UNITED STATES

REPORTS

573

OCT. TERM 2013

UNITED STATES REPORTS

VOLUME 573

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2013

JUNE 9 THROUGH OCTOBER 2, 2014

END OF TERM

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2020

Printed on Uncoated Permanent Printing Paper

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

ERRATUM

487 U. S. 725, line 30: "interefere" should be "interfere".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2012 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2013

CTS CORP. *v.* WALDBURGER ET AL.

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

No. 13–339. Argued April 23, 2014—Decided June 9, 2014

Federal law pre-empts state-law statutes of limitations in certain tort actions involving personal injury or property damage arising from the release of a hazardous substance, pollutant, or contaminant into the environment. 42 U. S. C. § 9658. Petitioner CTS Corporation sold property on which it had stored chemicals as part its operations as an electronics plant. Twenty-four years later, respondents, the owners of portions of that property and adjacent landowners, sued, alleging damages from the stored contaminants. CTS moved to dismiss, citing a state statute of repose that prevented subjecting a defendant to a tort suit brought more than 10 years after the defendant's last culpable act. Because CTS' last act occurred when it sold the property, the District Court granted the motion. Finding § 9658 ambiguous, the Fourth Circuit reversed, holding that the statute's remedial purpose favored pre-emption.

Held: The judgment is reversed.

723 F. 3d 434, reversed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to all but Part II–D, concluding that § 9658 does not pre-empt state statutes of repose. Pp. 7–18.

(a) The outcome here turns on whether § 9658 distinguishes between statutes of limitations and statutes of repose, which are both used to

limit the temporal extent or duration of tort liability. There is considerable common ground in the policies underlying the two, but their specified time periods are measured differently and they seek to attain different purposes and objectives. Statutes of limitations are designed to promote justice by encouraging plaintiffs to pursue claims diligently and begin to run when a claim accrues. Statutes of repose effect a legislative judgment that a defendant should be free from liability after a legislatively determined amount of time and are measured from the date of the defendant's last culpable act or omission. The application of equitable tolling underscores their difference in purpose. Because a statute of limitations' purpose is not furthered by barring an untimely action brought by a plaintiff who was prevented by extraordinary circumstances from timely filing, equitable tolling operates to pause the running of the statute. The purpose of statutes of repose are unaffected by such circumstances, and equitable tolling does not apply. Pp. 7–10.

(b) The text and structure of § 9658 resolve this case. Under that provision, pre-emption is characterized as an "[e]xception," § 9658(a)(1), to the regular rule that "the statute of limitations established under State law" applies. The "applicable limitations period," the "commencement date" of which is subject to pre-emption, is defined as "the period specified in a statute of limitations." § 9658(b)(2). That term appears four times, and "statute of repose" does not appear at all. While it is apparent from the historical development of the two terms that their general usage has not always been precise, their distinction was well enough established to be reflected in the 1982 Study Group Report that guided § 9658's enactment, acknowledged the distinction, and urged the repeal of both types of statutes. Because that distinction is not similarly reflected in § 9658, it is proper to conclude that Congress did not intend to pre-empt statutes of repose.

Other textual features further support this conclusion. It would be awkward to use the singular "applicable limitations period" to mandate pre-emption of two different time periods with two different purposes. And the definition of that limitations period as "the period" during which a "civil action" under state law "may be brought," § 9658(b)(2), presupposes that a civil action exists. A statute of repose, in contrast, can prohibit a cause of action from ever coming into existence. Section 9658's inclusion of a tolling rule also suggests that the statute's reach is limited to statutes of limitations, which traditionally have been subject to tolling. Respondents contend that § 9658 also effects an implied pre-emption because statutes of repose create an obstacle to Congress' purposes and objectives, see *Wyeth* v. *Levine*, 555 U. S. 555, 563–564. But the level of generality at which the statute's purpose is framed affects

whether a specific reading will further or hinder that purpose. Here, where Congress chose to leave many areas of state law untouched, respondents have not shown that statutes of repose pose an unacceptable obstacle to the attainment of statutory purposes. Pp. 10–18.

KENNEDY, J., delivered the opinion of the Court, except as to Part II–D. SOTOMAYOR and KAGAN, JJ., joined that opinion in full, and ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined as to all but Part II–D. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 19. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 20.

Brian J. Murray argued the cause for petitioner. With him on the briefs were *Michael F. Dolan*, *Dennis Murashko*, and *Richard M. Re*.

Joseph R. Palmore argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, and *Daniel Tenny*.

John J. Korzen argued the cause for respondents. With him on the brief was *Allison M. Zieve*.*

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–D.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2767, as amended, 42 U. S. C. § 9601 *et seq.*, contains a provision that by its terms pre-empts statutes of limitations applicable to state-law tort actions in certain circumstances. § 9658.

