. IN RE SEEBOTH. Petitions for writs of habeas corpus denied.

No. 08–1192. IN RE JOHNSON; and

No. 08–9437. IN RE BEVILACQUA-BOLLADA. Petitions for writs of mandamus denied.

No. 08–1170. IN RE WHITEFORD ET AL. Petition for writ of prohibition denied.

Certiorari Granted

No. 08–905. MERCK & CO., INC., ET AL. *v.* REYNOLDS ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 543 F. 3d 150.

Certiorari Denied

No. 08–801. MOJICA ET VIR, LEGAL REPRESENTATIVES OF ACEVEDO *v.* SIBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 287 Fed. Appx. 103.

No. 08–866. NEVADA *v.* HARTE. Sup. Ct. Nev. Certiorari denied. Reported below: 124 Nev. 969, 194 P. 3d 1263.

No. 08–904. HENSLEY ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 3d 1052.

No. 08–961. MCKINNEY ET AL., JOINTLY AND SEVERALLY *v.* PARSONS. C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 3d 492.

No. 08–1010. DAIMLERCHRYSLER CORP. *v.* FLAX ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 272 S. W. 3d 521.

No. 08–1078. EAST FIRST STREET, L. L. C., ET AL. *v.* BOARD OF ADJUSTMENTS ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 986 So. 2d 257.

No. 08–1093. TU MY TONG *v.* WILLIAM H. BROWNSTEIN & ASSOCIATES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–1164. HOUSE OF REALTY, INC. *v.* MIDWEST CITY, OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 198 P. 3d 886.

No. 08–1166. MADDEN *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 08–1177. HAYES LEMMERZ INTERNATIONAL, INC., ET AL. *v.* LACKS INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 300 Fed. Appx. 904.

No. 08–1178. REID, PERSONAL REPRESENTATIVE OF THE ESTATE OF MERLINO, DECEASED, ET AL. *v.* NEW HAMPSHIRE INDEMNITY CO. C. A. 11th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 459.

No. 08–1182. WILMINGTON HOSPITALITY, LLC *v.* NEW CASTLE COUNTY, DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 963 A. 2d 738.

No. 08–1208. CALIFORNIA ET AL. *v.* SAN PASQUAL BAND OF MISSION INDIANS. C. A. 9th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 880.

No. 08–1218. GAGNON, DBA MISTER COMPUTER *v.* ASSET MARKETING SYSTEMS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 3d 748.

No. 08–1241. MCLEAN *v.* MCGINNIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 3d 613.

No. 08–1248. SNEATHEN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 998 So. 2d 624.

No. 08–7997. MAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 535 F. 3d 912.

No. 08–8131. PIERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 544 F. 3d 933.

No. 08–8487. GAREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 546 F. 3d 1359.

No. 08–8823. PAYNE *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 539 F. 3d 1297.

No. 08–8857. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 599.

No. 08–8864. KENNEDY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 598 Pa. 621, 959 A. 2d 916.

No. 08–8944. SAUNDERS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 10 So. 3d 53.

No. 08–9298. RILEY *v.* CARROLL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–9304. STOREY *v.* KNOX COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9311. LILLARD *v.* SERVICE SOLUTIONS CORP. ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9318. WHITE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–9320. TONES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9321. WILSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 385 Ill. App. 3d 1133, 970 N. E. 2d 130.

No. 08–9324. CHRISTY *v.* BRADSHAW, SHERIFF, PALM BEACH COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 658.

No. 08–9325. CARTER *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9326. DIXIE *v.* BOWEN CENTER ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–9327. CLOUD *v.* BECKSTROM, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9336. EDELBACHER *v.* CALDERON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9343. BRYAN *v.* BOSTICK, CLERK, CIRCUIT COURT OF SOUTH CAROLINA, JASPER COUNTY. Sup. Ct. S. C. Certiorari denied.

No. 08–9359. MUNIZ *v.* JANECKA, WARDEN. Dist. Ct. N. M., Valencia County. Certiorari denied.

No. 08–9369. WARREN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–9370. TAYLOR *v.* REYNOLDS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 359.

No. 08–9371. WALKER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 08–9372. SMITH *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 08–9373. RICHARDSON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9374. RAMOS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 08–9377. DUNKLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–9383. KIMBLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 08–9387. ROUSH *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 754.

No. 08–9388. K. W. *v.* HUDSON COUNTY DEPARTMENT OF HUMAN SERVICES. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–9394. CARTER *v.* LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–9395. PEREZ *v.* GRIFFIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 72.

No. 08–9398. JOHNSON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9400. HUGHES *v.* HAVILAND, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9405. HIPPLER *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 08–9406. FRANKS *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9413. SHMELEV *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 08–9417. FRANKLIN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9418. HALL *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 848.

No. 08–9419. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–9421. FRYER *v.* CURRY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9426. ORSELLO *v.* GAFFNEY ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–9447. HERRINGTON *v.* FRAZIER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–9451. RAISER *v.* BRIGHAM YOUNG UNIVERSITY. C. A. 10th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 750.

No. 08–9463. PEOPLES *v.* BRUNSMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9518. PIMENTAL *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 305 Fed. Appx. 672.

No. 08–9522. DAT HUU VU *v.* KRAMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9541. VILLANUEVA *v.* SALAZAR, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9591. MONTANEZ *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9608. FIELDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 774.

No. 08–9611. LAWSON *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9618. BJARKO *v.* SCHUETZLE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 08–9621. MACKENZIE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 3d 929, 865 N. Y. S. 2d 571.

No. 08–9636. WILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9646. ROBERTSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 224.

No. 08–9648. MIDDLETON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9650. MUHAMMAD *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–9658. STEWARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 1408. C. A. 11th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 527.

No. 08–9660. WAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9662. HARRIS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 08–9675. DAVILA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 805.

No. 08–9688. JONES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 08–9709. AGUILERA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 08–9743. PONCE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 08–9827. EVANS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 968 A. 2d 491.

No. 08–9832. HOWELL *v.* DELAWARE. C. A. 3d Cir. Certiorari denied.

No. 08–9836. ANDERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 545 F. 3d 1072.

No. 08–9850. LOONEY ET UX. *v.* CAMPBELL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9865. BRUNSTING *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 08–9880. RICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 343.

No. 08–9885. TURNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 553 F. 3d 1337.

No. 08–9898. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 306 Fed. Appx. 719.

No. 08–9905. JAMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 307 Fed. Appx. 503.

No. 08–9906. KLEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 297 Fed. Appx. 19.

No. 08–9909. ALARCON *v.* CHASE HOME FINANCE LLC. C. A. 5th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 772.

No. 08–9913. MCRAE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 184.

No. 08–9914. WYATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9915. MASTERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 750.

No. 08–9916. LAROCCA *v.* FISHER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 168.

No. 08–9918. AVILA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–9919. BASHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 237.

No. 08–9920. BORDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9921. BUFORD *v.* MARBERRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9923. DADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–9925. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 240.

No. 08–9930. EVANS *v.* MUELLER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied.

No. 08–9932. LATHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9934. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 851.

No. 08–9935. MANESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 914.

No. 08–9940. SIMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 195.

No. 08–9941. SANCHEZ-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 829.

No. 08–9945. VARELA-ZUBIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 843.

No. 08–9954. BROYLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 99.

No. 08–9959. DUNIGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 3d 501.

No. 08–9961. DOWNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 310.

No. 08–9963. VINAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 307 Fed. Appx. 554.

No. 08–9965. PHILLIPS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 946 A. 2d 103.

No. 08–9967. ARMSTRONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9973. GOODMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 811.

No. 08–9975. HERNANDEZ-CAUDILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 543.

No. 08–9978. FABEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 932.

No. 08–9979. RESTREPO-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 487.

No. 08–9983. HERNANDEZ-FUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 799.

No. 08–9985. GOMEZ-CALDERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 885.

No. 08–9986. HENRIQUEZ-CASTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 85.

No. 08–9989. FRAMPTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 307 Fed. Appx. 535.

No. 08–9993. RICHARDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 3d 641.

No. 08–9997. BATTIEST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 3d 1132.

No. 08–10002. SPARKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 713.

No. 08–10003. TUCKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 3d 1073.

No. 08–10005. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 855.

No. 08–10008. NEWMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10011. LOUDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10013. Louis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 559 F. 3d 1220.

No. 08–10014. Kiet Tuong Lieu *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 586.

No. 08–10020. Turner *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 08–10022. Ward *v.* Stansberry, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 300.

No. 08–10026. Easley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 993.

No. 08–10027. Driggers *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 559 F. 3d 1021 and 319 Fed. Appx. 665.

No. 08–10031. Jones *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 687.

No. 08–10033. Rhodes *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 08–10042. De Pena *v.* United States. C. A. 1st Cir. Certiorari denied.

Rehearing Denied

No. 08–7626. Hoffman *v.* Folino, Superintendent, State Correctional Institution at Greene, et al., 555 U. S. 1182;

No. 08–7995. Maxwell *v.* Smith, *ante*, p. 1107;

No. 08–8047. Threadgill *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *ante*, p. 1108;

No. 08–8183. Ervin *v.* Purkett, Superintendent, Eastern Reception, Diagnostic and Correctional Center, *ante*, p. 1133;

No. 08–8219. Lattimore *v.* Westchester County Office of the Medical Examiner et al., *ante*, p. 1133;

No. 08–8299. Ebeh *v.* St. Paul Travelers et al., *ante*, p. 1135;

No. 08–8367. Akinwamide *v.* Transportation Insurance Co. et al., *ante*, p. 1155;

No. 08–8404. Banks-Bennett *v.* O'Brien, *ante*, p. 1137;

No. 08–8411. SPEARS *v.* FORNISS, WARDEN, ET AL., *ante*, p. 1156;

No. 08–8418. TIFFER *v.* WORKER'S COMPENSATION ET AL., *ante*, p. 1157;

No. 08–8502. PAYNE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1137;

No. 08–8533. EL BEY *v.* SOUTH CAROLINA, *ante*, p. 1169;

No. 08–8657. SLOVINEC *v.* AMERICAN UNIVERSITY, *ante*, p. 1171; and

No. 08–8777. DEPACK *v.* UNITED STATES, *ante*, p. 1142. Petitions for rehearing denied.

JUNE 1, 2009

Certiorari Granted—Reversed and Remanded. (See No. 08–1034, *ante*, p. 838.)

Certiorari Granted—Vacated and Remanded

No. 07–9519. KOEHL *v.* MIRZA ET AL. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Haywood* v. *Drown*, *ante*, p. 729. Reported below: 9 N. Y. 3d 985, 878 N. E. 2d 603.

Certiorari Dismissed

No. 08–9634. SPURLOCK *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 308 Fed. Appx. 669.

Miscellaneous Orders

No. 08–1191. MORRISON ET AL. *v.* NATIONAL AUSTRALIA BANK LTD. ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 08–10185. IN RE CARMONY;

No. 08–10236. IN RE DIEHL; and

No. 08–10260. IN RE O'NEAL. Petitions for writs of habeas corpus denied.

No. 08–9835. IN RE LEONARD; and

No. 08–10078. IN RE STONIER. Petitions for writs of mandamus denied.

No. 08–1230. IN RE KILCULLEN. Petition for writ of mandamus and/or prohibition denied.

No. 08–9547. IN RE MINNFEE; and
No. 08–9548. IN RE MINNFEE. Motions of petitioner for leave to proceed *in forma pauperis* denied, and petitions for writs of prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 08–964. BILSKI ET AL. *v.* DOLL, ACTING UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND ACTING DIRECTOR, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari granted. Reported below: 545 F. 3d 943.

Certiorari Denied

No. 08–720. CALLAHAN *v.* FERMON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 526 F. 3d 1040.

No. 08–805. SSC ODIN OPERATING CO., LLC, DBA ODIN HEALTHCARE CENTER *v.* CARTER, SPECIAL ADMINISTRATOR OF THE ESTATE OF GOTT, DECEASED. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 717, 885 N. E. 2d 1204.