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*Briefs of *amici curiae* urging reversal were filed for the American Chemistry Council et al. by *Allyson N. Ho*, *Michael W. Steinberg*, and *Ronald J. Tenpas*; and for DRI–The Voice of the Defense Bar by *J. Michael Weston* and *Lawrence S. Ebner*.

Briefs of *amici curiae* urging affirmance were filed for Environmental Law Professors by *Michael J. Brickman*; for Natural Resources Defense Council by *Sean B. Hecht*; and for Jerry Ensminger et al. by *Burton Craige*, *Narenda K. Ghosh*, and *J. Edward Bell III*.

Section 9658 applies to statutes of limitations governing actions for personal injury or property damage arising from the release of a hazardous substance, pollutant, or contaminant into the environment.

Section 9658 adopts what is known as the discovery rule. Under this framework, statutes of limitations in covered actions begin to run when a plaintiff discovers, or reasonably should have discovered, that the harm in question was caused by the contaminant. A person who is exposed to a toxic contaminant may not develop or show signs of resulting injury for many years, and so Congress enacted § 9658 out of concern for long latency periods.

It is undoubted that the discovery rule in § 9658 pre-empts state statutes of limitations that are in conflict with its terms. The question presented in this case is whether § 9658 also pre-empts state statutes of repose.

A divided panel of the Court of Appeals for the Fourth Circuit held that § 9658 does pre-empt statutes of repose. That holding was in error, and, for the reasons that follow, the judgment of the Court of Appeals must be reversed.

I

Congress enacted CERCLA in 1980 "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." *Burlington N. & S. F. R. Co.* v. *United States*, 556 U. S. 599, 602 (2009) (quoting *Consolidated Edison Co. of New York* v. *UGI Utilities, Inc.*, 423 F. 3d 90, 94 (CA2 2005)). The Act provided a federal cause of action to recover costs of cleanup from culpable entities but not a federal cause of action for personal injury or property damage. Instead, CERCLA directed preparation of an expert report to determine "the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment," in-

cluding "barriers to recovery posed by existing statutes of limitations." 42 U. S. C. §§ 9651(e)(1), (3)(F).

The 1982 report resulting from that statutory directive proposed certain changes to state tort law. Senate Committee on Environment and Public Works, Superfund Section 301(e) Study Group, Injuries and Damages From Hazardous Wastes—Analysis and Improvement of Legal Remedies, 97th Cong., 2d Sess. (Comm. Print 1982) (hereinafter Study Group Report or Report). As relevant here, the Study Group Report noted the long latency periods involved in harm caused by toxic substances and "recommend[ed] that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause." *Id.*, at pt. 1, 256. The Report further stated: "The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states[,] have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one." *Ibid.*

Congress did not wait long for States to respond to some or all of the Report's recommendations. Instead, Congress decided to act at the federal level. Congress amended CERCLA in 1986 to add the provision now codified in § 9658. Whether § 9658 repeals statutes of repose, as the Study Group Report recommended, is the question to be addressed here.

The instant case arose in North Carolina, where CTS Corporation ran an electronics plant in Asheville from 1959 to 1985. (A subsidiary, CTS of Asheville, Inc., ran the plant until 1983, when CTS Corporation took over.) The plant manufactured and disposed of electronics and electronic parts. In the process, it stored the chemicals trichloroethylene and cis-1, 2-dichloroethane. In 1987, CTS sold the property, along with a promise that the site was environmentally sound. The buyer eventually sold portions of the property to individuals who, along with adjacent landowners, brought

this suit alleging damage from contaminants on the land. Those who alleged the injury and damage were the plaintiffs in the trial court and are respondents here.

Their suit was brought in 2011, 24 years after CTS sold the property. The suit, filed in the United States District Court for the Western District of North Carolina, was a state-law nuisance action against CTS, petitioner here. Respondents sought "reclamation" of "toxic chemical contaminants" belonging to petitioner, "remediation of the environmental harm caused" by contaminants, and "monetary damages in an amount that will fully compensate them for all the losses and damages they have suffered, . . . and will suffer in the future." App. to Pet. for Cert. 57a. Respondents claim that in 2009 they learned from the Environmental Protection Agency that their wellwater was contaminated, allegedly while petitioner operated its electronics plant.

Citing North Carolina's statute of repose, CTS moved to dismiss the claim. That statute prevents subjecting a defendant to a tort suit brought more than 10 years after the last culpable act of the defendant. N. C. Gen. Stat. Ann. § 1–52(16) (Lexis 2013) ("[N]o cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action"); *Robinson* v. *Wadford*, 222 N. C. App. 694, 697, 731 S. E. 2d 539, 541 (2012) (referring to the provision as a "statute of repose"). Because CTS' last act occurred in 1987, when it sold the electronics plant, the District Court accepted the recommendation of a Magistrate Judge and granted CTS' motion to dismiss.

A divided panel of the Court of Appeals for the Fourth Circuit reversed, ruling that § 9658 pre-empted the statute of repose. 723 F. 3d 434 (2013). The majority found § 9658 "ambiguous," but also found that the interpretation in favor of pre-emption was preferable because of CERCLA's remedial purpose. *Id.*, at 443–444.

Judge Thacker dissented. *Id.*, at 445–454. She found the statutory text's exclusion of statutes of repose to be "plain

and unambiguous." *Id.*, at 445. She further indicated that, even "if the preemptive effect of § 9658 were susceptible to two interpretations, a presumption against preemption would counsel that we should limit § 9658's preemptive reach to statutes of limitations without also extending it to statutes of repose." *Ibid.*

The Courts of Appeals, as well as the Supreme Court of South Dakota, have rendered conflicting judgments on this question. Compare *Burlington N. & S. F. R. Co.* v. *Poole Chemical Co.*, 419 F. 3d 355, 362 (CA5 2005), and *Clark County* v. *Sioux Equipment Corp.*, 2008 S.D. 60, ¶¶27–29, 753 N. W. 2d 406, 417, with *McDonald* v. *Sun Oil Co.*, 548 F. 3d 774, 779 (CA9 2008). This Court granted certiorari. 571 U. S. 1118 (2014).

II

A

The outcome of the case turns on whether § 9658 makes a distinction between state-enacted statutes of limitations and statutes of repose. Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts. Both types of statute can operate to bar a plaintiff's suit, and in each instance time is the controlling factor. There is considerable common ground in the policies underlying the two types of statute. But the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives. And, as will be explained, § 9658 mandates a distinction between the two.

In the ordinary course, a statute of limitations creates "a time limit for suing in a civil case, based on the date when the claim accrued." Black's Law Dictionary 1546 (9th ed. 2009) (Black's); see also *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U. S. 99, 105 (2013) ("As a general matter, a statute of limitations begins to run when the cause of action '"accrues"'—that is, when 'the plaintiff can file suit and

obtain relief' " (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997))). Measured by this standard, a claim accrues in a personal-injury or property-damage action "when the injury occurred or was discovered." Black's 1546. For example, North Carolina, whose laws are central to this case, has a statute of limitations that allows a person three years to bring suit for personal injury or property damage, beginning on the date that damage "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N. C. Gen. Stat. Ann. § 1–52(16).

A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant. A statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." Black's 1546. The statute of repose limit is "not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered." 54 C. J. S., Limitations of Actions § 7, p. 24 (2010) (hereinafter C. J. S.). The repose provision is therefore equivalent to "a cutoff," *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 363 (1991), in essence an "absolute . . . bar" on a defendant's temporal liability, C. J. S. § 7, at 24.

Although there is substantial overlap between the policies of the two types of statute, each has a distinct purpose and each is targeted at a different actor. Statutes of limitations require plaintiffs to pursue "diligent prosecution of known claims." Black's 1546. Statutes of limitations "promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers* v. *Railway Express*

Agency, Inc., 321 U. S. 342, 348–349 (1944). Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons. But the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant should "be free from liability after the legislatively determined period of time." C. J. S. § 7, at 24; see also *School Board of Norfolk* v. *United States Gypsum Co.*, 234 Va. 32, 37, 360 S. E. 2d 325, 328 (1987) ("[S]tatutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability" (internal quotation marks omitted)). Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability. Indeed, the Double Jeopardy Clause has been described as "a statute of repose" because it in part embodies the idea that at some point a defendant should be able to put past events behind him. *Jones* v. *Thomas*, 491 U. S. 376, 392 (1989) (Scalia, J., dissenting).

One central distinction between statutes of limitations and statutes of repose underscores their differing purposes. Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10 (2014). Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control. See, *e. g.*, *Lampf*, *supra*, at 363 ("[A] period of repose [is] inconsistent with tolling"); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056, p. 240 (3d ed. 2002) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling"); Restatement (Second) of Torts § 899, Comment *g* (1977).

Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to "pursu[e] his rights diligently," and when an "extraordinary circumstance prevents him from bringing a timely action," the restriction imposed by the statute of limitations does not further the statute's purpose. *Lozano*, *supra*, at 10. But a statute of repose is a judgment that defendants should "be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason." C. J. S. § 7, at 24. As an illustrative example, under North Carolina law statutes of limitations may be tolled but statutes of repose may not. See, *e. g.*, *Monson* v. *Paramount Homes, Inc.*, 133 N. C. App. 235, 239–241, 515 S. E. 2d 445, 449 (1999).

B

The relevant provisions of § 9658 and its definitions are central here, so the pre-emption directive is quoted in full:

> "**(a) State statutes of limitations for hazardous substance cases**
>
> "**(1) Exception to State statutes**
>
> "In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.
>
> "**(2) State law generally applicable**
>
> "Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury,

or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

. . . . .