No. 08–853. ZESSAR *v.* KEITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 536 F. 3d 788.

No. 08–1068. GAGLIANO *v.* RELIANCE STANDARD LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 547 F. 3d 230.

No. 08–1081. CAVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 3d 180.

No. 08–1084. TAYLOR *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 08–1085. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY *v.* COOPER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 548 F. 3d 296.

No. 08–1197. SMACK APPAREL CO. ET AL. *v.* BOARD OF SUPERVISORS OF THE LOUISIANA STATE UNIVERSITY AND AGRICUL-

TURAL AND MECHANICAL COLLEGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 3d 465.

No. 08–1204. GIMBEL *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 123.

No. 08–1217. KEATING *v.* ABBOTT ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 759 N. W. 2d 131.

No. 08–1219. HORTON *v.* COMMISSION ON PROFESSIONAL COMPETENCE ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 08–1250. QUIROZ ARRATIA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 08–1253. VANKESTEREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 3d 286.

No. 08–1261. NINESTAR TECHNOLOGY CO., LTD., ET AL. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 309 Fed. Appx. 388.

No. 08–1265. DEGENES *v.* MURPHY, UNITED STATES CONGRESSMAN. C. A. 3d Cir. Certiorari denied. Reported below: 289 Fed. Appx. 558.

No. 08–1272. ALTOMARE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 300 Fed. Appx. 70.

No. 08–1290. WILLIAMS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 557 F. 3d 1287.

No. 08–1294. ASTER *v.* ASTER. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 08–1324. AWAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 3d 930.

No. 08–1331. HYNES *v.* SONIDO, INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 50 App. Div. 3d 314, 855 N. Y. S. 2d 83.

No. 08–1334. TURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 551 F. 3d 657.

No. 08–1338. McNeill *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 285 Fed. Appx. 975.

No. 08–1347. Kramer et ux. *v.* Kubicka et ux. Super. Ct. Pa. Certiorari denied. Reported below: 953 A. 2d 612.

No. 08–5920. Goodgion *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 403.

No. 08–6756. Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 202.

No. 08–8118. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 685.

No. 08–8179. Bell *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 461.

No. 08–8358. Green *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 532 F. 3d 538.

No. 08–8933. Henson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 550 F. 3d 739.

No. 08–8957. Mashburn *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 7 So. 3d 453.

No. 08–8970. Amouzou *v.* Holder, Attorney General. C. A. 4th Cir. Certiorari denied.

No. 08–8984. Dunn *v.* Pliler, Warden. C. A. 9th Cir. Certiorari denied.

No. 08–9441. Harman *v.* Beebe, Governor of Arkansas, et al. C. A. 8th Cir. Certiorari denied.

No. 08–9444. Flood *v.* Davis, Warden. C. A. 6th Cir. Certiorari denied.

No. 08–9448. McConico *v.* Cooke, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 08–9449. Staley *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 284 Ga. 873, 672 S. E. 2d 615.

No. 08–9461. Gonzales *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 08–9475. IGLESIAS *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9479. CO QUY DUONG *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9482. CEASER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 379 Ill. App. 3d 1073, 957 N. E. 2d 587.

No. 08–9486. FOULIARD *v.* TOWN OF BROOKFIELD, WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 314 Wis. 2d 507, 758 N. W. 2d 224.

No. 08–9487. GRAY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9489. MATZ *v.* THURMER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9495. PAGE *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 08–9499. RAZVI *v.* CITIBANK SOUTH DAKOTA, N. A., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–9502. RAY *v.* PARKER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 274.

No. 08–9504. HENDERSON *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9510. BOYKINS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 08–9511. BURNHAM *v.* MILLS, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 08–9524. ZACHARIE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9534. GUERRERO *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 08–9537. HUSKEY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–9539. WANG *v.* STATE UNIVERSITY OF NEW YORK HEALTH SCIENCES CENTER AT STONY BROOK ET AL.; and WANG *v.* UNITED STATES MEDICAL LICENSE EXAMINATION SECRETARIAT. C. A. 2d Cir. Certiorari denied.

No. 08–9540. WALKER *v.* BANKS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–9544. SIMPSON *v.* GENESEE COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9545. RAISER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. C. A. 10th Cir. Certiorari denied. Reported below: 293 Fed. Appx. 619.

No. 08–9551. DAVIS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 192.

No. 08–9552. DRAYTON *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 632.

No. 08–9553. DAVENPORT *v.* OREGON DRIVER AND MOTOR VEHICLE SERVICES. Ct. App. Ore. Certiorari denied. Reported below: 224 Ore. App. 477, 200 P. 3d 180.

No. 08–9554. DODD *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 894 N. E. 2d 1111.

No. 08–9558. WRIGHT *v.* HAWS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9563. MERCER *v.* CHERVENAK ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 181 Md. App. 736, 743.

No. 08–9565. VAN NGUYEN *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 08–9577. SANDOVAL MENDOZA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–9625. CUATETE-HERNANDEZ, AKA CUATETE *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 08–9651. JURADO *v.* RYAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 78.

No. 08–9659. TORRES *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 08–9701. DEFOY *v.* BRITTON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 301 Fed. Appx. 177.

No. 08–9711. BEST *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9720. WALTER *v.* CULLY, SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–9721. NEWSOME *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 559.

No. 08–9736. SNIPES *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 08–9738. CRAWFORD *v.* BAXTER HEALTHCARE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 77.

No. 08–9758. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 126.

No. 08–9761. LAWVER *v.* NEBRASKA DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–9771. BOUMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9777. TERRY *v.* CITY OF PITTSBURGH, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 297 Fed. Appx. 82.

No. 08–9778. COX *v.* GILSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–9804. TIMMON *v.* WOOD ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9812. SOTO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9818. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 606.

No. 08–9826. TAYLOR *v.* REYNOLDS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 196.

No. 08–9830. HENDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9839. STARKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 3d 839.

No. 08–9851. LEVELS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–9853. LIDDELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 543 F. 3d 877.

No. 08–9871. COLES *v.* CIRCUIT COURT OF AUGUSTA COUNTY, VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–9894. AYRES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–9976. ROLANDIS G. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 232 Ill. 2d 13, 902 N. E. 2d 600.

No. 08–9981. SMALL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 307 Fed. Appx. 703.

No. 08–9984. GAGNIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–9996. BUIE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 384 Ill. App. 3d 1111, 973 N. E. 2d 1098.

No. 08–10007. ORLANDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 553 F. 3d 1235.

No. 08–10017. MACK *v.* ANGLIN, WARDEN, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 08–10029. RIOS-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 488.

No. 08–10030. SABATINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10032. Ross *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 160.

No. 08–10037. Barlow *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 307 Fed. Appx. 678.

No. 08–10040. Spezzia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 853.

No. 08–10045. Howard *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 319 Fed. Appx. 165.

No. 08–10047. Humphries *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 892.

No. 08–10049. Offord *v.* Wengler, Warden. C. A. 9th Cir. Certiorari denied.

No. 08–10052. Campbell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 599.

No. 08–10053. Cesal *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 08–10056. White *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 910.

No. 08–10063. Welsh *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 222.

No. 08–10064. Tucker *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 518.

No. 08–10067. Navarro *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 312 Fed. Appx. 378.

No. 08–10070. Duncan *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 308 Fed. Appx. 601.

No. 08–10073. Rhodes *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 08–10086. Cook *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 792.

No. 08–10088. Marceau *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 554 F. 3d 24.

No. 08–10090. REED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 598.

No. 08–10092. DE LA MORA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 813.

No. 08–10096. WATTLETON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10102. VAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 313 Fed. Appx. 559.

No. 08–10104. LEWIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 554 F. 3d 208.

No. 08–10108. COLEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 9.

No. 08–10109. DOWAI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 959.

No. 08–10113. MCHENRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10115. BUTLER *v.* SANDERS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 08–10123. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 58.

No. 08–10125. MYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 3d 328.

No. 08–10127. RODDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10128. ARMSTEAD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 11.

No. 08–10129. BARNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 321 Fed. Appx. 293.

No. 08–10131. BERAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10132. CAMACHO-MALDONADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 235.

No. 08–10133. PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 242.

No. 08–10134. PATTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 206.

No. 08–10135. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 239.

No. 08–10136. WILKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10137. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 220.

No. 08–10142. MOODY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 3d 754.

No. 08–10143. KELLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 3d 171.

No. 08–10146. MAUSKAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 3d 219.

No. 08–10151. MARTINEZ-MENERA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 3d 1158.

No. 08–10152. MARCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10156. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 942.

No. 08–10157. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 794.

No. 08–10160. WILLIAMS *v.* CRAIG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 153.

No. 08–10161. HAWKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 3d 1143.

No. 08–10162. GRINNAGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 334.

No. 08–10164. HIDALGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 309 Fed. Appx. 618.

No. 08–10170. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10171. LEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 3d 678.

No. 08–10172. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 480.

No. 08–10174. BROWNLEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 23.

No. 08–10178. PITRE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 294 Fed. Appx. 690.

No. 08–10180. VIGILLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 919.

No. 08–10188. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10191. LAVERDE-GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–1209. PELLA CORP. ET AL. *v.* ANDERSEN CORP. C. A. Fed. Cir. Motion of respondent for leave to file a brief in opposition under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 300 Fed. Appx. 893.

No. 08–9496. PRATER *v.* RUBITSCHUN ET AL. C. A. 6th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 08–997. DELON *v.* NEWS & OBSERVER PUBLISHING COMPANY OF RALEIGH, NORTH CAROLINA, *ante*, p. 1166;

No. 08–8382. CORDERO *v.* DELANO ET UX., *ante*, p. 1156;

No. 08–8697. MAKAS *v.* MIRAGLIA ET AL., *ante*, p. 1163;

No. 08–8762. JUDD *v.* UNITED STATES, *ante*, p. 1142;

No. 08–8913. JAMES *v.* UNITED STATES ET AL., *ante*, p. 1161;

No. 08–8971. BUI *v.* BERHARDSON ET AL., *ante*, p. 1193;

No. 08–9021. DOE *v.* UNITED STATES, *ante*, p. 1172; and

No. 08–9065. WOODBERRY *v.* UNITED STATES, *ante*, p. 1173. Petitions for rehearing denied.

No. 08–8471. TILLMAN *v.* NEW LINE CINEMA ET AL., *ante*, p. 1176. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 07–5730. ELLISON *v.* ROGERS, ADMINISTRATOR, ADULT DIAGNOSTIC AND TREATMENT CENTER, ET AL., 552 U. S. 957; and No. 08–8360. PULLEN-WALKER *v.* ROOSEVELT UNIVERSITY ET AL., *ante*, p. 1155. Motions for leave to file petitions for rehearing denied.

JUNE 2, 2009

Certiorari Denied

No. 08–10645 (08A1069). WILSON *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 333 Fed. Appx. 28.

No. 08–10647 (08A1071). WILSON *v.* OHIO. Ct. App. Ohio, Lorain County. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 2009-Ohio-2347.

JUNE 8, 2009

Certiorari Granted—Vacated and Remanded

No. 08–983. SERNA-GUERRA *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chambers* v. *United States*, 555 U. S. 122 (2009). Reported below: 285 Fed. Appx. 110.

No. 08–8197. SMITH *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005). Reported below: 321 Fed. Appx. 229.

Certiorari Dismissed

No. 08–9638. BELL-BOSTON *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992)

(per curiam). JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 321 Fed. Appx. 6.

No. 08–9667. GRIFFIN *v.* GASH. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 317 Fed. Appx. 782.

No. 08–9671. AVERY *v.* WRENN, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. JUSTICE SOUTER took no part in the consideration or decision of this motion and this petition.

No. 08–9772. BAKER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 7 So. 3d 1097.

Miscellaneous Orders

No. 08M80. LOCKETT *v.* ADAMS, WARDEN; and

No. 08M82. MCMILLIAN *v.* CAROCHI, WARDEN, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 08M81. BELL *v.* PENNSYLVANIA ET AL. Motion to direct the Clerk to file an original action denied.