"**(b) Definitions**

. . . . .

"**(2) Applicable limitations period**

"The term 'applicable limitations period' means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

"**(3) Commencement date**

"The term 'commencement date' means the date specified in a statute of limitations as the beginning of the applicable limitations period.

"**(4) Federally required commencement date**

"**(A) In general**

"Except as provided in subparagraph (B), the term 'federally required commencement date' means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

"**(B) Special rules**

"In the case of a minor or incompetent plaintiff, the term 'federally required commencement date' means the later of the date referred to in subparagraph (A) or the following:

"(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

"(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed."

On the facts of this case, petitioner does not contend that North Carolina's 3-year statute of limitations bars respondents' suit. Though the suit was filed in 2011, more than 20 years after petitioner sold the property at issue, respondents allege that they learned about the contamination only in 2009.

C

The Court now examines in more detail the question whether the state statute of repose is pre-empted by the federal statute.

The Court of Appeals supported its interpretation of § 9658 by invoking the proposition that remedial statutes should be interpreted in a liberal manner. The Court of Appeals was in error when it treated this as a substitute for a conclusion grounded in the statute's text and structure. After all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the Court identified some subset of statutes as especially remedial, the Court has emphasized that "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*). Congressional intent is discerned primarily from the statutory text. In any event, were the Court to adopt a presumption to help resolve ambiguity, substantial support also exists for the proposition that "the States' coordinate role in government counsels against reading" federal laws such as § 9658 "to restrict the States' sovereign capacity to regulate" in areas of traditional state concern. *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. 216, 236 (2013).

Turning to the statutory text, the Court notes first that § 9658, in the caption of subsection (a), characterizes preemption as an "[e]xception" to the regular rule. § 9658(a)(1). Section 9658 contains another subsection, with the heading "State law generally applicable," that provides the rule that "the statute of limitations established under State law shall apply." § 9658(a)(2). Under this structure, state law

is not pre-empted unless it fits into the precise terms of the exception.

The statute defines the "applicable limitations period," the "commencement date" of which is subject to pre-emption, as a period specified in "a statute of limitations." § 9658(b)(2). Indeed, § 9658 uses the term "statute of limitations" four times (not including the caption), but not the term "statute of repose." This is instructive, but it is not dispositive. While the term "statute of limitations" has acquired a precise meaning, distinct from "statute of repose," and while that is its primary meaning, it must be acknowledged that the term "statute of limitations" is sometimes used in a less formal way. In that sense, it can refer to any provision restricting the time in which a plaintiff must bring suit. See Black's 1546; see also *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 210 (1976). Congress has used the term "statute of limitations" when enacting statutes of repose. See, *e. g.*, 15 U. S. C. § 78u–6(h)(1)(B)(iii)(I)(aa) (2012 ed.) (creating a statute of repose and placing it in a provision entitled "Statute of limitations"); 42 U. S. C. § 2278 (same). And petitioner does not point out an example in which Congress has used the term "statute of repose." So the Court must proceed to examine other evidence of the meaning of the term "statute of limitations" as it is used in § 9658. The parties debate the historical development of the terms "statute of limitations" and "statute of repose" in an effort to show how these terms were likely understood in 1986, when Congress enacted § 9658. It is apparent that the distinction between statutes of limitations and statutes of repose was understood by some courts and scholars before 1986. The 1977 Restatement of Torts noted that "[i]n recent years special 'statutes of repose' have been adopted in some states . . . . The statutory period in these acts is usually longer than that for the regular statute of limitations, but . . . may have run before a cause of action came fully into existence." Restatement (Second) of Torts § 899, Comment *g*.

But that usage, now predominant, then was not the only definition of the two terms. One scholar, writing in 1981, described multiple usages of the terms, including both a usage in which the terms are equivalent and also the modern, more precise usage. McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. U. L. Rev. 579, 584 (1981) (describing a statute of repose as "distinct from a statute of limitation because [a statute of repose] begins to run at a time unrelated to the traditional accrual of the cause of action").

Respondents note that an entry in Black's Law Dictionary from 1979 describes a statute of limitations as follows: "Statutes of limitations are statutes of repose." Black's 835 (5th ed.). That statement likely reflects an earlier, broader usage in which the term "statute of repose" referred to all provisions delineating the time in which a plaintiff must bring suit. See, *e. g.*, *Pillow* v. *Roberts*, 13 How. 472, 477 (1852) ("Statutes of limitation . . . are statutes of repose, and should not be evaded by a forced construction"); *Rosenberg* v. *North Bergen*, 61 N. J. 190, 201, 293 A. 2d 662, 667 (1972) ("All statutes limiting in any way the time within which a judicial remedy may be sought are statutes of repose"); Black's 1077 (rev. 4th ed. 1968) (defining "statute of limitations" as "[a] statute . . . declaring that no suit shall be maintained . . . unless brought within a specified period after the right accrued. Statutes of limitation are statutes of repose"); Ballentine's Law Dictionary 1233 (2d ed. 1948) (similar). That usage does not necessarily support respondents' interpretation, because the broad usage of the term "statute of repose" does not mean that the term "statute of limitations" must refer to both types of statute.

From all this, it is apparent that general usage of the legal terms has not always been precise, but the concept that statutes of repose and statutes of limitations are distinct was well enough established to be reflected in the 1982 Study

Group Report, commissioned by Congress. In one of its recommendations, the Study Group Report called on States to adopt the discovery rule now embodied in § 9658. Study Group Report, pt. 1, at 256. The Report acknowledged that statutes of repose were not equivalent to statutes of limitations and that a recommendation to pre-empt the latter did not necessarily include the former. For immediately it went on to state: "The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states[,] have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one." *Ibid.* The scholars and professionals who were discussing this matter (and indeed were advising Congress) knew of a clear distinction between the two.

The Report clearly urged the repeal of statutes of repose as well as statutes of limitations. But in so doing the Report did what the statute does not: It referred to statutes of repose as a distinct category. And when Congress did not make the same distinction, it is proper to conclude that Congress did not exercise the full scope of its pre-emption power.

While the use of the term "statute of limitations" in § 9658 is not dispositive, the Court's textual inquiry does not end there, for other features of the statutory text further support the exclusion of statutes of repose. The text of § 9658 includes language describing the covered period in the singular. The statute uses the terms "the applicable limitations period," "such period shall commence," and "the statute of limitations established under State law." This would be an awkward way to mandate the pre-emption of two different time periods with two different purposes.

True, the Dictionary Act states that "words importing the singular include and apply to several persons, parties, or things" unless "the context indicates otherwise." 1 U. S. C. § 1. But the Court has relied on this directive when the rule is "'necessary to carry out the evident intent of the stat-

ute.'" *United States* v. *Hayes*, 555 U. S. 415, 422, n. 5 (2009) (quoting *First Nat. Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 657 (1924)). As discussed, the context here shows an evident intent not to cover statutes of repose.

Further, to return again to the definition of the "applicable limitations period," the statute describes it as "the period" during which a "civil action" under state law "may be brought." § 9658(b)(2). It is true that in a literal sense a statute of repose limits the time during which a suit "may be brought" because it provides a point after which a suit cannot be brought. *Ibid.*; see C. J. S. § 7, at 24 ("A statute of repose . . . limits the time within which an action may be brought"). But the definition of the "applicable limitations period" presupposes that "a [covered] civil action" exists. § 9658(b)(2). Black's Law Dictionary defines a "civil action" as identical to an "action at law," which in relevant part is defined as a "civil suit stating a legal cause of action." Black's 32–33, 279 (9th ed. 2009); see also *id.*, at 222 (5th ed. 1979).

A statute of repose, however, as noted above, "is not related to the accrual of any cause of action." C. J. S. § 7, at 24. Rather, it mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued. Thus, a statute of repose can prohibit a cause of action from coming into existence. See, *e. g.*, N. C. Gen. Stat. Ann. § 1–52(16) ("[N]o cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action"); see also *Hargett* v. *Holland*, 337 N. C. 651, 654–655, 447 S. E. 2d 784, 787 (1994) ("A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained . . . . If the action is not brought within the specified period, the plaintiff literally has *no* cause of action" (internal quotation marks omitted)); *Lamb* v. *Wedgewood South Corp.*, 308 N. C. 419, 440–441, 302 S. E. 2d 868, 880 (1983). A statute of repose can be said to define the scope

of the cause of action, and therefore the liability of the defendant. See *Hargett*, *supra*, at 655–656, 447 S. E. 2d, at 788.

In light of the distinct purpose for statutes of repose, the definition of "applicable limitations period" (and thus also the definition of "commencement date") in § 9658(b)(2) is best read to encompass only statutes of limitations, which generally begin to run after a cause of action accrues and so always limit the time in which a civil action "may be brought." A statute of repose, however, may preclude an alleged tortfeasor's liability before a plaintiff is entitled to sue, before an actionable harm ever occurs.

Another and altogether unambiguous textual indication that § 9658 does not pre-empt statutes of repose is that § 9658 provides for equitable tolling for "minor or incompetent plaintiff[s]." § 9658(b)(4)(B). As noted in the preceding discussion, a "critical distinction" between statutes of limitations and statutes of repose "is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling." 4 Wright, Federal Practice and Procedure § 1056, at 240. As a consequence, the inclusion of a tolling rule in § 9658 suggests that the statute's reach is limited to statutes of limitations, which traditionally have been subject to tolling. It would be odd for Congress, if it did seek to pre-empt statutes of repose, to pre-empt not just the commencement date of statutes of repose but also state law prohibiting tolling of statutes of repose—all without an express indication that § 9658 was intended to reach the latter.