No. 08–1120. AMERICAN HOME PRODUCTS CORP., DBA WYETH, ET AL. *v.* FERRARI ET AL. Sup. Ct. Ga. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 08–10420. IN RE JENKINS. Petition for writ of habeas corpus denied.

No. 08–10306. IN RE FARLEY. 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. 08–9897. IN RE BRUNSILIUS. Petition for writ of mandamus denied.

No. 08–9603. IN RE HADDAD. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 08–9664. IN RE MCCREARY. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 08–1107. HERTZ CORP. *v.* FRIEND ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 297 Fed. Appx. 690.

No. 08–1119. MILAVETZ, GALLOP & MILAVETZ, P. A., ET AL. *v.* UNITED STATES; and

No. 08–1225. UNITED STATES *v.* MILAVETZ, GALLOP & MILAVETZ, P. A., ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 541 F. 3d 785.

Certiorari Denied

No. 08–846. NAVAJO NATION ET AL. *v.* UNITED STATES FOREST SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 3d 1058.

No. 08–894. SNYDER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 399.

No. 08–945. EMPRESS CASINO JOLIET CORP. ET AL. *v.* GIANNOULIAS, ILLINOIS STATE TREASURER, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 231 Ill. 2d 62, 896 N. E. 2d 277.

No. 08–968. HOUSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 3d 743.

No. 08–981. YUSUF ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 536 F. 3d 178.

No. 08–1098. MADSEN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* JPMORGAN CHASE BANK, N. A. Sup. Ct. Utah. Certiorari denied. Reported below: 199 P. 3d 898.

No. 08–1102. MCCLUNG ET UX. *v.* CITY OF SUMNER, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 3d 1219.

No. 08–1104. TANKERSLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 537 F. 3d 1100.

No. 08–1220. HENDERSON *v.* ROBERTSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 642.

No. 08–1221. PERRY ET AL. *v.* MIRFASIHI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 551 F. 3d 682.

No. 08–1231. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* BILLUPS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 554 F. 3d 1340.

No. 08–1240. ARIZONA EX REL. THOMAS, MARICOPA COUNTY ATTORNEY *v.* ARELLANO, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. Ct. App. Ariz. Certiorari denied.

No. 08–1247. STAR NORTHWEST, INC., DBA KENMORE LANES ET AL. *v.* CITY OF KENMORE, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 280 Fed. Appx. 654 and 308 Fed. Appx. 62.

No. 08–1252. MITRANO *v.* SUPREME COURT OF NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 08–1256. CHEESE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 827.

No. 08–1260. KOZLOWSKI ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 11 N. Y. 3d 223, 898 N. E. 2d 891.

No. 08–1274. SODOMSKY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 939 A. 2d 363.

No. 08–1305. PEQUENO *v.* SCHMIDT. C. A. 5th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 372.

No. 08–1326. FERNANDEZ *v.* HAYDEN, DIRECTOR, NATIONAL SECURITY AGENCY. C. A. 4th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 725.

No. 08–1333. MCRAE *v.* EVANS. C. A. 4th Cir. Certiorari denied.

No. 08–1336. LINVILLE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 755 N. W. 2d 314.

No. 08–1357. VICKNAIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–1364. YUNQUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–1367. REYEROS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 537 F. 3d 270.

No. 08–1380. JOHNSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 322 Fed. Appx. 660.

No. 08–1381. MARQUEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 3d 303.

No. 08–8142. DIX *v.* UNITED PARCEL SERVICE, INC. C. A. 11th Cir. Certiorari denied. Reported below: 279 Fed. Appx. 816.

No. 08–8521. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 399.

No. 08–8798. SATTAZAHN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 597 Pa. 648, 952 A. 2d 640.

No. 08–8890. VERA-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 398.

No. 08–8988. ODEH *v.* UNITED STATES; and
No. 08–9998. AL-'OWHALI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 3d 177.

No. 08–8993. MARTIN *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 08–9008. DURONIO *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 293 Fed. Appx. 155.

No. 08–9061. PILLADO-CHAPARRO, AKA MARTINEZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 3d 202.

No. 08–9159. HOWARD *v.* INOVA HEALTH CARE SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 166.

No. 08–9571. ELLISON *v.* BLACK ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9572. CHRISTY *v.* MILGRAM, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–9581. FEROLA *v.* RUSHTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 174.

No. 08–9584. LEE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 50 App. Div. 3d 1603, 856 N. Y. S. 2d 421.

No. 08–9586. ZAVALA *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 08–9587. YODER *v.* MCWILLIAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9590. MILES *v.* SCUTT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9594. WRIGHT *v.* CATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 235.

No. 08–9597. BRANAM *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 08–9598. BENJAMIN *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 240.

No. 08–9605. MARTIN *v.* ALAMEDA COUNTY BOARD OF SUPERVISORS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 646.

No. 08–9612. RUVALCABA *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 08–9619. ADAMS *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9622. HIEBER *v.* STEARNS. Ct. App. Mich. Certiorari denied.

No. 08–9623. DAVIS *v.* CITY OF SAN DIEGO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 691.

No. 08–9626. COLEMAN-BEY *v.* BOUCHARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 420.

No. 08–9632. GROSS ET AL. *v.* LINCOLN TOWNSHIP, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9641. WOOTEN *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 3d 1019.

No. 08–9643. DIXON *v.* GRUBBS, JUDGE, SUPERIOR COURT OF GEORGIA, COBB JUDICIAL CIRCUIT. Sup. Ct. Ga. Certiorari denied.

No. 08–9652. AUSTIN *v.* HARDIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 84.

No. 08–9655. SCANTLAND *v.* CLINTON TOWNSHIP POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9656. REYES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 165 Cal. App. 4th 426, 80 Cal. Rptr. 3d 619.

No. 08–9665. HACKETT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 598 Pa. 350, 956 A. 2d 978.

No. 08–9666. LIDDELL *v.* BOCK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9672. CLARK *v.* KELLY, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 08–9674. COOK *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9677. DAVIS *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9686. BIGGINS *v.* MINNER ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–9689. JOHNSON *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 3d 296.

No. 08–9690. JAMES *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–9697. DAVIS *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 08–9700. CASWELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 56 App. Div. 3d 1300, 867 N. Y. S. 2d 638.

No. 08–9702. D. H. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 120 Ohio St. 3d 540, 901 N. E. 2d 209.

No. 08–9755. MCMANUS *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 298 Fed. Appx. 60.

No. 08–9782. OTTO *v.* SCHUETZLE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 08–9793. BARRAQUIAS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 301 Fed. Appx. 947.

No. 08–9802. VISINAIZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 384 Ill. App. 3d 1091, 973 N. E. 2d 1089.

No. 08–9806. CAMBRIDGE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9816. COTTRELL *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 942.

No. 08–9819. WATSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 3 So. 3d 324.

No. 08–9874. CASTLE *v.* HARRINGTON, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9879. SIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 372.

No. 08–9881. SMITH *v.* DUFFEY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 08–9895. AUSTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 700.

No. 08–9901. CARR *v.* REED, SECRETARY OF STATE OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 588.

No. 08–9955. DEERING BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10018. LOWE *v.* KAPLAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 993.

No. 08–10050. DOYLE *v.* CELLA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 644.

No. 08–10055. KARNOFEL *v.* DWYCO XEROX OFFICE CENTER. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 08–10072. MCHENRY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 11 So. 3d 950.

No. 08–10077. WILLIAMS *v.* BIDEN, ATTORNEY GENERAL OF DELAWARE. C. A. 3d Cir. Certiorari denied.

No. 08–10155. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 310 Fed. Appx. 442.

No. 08–10177. MOORE *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–10179. MERRYFIELD *v.* TURNER ET AL. Ct. App. Kan. Certiorari denied. Reported below: 40 Kan. App. 2d xv, 191 P. 3d 1137.

No. 08–10182. DAWSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 149.

No. 08–10183. ELZAHABI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 F. 3d 879.

No. 08–10186. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 314.

No. 08–10187. FARIAS-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 815.

No. 08–10197. NICHOLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 105.

No. 08–10198. COUNCIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 532.

No. 08–10199. JOCHUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 679.

No. 08–10203. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10204. JAMES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 08–10206. BAGLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–10212. DICKERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 870.

No. 08–10220. VAN DE CRUIZE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10222. SEPULVEDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10223. ROGERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 556 F. 3d 1130.

No. 08–10227. NESTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 821.

No. 08–10228. CHENG WAI LING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10232. MORETA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 310 Fed. Appx. 534.

No. 08–10238. DAVID *v.* SCHULTZ, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 305 Fed. Appx. 854.

No. 08–10240. ENGLISH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10241. DAVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10242. CEBALLOS-SILVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 812.

No. 08–10243. MARSH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 561 F. 3d 81.

No. 08–10249. BUTERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 27.

No. 08–10250. BARRAGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 77.

No. 08–10251. GARCIA-RENTERIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 552.

No. 08–10254. GREGORY ET UX. *v.* UNITED STATES BANKRUPTCY ADMINISTRATOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 216.

No. 08–824. PIETRANGELO *v.* GATES, SECRETARY OF DEFENSE, ET AL. C. A. 1st Cir. Motion of petitioner to strike brief of Cook respondents denied. Motion of petitioner to seal attachment A to motion to strike granted. Motion of Cook respondents to withdraw brief filed January 26, 2009, granted. Certiorari denied. Reported below: 528 F. 3d 42.

No. 08–1173. AMALGAMATED TRANSIT UNION LOCAL NO. 1338 *v.* DALLAS AREA RAPID TRANSIT. Sup. Ct. Tex. Motion of Amalgamated Transit Union for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 273 S. W. 3d 659.

No. 08–1236. GIMBEL *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 308 Fed. Appx. 124.

No. 08–1237. SOUTH CAROLINA *v.* COUNCIL. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 380 S. C. 159, 670 S. E. 2d 356.

No. 08–1243. MICHIGAN *v.* SWAFFORD. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 483 Mich. 1, 762 N. W. 2d 902.

No. 08–9860. VAN BUREN *v.* WALKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 08–704. BOLTON *v.* CITY OF DALLAS, TEXAS, *ante*, p. 1152;

No. 08–977. GREEN *v.* DEPARTMENT OF LABOR ET AL., *ante*, p. 1153;

No. 08–1005. ADAMS *v.* GOLDSMITH, *ante*, p. 1182;

No. 08–1007. WIDTFELDT *v.* VILSACK, SECRETARY OF AGRICULTURE, ET AL., *ante*, p. 1182;

No. 08–8157. EDWARDS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1132;

No. 08–8329. CARBONELL *v.* ANDY, *ante*, p. 1154;

No. 08–8415. SANCHEZ *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., *ante*, p. 1157;

No. 08–8669. BATES *v.* BURATTI ET AL., *ante*, p. 1188;

No. 08–8778. MOORE *v.* GREYHOUND LINES CORP., *ante*, p. 1190;

No. 08–8781. SUBLET *v.* UNITED STATES, *ante*, p. 1142;

No. 08–8809. ENNIS *v.* UNITED STATES, *ante*, p. 1143;

No. 08–8869. COOPER *v.* GEORGIA, *ante*, p. 1192;

No. 08–9409. DUNLEA *v.* UNITED STATES, *ante*, p. 1202; and

No. 08–9536. PARKER *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 1216. Petitions for rehearing denied.

No. 08–7630. HOPKINS *v.* WHITE, SECRETARY OF STATE OF ILLINOIS, ET AL., 555 U. S. 1182. Motion for leave to file petition for rehearing denied.

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 March 26, 2009, 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. 1292. 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, and 550 U. S. 983.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 26, 2009

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

MARCH 26, 2009

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 22, 25, 26, 27, 28.1, 30, 31, 39, and 41, and new Rule 12.1.

[See *infra*, pp. 1295–1305.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2009, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of right—when taken.

(*a*) *Appeal in a civil case.*

. . . . .