In addition to their argument that § 9658 expressly preempts statutes of repose, respondents contend that § 9658 effects an implied pre-emption because statutes of repose "creat[e] an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth* v. *Levine*, 555 U. S. 555, 563–564 (2009) (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)). Respondents argue that pre-emption of statutes of repose ad-

vances § 9658's purpose, namely, to help plaintiffs bring tort actions for harm caused by toxic contaminants.

But the level of generality at which the statute's purpose is framed affects the judgment whether a specific reading will further or hinder that purpose. CERCLA, it must be remembered, does not provide a complete remedial framework. The statute does not provide a general cause of action for all harm caused by toxic contaminants. Section 9658 leaves untouched States' judgments about causes of action, the scope of liability, the duration of the period provided by statutes of limitations, burdens of proof, rules of evidence, and other important rules governing civil actions. "'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Wyeth*, *supra*, at 574–575 (quoting *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 166–167 (1989)). Respondents have not shown that in light of Congress' decision to leave those many areas of state law untouched, statutes of repose pose an unacceptable obstacle to the attainment of CERCLA's purposes.

D

Under a proper interpretation of § 9658, statutes of repose are not within Congress' pre-emption mandate. Although the natural reading of § 9658's text is that statutes of repose are excluded, the Court finds additional support for its conclusion in well-established "presumptions about the nature of pre-emption." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 484–485 (1996) (citing *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 111 (1992) (KENNEDY, J., concurring in part and concurring in judgment)).

"[B]ecause the States are independent sovereigns in our federal system," the Court "'assum[es] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose

of Congress.'" *Medtronic*, *supra*, at 485 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). It follows that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc.* v. *Good*, 555 U. S. 70, 77 (2008) (quoting *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 449 (2005)). That approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U. S., at 485.

The effect of that presumption is to support, where plausible, "a narrow interpretation" of an express pre-emption provision, *ibid.*, especially "when Congress has legislated in a field traditionally occupied by the States," *Altria*, *supra*, at 77. The presumption has greatest force when Congress legislates in an area traditionally governed by the States' police powers. See *Rice*, *supra*, at 230. "In our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." *Wos* v. *E. M. A.*, 568 U. S. 627, 639–640 (2013) (quoting *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984)).

The result of respondents' interpretation would be that statutes of repose would cease to serve any real function. Respondents have not shown the statute has the clarity necessary to justify that reading.

* * *

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

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, concurring in part and concurring in the judgment.

I join all but Part II–D of JUSTICE KENNEDY's opinion. I do not join that Part because I remain convinced that "[t]he proper rule of construction for express pre-emption provi-

sions is . . . the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning." *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 548 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part). The contrary notion—that express pre-emption provisions must be construed narrowly—was "extraordinary and unprecedented" when this Court announced it two decades ago, *id.*, at 544, and since then our reliance on it has been sporadic at best, see *Altria Group, Inc.* v. *Good*, 555 U. S. 70, 99–103 (2008) (THOMAS, J., dissenting). For the reasons given in the balance of the opinion, ordinary principles of statutory construction demonstrate that 42 U. S. C. § 9658 pre-empts only statutes of limitation and not statutes of repose.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

North Carolina's law prescribing "periods . . . for the commencement of actions [for personal injury or damage to property]," N. C. Gen. Stat. Ann. §§ 1–46, 1–52 (Lexis 2013), includes in the same paragraph, § 1–52(16), both a discovery rule and an absolute period of repose. Section 1–52(16) states that personal injury and property damage claims

> "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant . . . . Provided that no [claim] shall accrue more than 10 years from the last act or omission of the defendant giving rise to the [claim]."

The question presented is whether a federal statute on the timeliness of suits for harm caused by environmental contamination, 42 U. S. C. § 9658, preempts North Carolina's ten-year repose provision.

The federal statute concerns hazardous-waste-caused injuries with long latency periods that can run 10 to 40 years.

To ensure that latent injury claims would not become time barred during the years in which the injury remained without manifestation, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. § 9601 *et seq.*, to include a provision, § 9658, on "actions under state law for damages from exposure to hazardous substances." See H. R. Conf. Rep. No. 99–962, pp. 87–88, 261 (1986) (hereinafter Conference Report) (problem centers on when state limitations periods begin to run rather than the number of years they run; Congress therefore established "a [f]ederally-required commencement date"). Captioned "Exception to State statutes," § 9658(a)(1) instructs that when the applicable state limitations period specifies "a commencement date . . . earlier than the federally required commencement date," the federal date shall apply "in lieu of the date specified in [state law]."

The Court in the case at hand identifies as the relevant prescriptive period North Carolina's ten-year repose provision. I agree. But as I see it, the later "federally required commencement date," § 9658(a)(1), (b)(4), displaces the earlier date state law prescribes.