(*4*) *Effect of a motion on a notice of appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of

appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(*5*) *Motion for extension of time.*

. . . . .

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(*6*) *Reopening the time to file an appeal.*—The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

. . . . .

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

. . . . .

(*b*) *Appeal in a criminal case.*

(*1*) *Time for filing a notice of appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

. . . . .

(*3*) *Effect of a motion on a notice of appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14

days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

. . . . .

Rule 5. Appeal by permission.

. . . . .

(*b*) *Contents of the petition; answer or cross-petition; oral argument.*

. . . . .

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

. . . . .

(*d*) *Grant of permission; fees; cost bond; filing the record.*

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

. . . . .

Rule 6. Appeal in a bankruptcy case from a final judgment, order, or decree of a district court or bankruptcy appellate panel.

. . . . .

(*b*) *Appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.*

. . . . .

(*2*) *Additional rules.*—In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

. . . . .

(*B*) *The record on appeal.*

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

. . . . .

Rule 10. The record on appeal.

. . . . .

(*b*) *The transcript of proceedings.*

(*1*) *Appellant's duty to order.*—Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

. . . . .

(*3*) *Partial transcript.*—Unless the entire transcript is ordered:

(A) the appellant must—within the 14 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has

so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

. . . . .

(*c*) *Statement of the evidence when the proceedings were not recorded or when a transcript is unavailable.*—If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

. . . . .

Rule 12. Docketing the appeal; filing a representation statement; filing the record.

. . . . .

(*b*) *Filing a representation statement.*—Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

. . . . .

Rule 12.1. Remand after an indicative ruling by the district court on a motion for relief that is barred by a pending appeal.

(*a*) *Notice to the court of appeals.*—If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(*b*) *Remand after an indicative ruling.*—If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Rule 15. Review or enforcement of an agency order—how obtained; intervention.

. . . . .

(*b*) *Application or cross-application to enforce an order; answer; default.*

. . . . .

(2) Within 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

. . . . .

Rule 19. Settlement of a judgment enforcing an agency order in part.

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Rule 22. Habeas corpus and section 2255 proceedings.

. . . . .

(*b*) *Certificate of appealability.*

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state

court, or in a 28 U. S. C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U. S. C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U. S. C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

. . . . .

Rule 25. Filing and service.

(*a*) *Filing.*

. . . . .

(*2*) *Filing: method and timeliness.*

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(*B*) *A brief or appendix.*—A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

. . . . .

(*c*) *Manner of service.*

(1) Service may be any of the following:

. . . . .

(C) by third-party commercial carrier for delivery within 3 days; or

. . . . .

Rule 26. Computing and extending time.

(*a*) *Computing time.*—The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(*1*) *Period stated in days or a longer unit.*—When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(*2*) *Period stated in hours.*—When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(*3*) *Inaccessibility of the clerk's office.*—Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(*4*) *"Last day" defined.*—Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(b)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(*5*) *"Next day" defined.*—The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(*6*) *"Legal holiday" defined.*—"Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

. . . . .

(*c*) *Additional time after service.*—When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Rule 27. Motions.

(*a*) *In general.*

. . . . .

(*3*) *Response.*

(*A*) *Time to file.*—Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

. . . . .

(*4*) *Reply to response.*—Any reply to a response must be filed within 7 days after service of the response. A reply must not present matters that do not relate to the response.

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Rule 28.1. Cross-appeals.

. . . . .

(*f*) *Time to serve and file a brief.*—Briefs must be served and filed as follows:

. . . . .

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Rule 30. Appendix to the briefs.

. . . . .

(*b*) *All parties' responsibilities.*

(*1*) *Determining the contents of the appendix.*—The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's

attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

. . . . .

Rule 31. Serving and filing briefs.

(*a*) *Time to serve and file a brief.*

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

. . . . .

Rule 39. Costs.

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(*d*) *Bill of costs: objections; insertion in mandate.*

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(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

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Rule 41. Mandate: contents; issuance and effective date; stay.

. . . . .

(*b*) *When issued.*—The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

. . . . .

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 March 26, 2009, 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. 1308. 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, and 553 U. S. 1105.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 26, 2009

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

MARCH 26, 2009

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 4008, 6003, 6004, 6006, 6007, 7004, 7012, 7052, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9015, 9021, 9023, 9027, and 9033, and new Rule 7058.

[See *infra*, pp. 1311–1340.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2009, 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.

(*a*) *Corporate ownership statement, list of creditors and equity security holders, and other lists.*

. . . . .

(*2*) *Involuntary case.*—In an involuntary case, the debtor shall file within 14 days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

(*3*) *Equity security holders.*—In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 14 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.

. . . . .

(*c*) *Time limits.*—In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A)

within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 45 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

. . . . .

(*f*) *Statement of social security number.*—An individual debtor shall submit a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 14 days after the entry of the order for relief.

. . . . .

(*h*) *Interests acquired or arising after petition.*—If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the

debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

. . . . .

Rule 1011. Responsive pleading or motion in involuntary and cross-border cases.

. . . . .

(*b*) *Defenses and objections; when presented.*—Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F. R. Civ. P. and shall be filed and served within 21 days after service of the summons, except that if service is made by publication on a party or partner not residing or found within the state in which the court sits, the court shall prescribe the time for filing and serving the response.

. . . . .

Rule 1019. Conversion of a Chapter 11 reorganization case, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case to a Chapter 7 liquidation case.

. . . . .

(*5*) *Filing final report and schedule of postpetition debts.*

(*A*) *Conversion of Chapter 11 or Chapter 12 case.*—Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than 14 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

(*B*) *Conversion of Chapter 13 case.*—Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,

(i) the debtor, not later than 14 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account;

. . . . .

Rule 1020. Small business Chapter 11 reorganization case.

(*a*) *Small business debtor designation.*—In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.

. . . . .

Rule 2002. Notices to creditors, equity security holders, administrators in foreign proceedings, persons against whom provisional relief is sought in ancillary and other cross-border cases, United States, and United States trustee.

(*a*) *Twenty-one-day notices to parties in interest.*—Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of:

. . . . .

(*b*) *Twenty-eight-day notices to parties in interest.*—Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by mail of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement or, under § 1125(f), to make a final determination whether the plan provides adequate information so that a separate disclosure statement is not necessary; and (2) for filing objections and the hearing to consider confirmation of a chapter 9, chapter 11, or chapter 13 plan.

. . . . .

(*o*) *Notice of order for relief in consumer case.*—In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors notice by mail of the order for relief within 21 days from the date thereof.

. . . . .

(*q*) *Notice of petition for recognition of foreign proceeding and of court's intention to communicate with foreign courts and foreign representatives.*

(*1*) *Notice of petition for recognition.*—The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the

Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing on the petition for recognition of a foreign proceeding. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding.

. . . . .

Rule 2003. Meeting of creditors or equity security holders.

(*a*) *Date and place.*—Except as otherwise provided in § 341(e) of the Code, in a chapter 7 liquidation or a chapter 11 reorganization case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 40 days after the order for relief. In a chapter 12 family farmer debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 35 days after the order for relief. In a chapter 13 individual's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later date for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.

. . . . .

(*d*) *Report of election and resolution of disputes in a Chapter 7 case.*

. . . . .

(*2*) *Disputed election.*—If the election is disputed, the United States trustee shall promptly file a report stating

that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. Unless a motion for the resolution of the dispute is filed no later than 14 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.

. . . . .

Rule 2006. Solicitation and voting of proxies in Chapter 7 liquidation cases.

. . . . .

(*c*) *Authorized solicitation.*

(1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over $500 or the 100 creditors having the largest claims had at least seven days' notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition.

. . . . .

Rule 2007. Review of appointment of creditors' committee organized before commencement of the case.

. . . . .

(*b*) *Selection of members of committee.*—The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over $1,000 or the 100 unsecured creditors having the largest claims had at least seven days' notice in writing, and of which meeting written minutes reporting the names of the creditors present or represented and voting and the amounts of their claims were kept and are available for inspection;

. . . . .

Rule 2007.2. Appointment of patient care ombudsman in a health care business case.

(*a*) *Order to appoint patient care ombudsman.*—In a chapter 7, chapter 9, or chapter 11 case in which the debtor is a health care business, the court shall order the appointment of a patient care ombudsman under § 333 of the Code, unless the court, on motion of the United States trustee or a party in interest filed no later than 21 days after the commencement of the case or within another time fixed by the court, finds that the appointment of a patient care ombudsman is not necessary under the specific circumstances of the case for the protection of patients.

. . . . .

Rule 2008. Notice to trustee of selection.

The United States trustee shall immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee's bond. A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as

trustee in a chapter 7, chapter 12, or chapter 13 case that does not notify the court and the United States trustee in writing of rejection of the office within seven days after receipt of notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court and the United States trustee in writing of acceptance of the office within seven days after receipt of notice of selection or shall be deemed to have rejected the office.

Rule 2015. Duty to keep records, make reports, and give notice of case or change of status.

(*a*) *Trustee or debtor in possession.*—A trustee or debtor in possession shall:

. . . . .

(6) in a chapter 11 small business case, unless the court, for cause, sets another reporting interval, file and transmit to the United States trustee for each calendar month after the order for relief, on the appropriate Official Form, the report required by § 308. If the order for relief is within the first 15 days of a calendar month, a report shall be filed for the portion of the month that follows the order for relief. If the order for relief is after the 15th day of a calendar month, the period for the remainder of the month shall be included in the report for the next calendar month. Each report shall be filed no later than 21 days after the last day of the calendar month following the month covered by the report. The obligation to file reports under this subparagraph terminates on the effective date of the plan, or conversion or dismissal of the case.

. . . . .

(*d*) *Foreign representative.*—In a case in which the court has granted recognition of a foreign proceeding under chapter 15, the foreign representative shall file any notice required under § 1518 of the Code within 14 days after the date when the representative becomes aware of the subsequent information.

. . . . .

Rule 2015.1. Patient care ombudsman.

(*a*) *Reports.*—A patient care ombudsman, at least 14 days before making a report under § 333(b)(2) of the Code, shall give notice that the report will be made to the court, unless the court orders otherwise. The notice shall be transmitted to the United States trustee, posted conspicuously at the health care facility that is the subject of the report, and served on: the debtor; the trustee; all patients; and any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct. The notice shall state the date and time when the report will be made, the manner in which the report will be made, and, if the report is in writing, the name, address, telephone number, email address, and website, if any, of the person from whom a copy of the report may be obtained at the debtor's expense.

(*b*) *Authorization to review confidential patient records.*—A motion by a patient care ombudsman under § 333(c) to review confidential patient records shall be governed by Rule 9014, served on the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, and transmitted to the United States trustee subject to applicable nonbankruptcy law relating to patient privacy. Unless the court orders otherwise, a hearing on the motion may not be commenced earlier than 14 days after service of the motion.

Rule 2015.2. Transfer of patient in health care business case.

Unless the court orders otherwise, if the debtor is a health care business, the trustee may not transfer a patient to another health care business under § 704(a)(12) of the Code un-

less the trustee gives at least 14 days' notice of the transfer to the patient care ombudsman, if any, the patient, and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care. The notice is subject to applicable nonbankruptcy law relating to patient privacy.

Rule 2015.3. Reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest.

. . . . .

(*b*) *Time for filing; service.*—The first report required by this rule shall be filed no later than seven days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent reports shall be filed no less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted. Copies of the report shall be served on the United States trustee, any committee appointed under § 1102 of the Code, and any other party in interest that has filed a request therefor.

. . . . .

Rule 2016. Compensation for services rendered and reimbursement of expenses.

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(*b*) *Disclosure of compensation paid or promised to attorney for debtor.*—Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental

statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

(*c*) *Disclosure of compensation paid or promised to bankruptcy petition preparer.*—Before a petition is filed, every bankruptcy petition preparer for a debtor shall deliver to the debtor, the declaration under penalty of perjury required by § 110(h)(2). The declaration shall disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration shall also describe the services performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. The declaration shall be filed with the petition. The petition preparer shall file a supplemental statement within 14 days after any payment or agreement not previously disclosed.

Rule 3001. Proof of claim.

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(*e*) *Transferred claim.*

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(*2*) *Transfer of claim other than for security after proof filed.*—If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

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(*4*) *Transfer of claim for security after proof filed.*—If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

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Rule 3015. Filing, objection to confirmation, and modification of a plan in a Chapter 12 family farmer's debt adjustment or a Chapter 13 individual's debt adjustment case.

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(*b*) *Chapter 13 plan.*—The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

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(*g*) *Modification of plan after confirmation.*—A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person

as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

Rule 3017. Court consideration of disclosure statement in a Chapter 9 municipality or Chapter 11 reorganization case.

(*a*) *Hearing on disclosure statement and objections.*—Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any other entity designated by the court, at any time before the disclosure statement is approved or by an earlier date as the court may fix. In a chapter 11 reorganization case, every

notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

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(*f*) *Notice and transmission of documents to entities subject to an injunction under a plan.*—If a plan provides for an injunction against conduct not otherwise enjoined under the Code and an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:

(1) at least 28 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and

(2) to the extent feasible, a copy of the plan and disclosure statement.

Rule 3019. Modification of accepted plan in a Chapter 9 municipality or Chapter 11 reorganization case.

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(*b*) *Modification of plan after confirmation in individual debtor case.*—If the debtor is an individual, a request to modify the plan under § 1127(e) of the Code is governed by Rule 9014. The request shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed to file objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee, together with a copy of the proposed modification. Any objection to the proposed modification shall be filed and served on the debtor, the proponent of the modification, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee.

Rule 3020. Deposit; confirmation of plan in a Chapter 9 municipality or Chapter 11 reorganization case.

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(*e*) *Stay of confirmation order.*—An order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.

Rule 4001. Relief from automatic stay; prohibiting or conditioning the use, sale, or lease of property; use of cash collateral; obtaining credit; agreements.

(*a*) *Relief from stay; prohibiting or conditioning the use, sale, or lease of property.*

. . . . .

(*3*) *Stay of order.*—An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.

(*b*) *Use of cash collateral.*

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(*2*) *Hearing.*—The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

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(*c*) *Obtaining credit.*

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(*2*) *Hearing.*—The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid

immediate and irreparable harm to the estate pending a final hearing.

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Rule 4002. Duties of debtor.

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(*b*) *Individual debtor's duty to provide documentation.*

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(*4*) *Tax returns provided to creditors.*—If a creditor, at least 14 days before the first date set for the meeting of creditors under § 341, requests a copy of the debtor's tax return that is to be provided to the trustee under subdivision (b)(3), the debtor, at least 7 days before the first date set for the meeting of creditors under § 341, shall provide to the requesting creditor a copy of the return, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.

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Rule 4004. Grant or denial of discharge.

(*a*) *Time for filing complaint objecting to discharge; notice of time fixed.*—In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 reorganization case, the complaint shall be filed no later than the first date set for the hearing on confirmation. At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

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Rule 4008. Filing of reaffirmation agreement; statement in support of reaffirmation agreement.

(*a*) *Filing of reaffirmation agreement.*—A reaffirmation agreement shall be filed no later than 60 days after the first

date set for the meeting of creditors under § 341(a) of the Code. The reaffirmation agreement shall be accompanied by a cover sheet, prepared as prescribed by the appropriate Official Form. The court may, at any time and in its discretion, enlarge the time to file a reaffirmation agreement.

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Rule 6003. Interim and final relief immediately following the commencement of the case—applications for employment; motions for use, sale, or lease of property; and motions for assumption or assignment of executory contracts.

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding the following:

(a) an application under Rule 2014;

(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and

(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

Rule 6004. Use, sale, or lease of property.

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(*b*) *Objection to proposal.*—Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than seven days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014.

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(*d*) *Sale of property under $2,500.*—Notwithstanding subdivision (a) of this rule, when all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give a general notice of intent to sell

such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 14 days of the mailing of the notice, or within the time fixed by the court. An objection is governed by Rule 9014.

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(*g*) *Sale of personally identifiable information.*

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(*2*) *Appointment.*—If a consumer privacy ombudsman is appointed under § 332, no later than seven days before the hearing on the motion under § 363(b)(1)(B), the United States trustee shall file a notice of the appointment, including the name and address of the person appointed. The United States trustee's notice shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(*h*) *Stay of order authorizing use, sale, or lease of property.*—An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.

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Rule 6006. Assumption, rejection or assignment of an executory contract or unexpired lease.

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(*d*) *Stay of order authorizing assignment.*—An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.

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Rule 6007. Abandonment or disposition of property.

(*a*) *Notice of proposed abandonment or disposition; objections; hearing.*—Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

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Rule 7004. Process; service of summons, complaint.

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(*e*) *Summons: time limit for service within the United States.*—Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F. R. Civ. P. shall be by delivery of the summons and complaint within 14 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 14 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

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Rule 7012. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings.

(*a*) *When presented.*—If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 21 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 21

days after service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 14 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 14 days after the service of a more definite statement.

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Rule 7052. Findings by the court.

Rule 52 F. R. Civ. P. applies in adversary proceedings, except that any motion under subdivision (b) of that rule for amended or additional findings shall be filed no later than 14 days after entry of judgment. In these proceedings, the reference in Rule 52 F. R. Civ. P. to the entry of judgment under Rule 58 F. R. Civ. P. shall be read as a reference to the entry of a judgment or order under Rule 5003(a).

Rule 7058. Entering judgment in adversary proceeding.

Rule 58 F. R. Civ. P. applies in adversary proceedings. In these proceedings, the reference in Rule 58 F. R. Civ. P. to the civil docket shall be read as a reference to the docket maintained by the clerk under Rule 5003(a).

Rule 8001. Manner of taking appeal; voluntary dismissal; certification to court of appeals.

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(*f*) *Certification for direct appeal to court of appeals.*

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(*3*) *Request for certification; filing; service; contents.*

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(D) A party may file a response to a request for certification or a cross request within 14 days after the notice of the request is served, or another time fixed by the court.

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(*4*) *Certification on court's own initiative.*

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(B) A party may file a supplementary short statement of the basis for certification within 14 days after the certification.

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Rule 8002. Time for filing notice of appeal.

(*a*) *Fourteen-day period.*—The notice of appeal shall be filed with the clerk within 14 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(*b*) *Effect of motion on time for appeal.*—If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:

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(4) for relief under Rule 9024 if the motion is filed no later than 14 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(*c*) *Extension of time for appeal.*

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(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 21 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 14 days from the date of entry of the order granting the motion, whichever is later.

Rule 8003. Leave to appeal.

(*a*) *Content of motion; answer.*—A motion for leave to appeal under 28 U. S. C. § 158(a) shall contain: (1) a statement of the facts necessary to an understanding of the questions to be presented by the appeal; (2) a statement of those questions and of the relief sought; (3) a statement of the reasons why an appeal should be granted; and (4) a copy of the judg-

ment, order, or decree complained of and of any opinion or memorandum relating thereto. Within 14 days after service of the motion, an adverse party may file with the clerk an answer in opposition.

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(c) *Appeal improperly taken regarded as a motion for leave to appeal.*—If a required motion for leave to appeal is not filed, but a notice of appeal is timely filed, the district court or bankruptcy appellate panel may grant leave to appeal or direct that a motion for leave to appeal be filed. The district court or the bankruptcy appellate panel may also deny leave to appeal but in so doing shall consider the notice of appeal as a motion for leave to appeal. Unless an order directing that a motion for leave to appeal be filed provides otherwise, the motion shall be filed within 14 days of entry of the order.

Rule 8006. Record and issues on appeal.

Within 14 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 14 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 14 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or

decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8009. Briefs and appendix; filing and service.

(*a*) *Briefs.*—Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 14 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file a brief within 14 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 14 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

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Rule 8015. Motion for rehearing.

Unless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 14 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of subsequent judgment.

Rule 8017. Stay of judgment of district court or bankruptcy appellate panel.

(*a*) *Automatic stay of judgment on appeal.*—Judgments of the district court or the bankruptcy appellate panel are stayed until the expiration of 14 days after entry, unless otherwise ordered by the district court or the bankruptcy appellate panel.

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Rule 9006. Computing and extending time.

(*a*) *Computing time.*—The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.

(*1*) *Period stated in days or a longer unit.*—When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(*2*) *Period stated in hours.*—When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(*3*) *Inaccessibility of clerk's office.*—Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 9006(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 9006(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(*4*) "*Last day*" *defined.*—Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(*5*) "*Next day*" *defined.*—The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(*6*) "*Legal holiday*" *defined.*—"Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located. (In this rule, "state" includes the District of Columbia and any United States commonwealth or territory.)

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(*d*) *For motions—affidavits.*—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; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

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(*f*) *Additional time after service by mail or under Rule 5(b)(2)(D), (E), or (F) F. R. Civ. P.*—When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F. R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

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Rule 9015. Jury trials.

(*a*) *Applicability of certain Federal Rules of Civil Procedure.*—Rules 38, 39, 47–49, and 51 F. R. Civ. P., and Rule 81(c) F. R. Civ. P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made under Rule 38(b) F. R. Civ. P. shall be filed in accordance with Rule 5005.

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(*c*) *Applicability of Rule 50 F. R. Civ. P.*—Rule 50 F. R. Civ. P. applies in cases and proceedings, except that any re-

newed motion for judgment or request for a new trial shall be filed no later than 14 days after the entry of judgment.

Rule 9021. Entry of Judgment.

A judgment or order is effective when entered under Rule 5003.

Rule 9023. New trials; amendment of judgments.

Except as provided in this rule and Rule 3008, Rule 59 F. R. Civ. P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment.

Rule 9027. Removal.

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(*e*) *Procedure after removal.*

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(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

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(*g*) *Applicability of Part VII.*—The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not

answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 21 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 21 days following the service of summons on such initial pleading, or within seven days following the filing of the notice of removal, whichever period is longest.

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Rule 9033. Review of proposed findings of fact and conclusions of law in non-core proceedings.

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(*b*) *Objections: time for filing.*—Within 14 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 14 days after being served with a copy thereof. A party objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs.

(*c*) *Extension of time.*—The bankruptcy judge may for cause extend the time for filing objections by any party for a period not to exceed 21 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing objections must be made before the time for filing objections has expired, except that a request made no more than 21 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect.

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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 March 26, 2009, 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. 1342. 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, and 553 U. S. 1149.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 26, 2009

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

MARCH 26, 2009

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 6, 12, 13, 14, 15, 23, 27, 32, 38, 48, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81, and new Rule 62.1, and Supplemental Rules B, C, and G, and Illustrative Civil Forms 3, 4, and 60.

[See *infra*, pp. 1345–1362.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2009, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of 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 6. Computing and extending time; time for motion papers.

(*a*) *Computing time.*—The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(*1*) *Period stated in days or a longer unit.*—When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(*2*) *Period stated in hours.*—When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(*3*) *Inaccessibility of the clerk's office.*—Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(*4*) *"Last day" defined.*—Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(*5*) *"Next day" defined.*—The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(*6*) *"Legal holiday" defined.*—"Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(*b*) *Extending time.*

. . . . .

(*2*) *Exceptions.*—A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(*c*) *Motions, notices of hearing, and affidavits.*

(*1*) *In general.*—A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order—which a party may, for good cause, apply for ex parte—sets a different time.

(*2*) *Supporting affidavit.*—Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

. . . . .

Rule 12. Defenses and objections: when and how presented; motion for judgment on the pleadings; consolidating motions; waiving defenses; pretrial hearing.

(*a*) *Time to serve a responsive pleading.*

(*1*) *In general.*—Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

. . . . .

(*4*) *Effect of a motion.*—Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be

served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

. . . . .

(*e*) *Motion for a more definite statement.*—A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(*f*) *Motion to strike.*—The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

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Rule 13. Counterclaim and crossclaim.