Section 9658(b)(3) defines "commencement date" as "the date specified in a statute of limitations as the beginning of the applicable limitations period." Under North Carolina law, that date is determined by the occurrence of "the last act or omission of the defendant giving rise to the [claim]." N. C. Gen. Stat. Ann. § 1–52(16). The definition key to this controversy, however, appears in § 9658(b)(4)(A): "'[F]ederally required commencement date' means the date the plaintiff knew (or reasonably should have known) that [her] injury . . . [was] caused . . . by the hazardous substance . . . concerned." Congress, in short, directed, in § 9658(a)(1), that the federally prescribed discovery rule, set out in § 9658(b)(4), shall apply "in lieu of" the earlier "commencement date" (the defendant's "last act or omission") specified in N. C. Gen. Stat. Ann. § 1–52(16).

Why does the Court fight this straightforward reading? At length, the Court's opinion distinguishes statutes of limitations from statutes of repose. See *ante*, at 7–18. Yet North Carolina itself made its repose period a component of the statute prescribing periods for "the commencement of actions." §§ 1–46, 1–52(16). What is a repose period, in essence, other than a limitations period unattended by a discovery rule? See Senate Committee on Environment and Public Works, Superfund Section 301(e) Study Group, Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies, 97th Cong., 2d Sess., pt. 1, pp. 255–256 (Comm. Print 1982) (hereinafter Study Group Report).

The legislative history of § 9658, moreover, shows why the distinction the Court draws between statutes of limitations and repose prescriptions cannot be what Congress ordered. As the Court recognizes, *ante*, at 4–5, Congress amended CERCLA to include § 9658 in response to the report of an expert Study Group commissioned when CERCLA was enacted. That report directed its proposals to the States rather than to Congress. It "recommend[ed] that the several states enhance and develop common law and statutory remedies, and that they remove unreasonable procedural and other barriers to recovery in court action for personal injuries resulting from exposure to hazardous waste." Study Group Report 255. The report then made specific proposals. Under the heading "Statutes of Limitations," the Study Group proposed (1) "that all [S]tates . . . clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause" and (2) that States repeal "statutes of repose which, in a number of [S]tates[,] have the same effect as some statutes of limitation in barring plaintiff's claim before he knows he has one." *Id.*, at 255–256. Both measures are necessary, the report explained, because "many of the hazardous wastes are carcinogens" with "latency period[s] for the appearance of

injury or disease . . . likely to [run] for thirty years or more." *Id.*, at 255.

Beyond question, a repose period, like the ten-year period at issue here, will prevent recovery for injuries with latency periods running for decades. Thus, altering statutes of limitations to include a discovery rule would be of little use in States with repose prescriptions.

Rather than await action by the States, Congress decided to implement the Study Group's proposal itself by adopting § 9658. *Ante*, at 5. The Conference Report relates the Study Group Report's observation that "certain State statutes deprive plaintiffs of their day in court" because "[i]n the case of a long-latency disease, such as cancer," a limitations period that begins to run before the plaintiff has discovered her injury frequently will make timely suit impossible. Conference Report 261. The Conference Report then states that "[t]his section"—§ 9658—"addresses the problem identified in the [Study Group Report]." *Ibid.* As the Study Group Report makes clear, "the problem" it identified, to which the Conference Report adverted, cannot be solved when statutes of repose remain operative. The Court's interpretation thus thwarts Congress' clearly expressed intent to fix "the problem" the Study Group described.

In lieu of uniform application of the "federally required commencement date," § 9658(b)(4), the Court allows those responsible for environmental contamination, if they are located in the still small number of States with repose periods,* to escape liability for the devastating harm they cause, harm hidden from detection for more than ten years. Instead of encouraging prompt identification and remediation of toxic contamination before it can kill, the Court's decision

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*See Conn. Gen. Stat. §§ 52–577, 52–584 (2013) (three years); Kan. Stat. Ann. § 60–513(b) (2005) (ten years); Ore. Rev. Stat. § 12.115 (2013) (ten years). See also *Abrams* v. *Ciba Specialty Chemicals Corp.*, 659 F. Supp. 2d 1225, 1228–1240 (SD Ala. 2009) (discussing Alabama's 20-year common-law rule of repose and holding that § 9658 preempts it).

gives contaminators an incentive to conceal the hazards they have created until the repose period has run its full course.

Far from erring, see *ante*, at 4, 12, the Fourth Circuit, I am convinced, got it exactly right in holding that § 9658 supersedes state law contrary to the federally required discovery rule. I would affirm that court's sound judgment.