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(*f*) *[Abrogated.]*

. . . . .

Rule 14. Third-party practice.

(*a*) *When a defending party may bring in a third party.*

(*1*) *Timing of the summons and complaint.*—A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files

the third-party complaint more than 14 days after serving its original answer.

. . . . .

Rule 15. Amended and supplemental pleadings.

(*a*) *Amendments before trial.*

(*1*) *Amending as a matter of course.*—A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(*2*) *Other amendments.*—In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(*3*) *Time to respond.*—Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

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Rule 23. Class actions.

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(*f*) *Appeals.*—A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

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Rule 27. Depositions to perpetuate testimony.

(*a*) *Before an action is filed.*

. . . . .

(*2*) *Notice and service.*—At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

. . . . .

Rule 32. Using depositions in court proceedings.

(*a*) *Using depositions.*

. . . . .

(*5*) *Limitations on use.*

(*A*) *Deposition taken on short notice.*—A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

. . . . .

(*d*) *Waiver of objections.*

. . . . .

(*3*) *To the taking of the deposition.*

. . . . .

(*C*) *Objection to a written question.*—An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

. . . . .

Rule 38. Right to a jury trial; demand.

. . . . .

(*b*) *Demand.*—On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(*c*) *Specifying issues.*—In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

. . . . .

Rule 48. Number of jurors; verdict; polling.

(*a*) *Number of jurors.*—A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(*b*) *Verdict.*—Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(*c*) *Polling.*—After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Rule 50. Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling.

. . . . .

(*b*) *Renewing the motion after trial; alternative motion for a new trial.*—If the court does not grant a motion for

judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

. . . . .

(*d*) *Time for a losing party's new-trial motion.*—Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

. . . . .

Rule 52. Findings and conclusions by the court; judgment on partial findings.

. . . . .

(*b*) *Amended or additional findings.*—On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

. . . . .

Rule 53. Masters.

. . . . .

(*f*) *Action on the master's order, report, or recommendations.*

. . . . .

(*2*) *Time to object or move to adopt or modify.*—A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

. . . . .

Rule 54. Judgment; costs.

. . . . .

(*d*) *Costs; attorney's fees.*

(*1*) *Costs other than attorney's fees.*—Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

. . . . .

Rule 55. Default; default judgment.

. . . . .

(*b*) *Entering a default judgment.*

. . . . .

(*2*) *By the court.*—In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

. . . . .

Rule 56. Summary judgment.

(*a*) *By a claiming party.*—A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(*b*) *By a defending party.*—A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(*c*) *Time for a motion, response, and reply; proceedings.*

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

. . . . .

Rule 59. New trial; altering or amending a judgment.

. . . . .

(*b*) *Time to file a motion for a new trial.*—A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(*c*) *Time to serve affidavits.*—When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(*d*) *New trial on the court's initiative or for reasons not in the motion.*—No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(*e*) *Motion to alter or amend a judgment.*—A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 62. Stay of proceedings to enforce a judgment.

(*a*) *Automatic stay; exceptions for injunctions, receiverships, and patent accountings.*—Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

. . . . .

Rule 62.1. Indicative ruling on a motion for relief that is barred by a pending appeal.

(*a*) *Relief pending appeal.*—If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(*b*) *Notice to the court of appeals.*—The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(*c*) *Remand.*—The district court may decide the motion if the court of appeals remands for that purpose.

Rule 65. Injunctions and restraining orders.

. . . . .

(*b*) *Temporary restraining order.*

. . . . .

(*2*) *Contents; expiration.*—Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the

record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

. . . . .

Rule 68. Offer of judgment.

(*a*) *Making an offer; judgment on an accepted offer.*—At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party 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.

. . . . .

(*c*) *Offer after liability is determined.*—When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

. . . . .

Rule 71.1. Condemning real or personal property.

. . . . .

(*d*) *Process.*

. . . . .

(*2*) *Contents of the notice.*

(*A*) *Main contents.*—Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

. . . . .

(*e*) *Appearance or answer.*

. . . . .

(*2*) *Answer.*—A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice. The answer must:

. . . . .

Rule 72. Magistrate judges: pretrial order.

(*a*) *Nondispositive matters.*—When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(*b*) *Dispositive motions and prisoner petitions.*

. . . . .

(*2*) *Objections.*—Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to an-

other party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

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Rule 81. Applicability of the rules in general; removed actions.

. . . . .

(*c*) *Removed actions.*

. . . . .

(*2*) *Further pleading.*—After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

(*3*) *Demand for a jury trial.*

. . . . .

(*B*) *Under Rule 38.*—If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(*d*) *Law applicable.*

(*1*) "*State law*" *defined.*—When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(*2*) "*State*" *defined.*—The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth or territory.

(*3*) "*Federal statute*" *defined in the District of Columbia.*—In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

FORM 3. SUMMONS

(Caption—See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

. . . . .

FORM 4. SUMMONS ON A THIRD-PARTY COMPLAINT

(Caption—See Form 1.)

To *name the third-party defendant*:

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

. . . . .

FORM 60. NOTICE OF CONDEMNATION

(Caption—See Form 1.)

. . . . .

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 21 days [after being served with this notice] [from *insert the date of the last publication of notice*]. Send your answer to this address: _____.

. . . . .

AMENDMENTS TO THE SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS

Rule B. In personam actions: attachment and garnishment.

. . . . .

(*3*) *Answer.*

(*a*) *By garnishee.*—The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 21 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

. . . . .

Rule C. In rem actions: special provisions.

. . . . .

(*4*) *Notice.*—No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 14 days after execution, the plaintiff must promptly—or within the time that the court allows—give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must

specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U. S. C. §§ 31301 et seq., as amended.

. . . . .

(*6*) *Responsive pleading; interrogatories.*

(*a*) *Statement of interest; answer.*—In an action in rem:

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 14 days after the execution of process, or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 21 days after filing the statement of interest or right.

. . . . .

Rule G. Forfeiture actions in rem.

. . . . .

(*4*) *Notice.*

. . . . .

(*b*) *Notice to known potential claimants.*

(*i*) *Direct notice required.*—The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).

(*ii*) *Content of the notice.*—The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than 21 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

. . . . .

(*5*) *Responsive pleadings.*

. . . . .

(*b*) *Answer.*—A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 21 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(*6*) *Special interrogatories.*

(*a*) *Time and scope.*—The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 21 days after the motion is served.

(*b*) *Answers or objections.*—Answers or objections to these interrogatories must be served within 21 days after the interrogatories are served.

(*c*) *Government's response deferred.*—The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until 21 days after the claimant has answered these interrogatories.

. . . . .

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure and to the Rules Governing Cases in the United States District Courts under 28 U. S. C. §§ 2254 and 2255 were prescribed by the Supreme Court of the United States on March 26, 2009, 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. 1364. 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, and 553 U. S. 1155.

For earlier publication of the Rules Governing 28 U. S. C. §§ 2254 and 2255 Cases and amendments thereto, see 425 U. S. 1167, 441 U. S. 1001, 456 U. S. 1031, and 541 U. S. 1103.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 26, 2009

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MARCH 26, 2009

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 32, 32.2, 33, 34, 35, 41, 45, 47, 58, and 59, and Rules 8 and 11, and new Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts, and Rules 8 and 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

[See *infra*, pp. 1367–1382.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2009, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5.1. Preliminary hearing.

. . . . .

(*c*) *Scheduling.*—The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody.

. . . . .

Rule 7. The indictment and the information.

. . . . .

(*c*) *Nature and contents.*

. . . . .

(*2*) *Citation error.*—Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

. . . . .

(*f*) *Bill of particulars.*—The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Rule 12.1. Notice of an alibi defense.

(*a*) *Government's request for notice and defendant's response.*

. . . . .

(*2*) *Defendant's response.*—Within 14 days after the request, or at some other time the court sets, the defendant

must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(*b*) *Disclosing government witnesses.*

. . . . .

(*2*) *Time to disclose.*—Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 14 days before trial.

. . . . .

Rule 12.3. Notice of a public-authority defense.

(*a*) *Notice of the defense and disclosure of witnesses.*

. . . . .

(*3*) *Response to the notice.*—An attorney for the government must serve a written response on the defendant or the defendant's attorney within 14 days after receiving the defendant's notice, but no later than 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(*4*) *Disclosing witnesses.*

(*A*) *Government's request.*—An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 21 days before trial.

(*B*) *Defendant's response.*—Within 14 days after receiving the government's request, the defendant must

serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(*C*) *Government's reply.*—Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

. . . . .

Rule 29. Motion for a judgment of acquittal.

. . . . .

(*c*) *After jury verdict or discharge.*

(*1*) *Time for a motion.*—A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

. . . . .

Rule 32. Sentencing and judgment.

. . . . .

(*d*) *Presentence report.*

. . . . .

(*2*) *Additional information.*—The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U. S. C. § 3552(b), any resulting report and recommendation;

(F) any other information that the court requires, including information relevant to the factors under 18 U. S. C. § 3553(a); and

(G) specify whether the government seeks forfeiture under Rule 32.2 and any other provision of law.

. . . . .

Rule 32.2. Criminal forfeiture.

(*a*) *Notice to the defendant.*—A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(*b*) *Entering a preliminary order of forfeiture.*

(*1*) *Forfeiture phase of the trial.*

(*A*) *Forfeiture determinations.*—As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the

amount of money that the defendant will be ordered to pay.

(*B*) *Evidence and hearing.*—The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(*2*) *Preliminary order.*

(*A*) *Contents of a specific order.*—If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(*B*) *Timing.*—Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(*C*) *General order.*—If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(*3*) *Seizing property.*—The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(*4*) *Sentence and judgment.*

(*A*) *When final.*—At sentencing—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(*B*) *Notice and inclusion in the judgment.*—The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(*C*) *Time to appeal.*—The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(*5*) *Jury determination.*

(*A*) *Retaining the jury.*—In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must deter-

mine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(*B*) *Special Verdict Form.*—If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(*6*) *Notice of the forfeiture order.*

(*A*) *Publishing and sending notice.*—If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(*B*) *Content of the notice.*—The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(*C*) *Means of publication; exceptions to publication requirement.*—Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(*D*) *Means of sending the notice.*—The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)–(v) of the Federal Rules of Civil Procedure.

(*7*) *Interlocutory sale.*—At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure,

may order the interlocutory sale of property alleged to be forfeitable.

. . . . .

Rule 33. New Trial.

. . . . .

(*b*) *Time to file.*

. . . . .

(*2*) *Other grounds.*—Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Rule 34. Arresting judgment.

. . . . .

(*b*) *Time to file.*—The defendant must move to arrest judgment within 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Rule 35. Correcting or reducing a sentence.

(*a*) *Correcting clear error.*—Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

. . . . .

Rule 41. Search and seizure.

. . . . .

(*e*) *Issuing the warrant.*

. . . . .

(*2*) *Contents of the warrant.*

(*A*) *Warrant to search for and seize a person or property.*—Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 14 days;

. . . . .

(*B*) *Warrant seeking electronically stored information.*—A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(*C*) *Warrant for a tracking device.*—A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

. . . . .

(*f*) *Executing and returning the warrant.*

(*1*) *Warrant to search for and seize a person or property.*

. . . . .

(*B*) *Inventory.*—An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

. . . . .

Rule 45. Computing and extending time.

(*a*) *Computing time.*—The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(*1*) *Period stated in days or a longer unit.*—When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(*2*) *Period stated in hours.*—When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(*3*) *Inaccessibility of the clerk's office.*—Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(*4*) "*Last day*" *defined.*—Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(*5*) "*Next day*" *defined.*—The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(*6*) "*Legal holiday*" *defined.*—"Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

. . . . .

Rule 47. Motions and supporting affidavits.

. . . . .

(*c*) *Timing of a motion.*—A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

. . . . .

Rule 58. Petty offenses and other misdemeanors.

. . . . .

(*g*) *Appeal.*

. . . . .

(*2*) *From a magistrate judge's order or judgment.*

(*A*) *Interlocutory appeal.*—Either party may appeal an order of a magistrate judge to a district judge within 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a no-

tice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(*B*) *Appeal from a conviction or sentence.*—A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

. . . . .

Rule 59. Matters before a magistrate judge.

(*a*) *Nondispositive matters.*—A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(*b*) *Dispositive matters.*

. . . . .

(*2*) *Objections to findings and recommendations.*—Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

. . . . .

RULES GOVERNING 28 U. S. C. § 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary hearing.

. . . . .

(*b*) *Reference to a magistrate judge.*—A judge may, under 28 U. S. C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

. . . . .

Rule 11. Certificate of appealability; time to appeal.

(*a*) *Certificate of appealability.*—The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U. S. C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(*b*) *Time to appeal.*—Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these

rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 12. Applicability of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

RULES GOVERNING 28 U. S. C. § 2255 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary hearing.

. . . . .

(*b*) *Reference to a magistrate judge.*—A judge may, under 28 U. S. C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

. . . . .

Rule 11. Certificate of appealability; time to appeal.

(*a*) *Certificate of appealability.*—The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U. S. C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(*b*) *Time to appeal.*—Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these

rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

Reporter's Note

The next page is purposely numbered 1401. The numbers between 1382 and 1401 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CONKRIGHT ET AL. *v.* FROMMERT ET AL.

ON APPLICATION FOR STAY

No. 08A884 (08–810). Decided April 30, 2009

Pension plan officials' second application to stay the Second Circuit's mandate pending the disposition of the applicants' petition for certiorari is denied. The applicants first sought a stay before filing their petition, claiming that the Circuit's mandate was erroneous, created a Circuit conflict, and would cause irreparable harm if given effect, because, should the applicants prevail in this Court, they may have trouble recouping any pension funds disbursed to beneficiaries. That application was denied according to the standard criteria for relief: (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood that "irreparable harm [will] result from the denial of a stay." *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (Brennan, J., in chambers). The applicants seek reconsideration based on a change in circumstances. Specifically, they have filed their certiorari petition and this Court has called for the views of the Solicitor General. They claim that a stay is now in order because the invitation to the Solicitor General—a step taken in only a fraction of cases—establishes a "reasonable probability" that certiorari will be granted. Calling for the views of the Solicitor General, however, does not necessarily mean a case is worthy of this Court's review. An applicant, moreover, must clear other hurdles as well. The other criteria for relief do not counsel in favor of a stay. Regarding irreparable harm, the applicants urge that they will be unable to recoup funds disbursed to beneficiaries, but they do not establish that recoupment will be impossible or suggest that the outlays involved will place the plan in jeopardy.

JUSTICE GINSBURG, Circuit Justice.

Sally L. Conkright, Administrator of the Xerox Corporation Pension Plan, et al., have reapplied for a stay of the mandate of the United States Court of Appeals for the Second Circuit. In their initial application, filed October 16, 2008, the applicants sought a stay pending the filing and disposition of their petition for certiorari. The Second Circuit's decision in their case, 535 F. 3d 111 (2008), they asserted, was erroneous, created a Circuit conflict, and would cause irreparable harm if given effect. Without a stay, the applicants explained, they would be required to make additional payments to dozens of pension plan beneficiaries—money that could prove difficult to recoup if this Court were to grant certiorari and rule in their favor.

Acting in my capacity as Circuit Justice, I denied the stay application on October 20, 2008. Denial of such in-chambers stay applications is the norm; relief is granted only in "extraordinary cases." *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (Brennan, J., in chambers). Specifically, the applicant must demonstrate (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood that "irreparable harm [will] result from the denial of a stay." *Ibid.* In addition, "in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Ibid.* I earlier determined, taking account of the Second Circuit's evaluation, that this case did not meet the above-stated criteria.

The applicants seek reconsideration based on a change in circumstances. Specifically, after I denied their initial application, the applicants filed their petition for certiorari, and, on March 2, 2009, the Court called for the views of the Solicitor General (CVSG). The Solicitor General has yet to re-

spond. According to the applicants, a stay is now in order because the Court's invitation to the Solicitor General—a step taken in only a small fraction of cases—establishes a "reasonable probability" that certiorari will be granted.

Our request for the Solicitor General's view, although relevant to the "reasonable probability" analysis, is hardly dispositive of an application to block implementation of a Court of Appeals' judgment. CVSG'd petitions, it is true, are granted at a far higher rate than other petitions. But it is also true that the Court denies certiorari in such cases more often than not. Consideration of the guiding criteria in the context of the particular case remains appropriate.

A "reasonable probability" of a grant is only one of the hurdles an applicant must clear. Relief is not warranted unless the other factors also counsel in favor of a stay. The Court's invitation to the Solicitor General does not lead me to depart from my previous assessment of those factors. With respect to irreparable harm, the applicants urge that, should they prevail in this Court, they may have trouble recouping any funds they disburse to beneficiaries. But they do not establish that recoupment will be impossible; nor do they suggest that the outlays at issue will place the plan itself in jeopardy. Cf. *Sampson* v. *Murray*, 415 U. S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm" (internal quotation marks omitted)).

Accordingly, the request for a stay is denied.

It is so ordered.

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ASBESTOSIS. See **Federal Employers' Liability Act.**

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CLEANUP OF CHEMICAL WASTE SITES. See **Comprehensive Environmental Response, Compensation, and Liability Act.**

CLEAN WATER ACT.

Environmental Protection Agency regulations—National performance standards.—EPA permissibly relied on cost-benefit analysis in setting national performance standards for existing powerplants' cooling water intake structures and in providing for variances from those standards. Entergy Corp. v. Riverkeeper, Inc., p. 208.

CLEMENCY PROCEEDINGS. See **Habeas Corpus,** 2.

COAL LEASES. See **Indian Tucker Act.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Labor Law.**

COMMUNICATIONS LAW. See **Federal Communications Act of 1934.**

COMPELLING ARBITRATION. See **Jurisdiction,** 2.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT.

Chemical distribution facility contamination—Distribution of cleanup costs.—Under CERCLA, petitioner Shell Oil Company is not liable for contamination at an agricultural chemical distribution facility, and District Court reasonably apportioned petitioner railroads' share of site's remediation costs. Burlington N. & S. F. R. Co. v. United States, p. 599.

CONFESSIONS. See **Criminal Law,** 1.

CONFLICTS OF INTEREST. See **Constitutional Law,** II, 1.

CONSECUTIVE PRISON TERMS. See **Criminal Law,** 3.

CONSTITUTIONAL LAW.

I. Double Jeopardy.

Capital murder—Execution of mentally retarded offender—Mental capacity hearing.—Double Jeopardy Clause does not bar Ohio courts from conducting a full hearing on whether Bies qualifies as a mentally retarded offender who cannot be executed under *Atkins* v. *Virginia,* 536 U. S. 304, because of their earlier determination, under pre-*Atkins* standard, that his mental retardation qualified as a mitigating factor. Bobby v. Bies, p. 825.

II. Due Process.

1. *Campaign contributions to State Supreme Court justice—Requiring recusal in contributor's case.*—Where West Virginia Supreme Court of Appeals reversed a $50 million verdict, due process required recusal of a justice who had received campaign contributions in an extraordinary amount from board chairman and principal officer of corporation found liable for damages. Caperton v. A. T. Massey Coal Co., p. 868.

2. *Jury selection—Peremptory challenge.*—Provided that all jurors seated in a criminal case are qualified and unbiased, Due Process Clause does not require automatic reversal of a conviction because of trial court's good-faith error in denying defendant's peremptory challenge to a juror. Rivera v. Illinois, p. 148.

III. Right to Counsel.

1. *Incriminating statement to informant—Admission for impeachment purposes.*—Respondent's incriminating statement to an informant planted in his jail cell, concededly elicited in violation of Sixth Amendment, was admissible to impeach his inconsistent testimony at trial. Kansas v. Ventris, p. 586.

2. *Ineffective assistance—Standard of review.*—Whether California Court of Appeal's decision rejecting Mirzayance's ineffective-assistance-of-counsel claim is reviewed under 28 U. S. C. § 2254(d)(1) or *de novo,* he has failed to establish that his counsel's performance was ineffective. Knowles v. Mirzayance, p. 111.

3. *Police interrogation.—Michigan* v. *Jackson,* 475 U. S. 625, which forbade police to initiate interrogation of a criminal defendant once he invoked his Sixth Amendment right to counsel at an arraignment or similar proceeding, is overruled. Montejo v. Louisiana, p. 778.

IV. Right to Speedy Trial.

Balancing test—Delays caused by assigned counsel.—In applying balancing test of *Barker* v. *Wingo,* 407 U. S. 514, 530, which weighs prosecution's conduct against defense's in resolving speedy trial issues, Vermont Supreme Court erred in ranking assigned counsel essentially as state

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actors, attributing delays they caused to State rather than to defendant. Vermont v. Brillon, p. 81.

V. Searches and Seizures.

Vehicle search incident to arrest.—Under Fourth Amendment, police may search a vehicle's passenger compartment incident to a recent occupant's arrest only if it is reasonable to believe that arrestee might access vehicle at time of search or that vehicle contains evidence of offense of arrest. Arizona v. Gant, p. 332.

VI. Supremacy Clause.

Federal-State relations—State court's jurisdiction over 42 U. S. C. § 1983 claims.—A New York law that divests State's general jurisdiction courts of their jurisdiction to hear § 1983 damages suits filed by prisoners against state correction officers violates Supremacy Clause. Haywood v. Drown, p. 729.

CONTROLLED SUBSTANCES ACT. See **Criminal Law,** 2.

COOLING WATER INTAKE STRUCTURES. See **Clean Water Act.**

***CORAM NOBIS* PETITIONS.** See **Military Justice.**

CRIMINAL LAW. See also **Constitutional Law,** I; II, 2; III; IV; V.

1. *Confessions—Admissibility.*—Title 18 U. S. C. § 3501 modified, but did not supplant, rule of *McNabb* v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449, which makes an arrested person's confession inadmissible if given after an unreasonable delay in bringing him before a judge. Corley v. United States, p. 303.

2. *Controlled Substances Act—Misdemeanor drug purchase—Use of telephone.*—Using a telephone to make a misdemeanor drug purchase does not "facilitat[e]" felony drug distribution in violation of 21 U. S. C. § 843(b), which prohibits "us[ing] any communication facility in . . . facilitating" certain drug felonies. Abuelhawa v. United States, p. 816.

3. *Identity theft—Mandatory consecutive prison term—Knowledge requirement.*—Title 18 U. S. C. § 1028(a)(1)—which imposes a mandatory consecutive 2-year prison term on an individual convicted of certain predicate crimes if, during (or in relation to) commission of those other crimes, offender "knowingly . . . uses, without lawful authority, a means of identification of another person"—requires Government to show that defendant knew that means of identification at issue belonged to someone else. Flores-Figueroa v. United States, p. 646.

4. *Mandatory minimum sentences—Firearm discharge during crime—Proof of intent.*—Title 18 U. S. C. § 924(c)(1)(A)(iii), which mandates a 10-year mandatory minimum sentence "if [a] firearm is discharged"

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in course of a violent or drug trafficking crime, requires no separate proof of intent, and thus applies whether gun is discharged on purpose or by accident. Dean v. United States, p. 568.

5. *Plea agreement violation—Forfeited claim—Federal Rules of Criminal Procedure—Plain-error test.*—Rule 52(b)'s plain-error test applies to a forfeited claim, like Puckett's, that Government failed to meet its obligations under a plea agreement, and that test applies in usual fashion. Puckett v. United States, p. 129.

DEATH PENALTY. See **Constitutional Law,** I.

DISABILITY BENEFITS. See **Veterans Claims Assistance Act of 2000.**

DISCRIMINATION BASED ON PREGNANCY. See **Pregnancy Discrimination Act.**

DOUBLE JEOPARDY. See **Constitutional Law,** I.

DRUG TRAFFICKING. See **Criminal Law,** 2, 4.

DUE PROCESS. See **Constitutional Law,** II.

EFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law,** III, 2.

ELECTIONS. See **Voting Rights Act of 1965.**

EMPLOYER AND EMPLOYEES. See **Federal Employers' Liability Act**; **Pregnancy Discrimination Act.**

EMPLOYMENT DISCRIMINATION. See **Pregnancy Discrimination Act.**

ENTERPRISES. See **Racketeer Influenced and Corrupt Organizations Act.**

ENVIRONMENTAL LAW. See **Comprehensive Environmental Response, Compensation, and Liability Act.**

EXPERT WITNESS FEES. See **Supreme Court,** 8.

EXPLETIVES IN BROADCASTING. See **Federal Communications Act of 1934.**

FAILURE TO STATE A CLAIM. See **Federal Rules of Civil Procedure,** 2.

FALSE CLAIMS ACT. See **Appeals.**

FEDERAL ARBITRATION ACT. See **Arbitration; Jurisdiction,** 2.

FEDERAL COMMUNICATIONS ACT OF 1934.

Indecent language ban—Application to fleeting expletives.—FCC's revised policy finding that federal ban on broadcasting "any . . . indecent language," 18 U. S. C. § 1464, sometimes applies to indecent expletives even when offensive words are not repeated is neither "arbitrary" nor "capricious" within meaning of Administrative Procedure Act. FCC v. Fox Television Stations, Inc., p. 502.

FEDERAL EMPLOYERS' LIABILITY ACT.

Asbestosis suit—Fear-of-cancer jury instruction.—In affirming trial court's refusal to give fear-of-cancer jury instructions in this FELA suit alleging that petitioner railroad had negligently caused respondent employee to contract asbestosis at work, Tennessee Court of Appeals misread and misapplied *Norfolk & Western R. Co.* v. *Ayers,* 538 U. S. 135. CSX Transp., Inc. v. Hensley, p. 838.

FEDERAL RULES OF APPELLATE PROCEDURE. See also **Appeals.**

Amendments to Rules, p. 1291.

FEDERAL RULES OF BANKRUPTCY PROCEDURE.

Amendments to Rules, p. 1307.

FEDERAL RULES OF CIVIL PROCEDURE.

1. Amendments to Rules, p. 1341.

2. *Failure to state a claim—9/11 detainee.*—Respondent 9/11 detainee's complaint alleging that petitioner federal officials subjected him to harsh confinement conditions as a matter of policy on account of his religion, race, and/or national origin fails to plead sufficient facts to satisfy requirements of Federal Rule of Civil Procedure 8, as interpreted in *Bell Atlantic Corp.* v. *Twombly,* 550 U. S. 544. Ashcroft v. Iqbal, p. 662.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Criminal Law,** 5.

Amendments to Rules, p. 1363.

FEDERAL-STATE RELATIONS. See **Constitutional Law,** VI; **Habeas Corpus,** 2; **Jurisdiction,** 1; **States' Powers.**

FIDUCIARY DUTY. See **Indian Tucker Act.**

FIFTH AMENDMENT. See **Constitutional Law,** I; II, 1.

FIREARM USE DURING CRIME. See **Criminal Law,** 4.

FIRST-DEGREE MURDER. See **Habeas Corpus,** 1.

FOREIGN SOVEREIGN IMMUNITY.

Terrorism exception—Suit against Iraq.—Iraq is no longer subject to suit in federal court pursuant to terrorism exception to foreign sovereign immunity, now repealed, that had been codified at 28 U. S. C. § 1605(a)(7). Republic of Iraq v. Beaty, p. 848.

FORFEITED CLAIMS. See **Criminal Law,** 5.

FOURTEENTH AMENDMENT. See **Constitutional Law,** II, 2.

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HABEAS CORPUS.

1. *Capital murder—Suppression of evidence.*—Tennessee courts' procedural rejection of Cone's claim of unlawful suppression of evidence does not bar federal habeas review of that claim's merits; although suppressed evidence was not material to Cone's first-degree murder conviction, lower federal courts erred in failing to assess cumulative effect of that evidence with respect to Cone's capital sentence. Cone v. Bell, p. 449.

2. *State clemency proceedings—Appointment of counsel.*—Title 18 U. S. C. § 3599 authorizes counsel appointed to represent state petitioners in 28 U. S. C. § 2254 habeas proceedings to represent those clients in subsequent state clemency proceedings and entitles counsel to compensation for that representation. Harbison v. Bell, p. 180.

HAWAII. See **States' Powers.**

HAZARDOUS WASTE SITES. See **Comprehensive Environmental Response, Compensation, and Liability Act.**

IDENTITY THEFT. See **Criminal Law,** 3.

IMMIGRATION.

Removal—Stay pending court review.—Traditional stay factors, rather than 8 U. S. C. § 1252(f)(2)'s demanding standard for issuance of injunctions, govern a court of appeals' authority to stay an alien's removal from this country pending court's review of removal order. Nken v. Holder, p. 418.

IMMUNITY FROM SUIT. See **Foreign Sovereign Immunity.**

IMPEACHMENT EVIDENCE. See **Constitutional Law,** III, 1.

INCRIMINATING STATEMENTS. See **Constitutional Law,** III, 1.

INDECENT LANGUAGE. See **Federal Communications Act of 1934.**

INDIAN TUCKER ACT.

Tribal claims—Coal leases—Interior Secretary's fiduciary duty.—Respondent Tribe's 15-year-old damages suit against Government—which alleges that Interior Secretary breached his fiduciary duty to Tribe in approving amendments to a coal lease Tribe executed in 1964—fails because none of laws Tribe relies on provides any more sound a basis for suit than those rejected in *United States* v. *Navajo Nation*, 537 U. S. 488. United States v. Navajo Nation, p. 287.

INEFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law,** III, 2.

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IRAN. See **Terrorism Risk Insurance Act of 2002.**

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JUDICIAL BIAS. See **Constitutional Law,** II, 1.

JURISDICTION. See also **Arbitration; Constitutional Law,** VI; **Military Justice.**

1. *Court of appeals' jurisdiction—Remand to state court—Supplemental jurisdiction.*—A federal district court's order remanding a case to state court after declining to exercise supplemental jurisdiction over state-law claims is not a remand for lack of subject-matter jurisdiction for which appellate review is barred by 28 U. S. C. §§ 1447(c) and (d). Carlsbad Technology, Inc. v. HIF Bio, Inc., p. 635.

2. *Subject-matter jurisdiction—Petition to compel arbitration.*—A federal court may "look through" a petition to compel arbitration filed under Federal Arbitration Act § 4 to determine whether it is predicated on a controversy that "arises under" federal law; in keeping with well-pleaded complaint rule, court may not entertain a § 4 petition based on a counterclaim when whole controversy between parties does not qualify for federal-court adjudication. Vaden v. Discover Bank, p. 49.

JURY INSTRUCTIONS. See **Federal Employers' Liability Act**; **Racketeer Influenced and Corrupt Organizations Act.**

JURY SELECTION. See **Constitutional Law,** II, 2.

LABOR LAW.

National Labor Relations Act—Collective-bargaining agreements—Arbitration.—A collective-bargaining agreement provision that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act of 1967 claims is enforceable as a matter of federal law. 14 Penn Plaza LLC v. Pyett, p. 247.

LEGISLATIVE-DISTRICT LINES. See **Voting Rights Act of 1965.**

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MENTAL RETARDATION. See **Constitutional Law,** I.

MILITARY JUSTICE.

Jurisdiction—Coram nobis petitions.—Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect. United States v. Denedo, p. 904.

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PLEA AGREEMENTS. See **Criminal Law,** 5.

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PREGNANCY DISCRIMINATION ACT.

Employment discrimination—Pension benefits calculation—Credit for pregnancy leave.—An employer does not necessarily violate PDA when it pays pension benefits calculated in part under an accrual rule, applied only prior to PDA, that gave less retirement credit for pregnancy leave than for medical leave generally; because AT&T's pension payments accord with a bona fide seniority system's terms, they are insulated from challenge under § 703(h) of Title VII of Civil Rights Act of 1964. AT&T Corp. v. Hulteen, p. 701.

PRISONERS' SUITS. See **Constitutional Law,** VI.

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

Association-in-fact "enterprise"—Jury instructions.—An association-in-fact "enterprise" under RICO must have a "structure," but pertinent jury instruction need not be framed in petitioner's proposed language, *i. e.*, as having "an ascertainable structure beyond that inherent in pattern of racketeering activity in which it engages." Boyle v. United States, p. 938.

RAILROAD'S NEGLIGENCE. See **Federal Employers' Liability Act.**

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Alienation of Hawaii's sovereign territory—Effect of congressional apology.—Congress did not strip Hawaii of its authority to alienate its sovereign territory by passing a joint resolution apologizing for role United States played in overthrowing Hawaiian monarchy in 1893. Hawaii v. Office of Hawaiian Affairs, p. 163.

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SUPREME COURT.

1. Retirement of JUSTICE SOUTER, p. IV.
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5. Amendments to Federal Rules of Bankruptcy Procedure, p. 1307.
6. Amendments to Federal Rules of Civil Procedure, p. 1341.
7. Amendments to Federal Rules of Criminal Procedure, p. 1363.
8. *Original cases—Expert witness fees.*—Expert witness attendance fees that are available in cases brought under this Court's original jurisdiction are same as expert witness attendance fees that would be available in a district court under 28 U. S. C. § 1821(b). Kansas v. Colorado, p. 98.
9. *Stays—Chrysler sale.*—Applications for stay of Chrysler sale denied, and temporary stay vacated. Indiana State Police Pension Trust v. Chrysler LLC, p. 960.
10. *Stays—Pending certiorari petition.*—Stay requested by applicants—who claim that Second Circuit's mandate will require them to pay out pension payments to beneficiaries which they will be unable to recoup should they be successful in this Court—pending a decision on their certiorari petition is denied. Conkright v. Frommert (GINSBURG, J., in chambers), p. 1401.

TELEPHONE USE FACILITATING DRUG CRIMES. See **Criminal Law,** 2.

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TERRORISM RISK INSURANCE ACT OF 2002.

Iranian asset—Attachment.—At time of Ninth Circuit's decision in this case, a judgment held by Iran was not an asset "blocked" by United States that could be attached by respondent under Act; even if Iran's judgment is presently "blocked," respondent has waived his right to attach it under Victims of Trafficking and Violence Protection Act of 2000. Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi, p. 366.

TIME LIMITS FOR APPEALS. See **Appeals.**

TRIBES AND FEDERAL GOVERNMENT. See **Indian Tucker Act.**

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Disability benefits claim—Notice error—Harmlessness determination.—Federal Circuit's framework for determining harmlessness of errors by Department of Veterans Affairs in notifying a veteran of information

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or evidence necessary to substantiate his disability claim conflicts with 38 U. S. C. § 7261(b)(2)'s requirement that Veterans Court take "due account of the rule of prejudicial error." Shinseki v. Sanders, p. 396.

VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000. See **Terrorism Risk Insurance Act of 2002.**

VOTING RIGHTS ACT OF 1965.

Legislative-district lines—Vote dilution.—North Carolina Supreme Court's holding that a minority group must constitute a numerical majority of voting-age population in an area before VRA § 2 requires creating a legislative district to prevent dilution of that group's votes is affirmed. Bartlett v. Strickland, p. 1.

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WORDS AND PHRASES.

1. "*Due account of the rule of prejudicial error.*" 38 U. S. C. § 7261(b)(2). Shinseki v. Sanders, p. 396.

2. "*Facilitating [felony drug distribution].*" Controlled Substances Act, 21 U. S. C. § 843(b). Abuelhawa v. United States, p. 816.

3. "*If [a] firearm is discharged.*" 18 U. S. C. § 924(c)(1)(A)(iii). Dean v. United States, p. 568.

4. "*Knowingly . . . uses, without lawful authority, a means of identification of another person.*" 18 U. S. C. § 1028(a)(1). Flores-Figueroa v. United States, p. 646.