Syllabus

EXECUTIVE BENEFITS INSURANCE AGENCY *v.* ARKISON, CHAPTER 7 TRUSTEE OF ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

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

No. 12–1200. Argued January 14, 2014—Decided June 9, 2014

Bellingham Insurance Agency, Inc. (BIA), filed a voluntary Chapter 7 bankruptcy petition. Respondent Peter Arkison, the bankruptcy trustee, filed a complaint in the Bankruptcy Court against petitioner Executive Benefits Insurance Agency (EBIA) and others alleging the fraudulent conveyance of assets from BIA to EBIA. The Bankruptcy Court granted summary judgment for the trustee. EBIA appealed to the District Court, which affirmed the Bankruptcy Court's decision after *de novo* review and entered judgment for the trustee. While EBIA's appeal to the Ninth Circuit was pending, this Court held that Article III did not permit a Bankruptcy Court to enter final judgment on a counterclaim for tortious interference, even though final adjudication of that claim by the Bankruptcy Court was authorized by statute. *Stern* v. *Marshall*, 564 U. S. 462, 487. In light of *Stern*, EBIA moved to dismiss its appeal for lack of jurisdiction. The Ninth Circuit rejected EBIA's motion and affirmed. It acknowledged the trustee's claims as "*Stern* claims," *i. e.*, claims designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter. The Court of Appeals nevertheless concluded that EBIA had impliedly consented to jurisdiction. The Court of Appeals also observed that the Bankruptcy Court's judgment could instead be treated as proposed findings of fact and conclusions of law, subject to *de novo* review by the District Court.

Held:

1. Under the Bankruptcy Amendments and Federal Judgeship Act of 1984, federal district courts have original jurisdiction in bankruptcy cases and may refer to bankruptcy judges two statutory categories of proceedings: "core" proceedings and "non-core" proceedings. See generally 28 U. S. C. § 157. In core proceedings, a bankruptcy judge "may hear and determine . . . and enter appropriate orders and judgments," subject to the district court's traditional appellate review. § 157(b)(1). In non-core proceedings—those that are "not . . . core" but are "otherwise related to a case under title 11," § 157(c)(1)—final judgment must be entered by the district court after *de novo* review of the bankruptcy

judge's proposed findings of fact and conclusions of law, *ibid.*, except that the bankruptcy judge may enter final judgment if the parties consent, § 157(c)(2).

In *Stern*, the Court confronted an underlying conflict between the 1984 Act and the requirements of Article III. The Court held that Article III prohibits Congress from vesting a bankruptcy court with the authority to finally adjudicate the "core" claim of tortious interference. The Court did not, however, address how courts should proceed when they encounter a *Stern* claim. Pp. 30–35.

2. *Stern* claims may proceed as non-core within the meaning of § 157(c). Lower courts have described *Stern* claims as creating a statutory "gap," since bankruptcy judges are not explicitly authorized to propose findings of fact and conclusions of law in a core proceeding. However, this so-called gap is closed by the Act's severability provision, which instructs that where a "provision of the Act or [its] application . . . is held invalid, the remainder of th[e] Act . . . is not affected thereby." 98 Stat. 344. As applicable here, when a court identifies a *Stern* claim, it has "held invalid" the "application" of § 157(b), and the "remainder" not affected includes § 157(c), which governs non-core proceedings. Accordingly, where a claim otherwise satisfies § 157(c)(1), the bankruptcy court should simply treat the *Stern* claim as non-core. This conclusion accords with the Court's general approach to severability, which is to give effect to the valid portion of a statute so long as it "remains 'fully operative as a law,'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 509, and so long as the statutory text and context do not suggest that Congress would have preferred no statute at all, *ibid.* Pp. 35–37.

3. Section 157(c)(1)'s procedures apply to the fraudulent conveyance claims here. This Court assumes without deciding that these claims are *Stern* claims, which Article III does not permit to be treated as "core" claims under § 157(b). But because the claims assert that property of the bankruptcy estate was improperly removed, they are self-evidently "related to a case under title 11." Accordingly, they fit comfortably within the category of claims governed by § 157(c)(1). The Bankruptcy Court would have been permitted to follow that provision's procedures, *i. e.*, to submit proposed findings of fact and conclusions of law to the District Court for *de novo* review. Pp. 37–38.

4. Here, the District Court's *de novo* review of the Bankruptcy Court's order and entry of its own valid final judgment cured any potential error in the Bankruptcy Court's entry of judgment. EBIA contends that it was constitutionally entitled to review by an Article III court regardless of whether the parties consented to bankruptcy court adjudication. In the alternative, EBIA asserts that even if such con-

sent were constitutionally permissible, it did not in fact consent. Neither contention need be addressed here, because EBIA received the same review from the District Court that it would have received had the Bankruptcy Court treated the claims as non-core proceedings under § 157(c)(1). Pp. 38–40.

702 F. 3d 553, affirmed.

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

Douglas Hallward-Driemeier argued the cause for petitioner. With him on the briefs were *Elizabeth N. Dewar* and *Ryan McManus*.

John A. E. Pottow argued the cause for respondent. With him on the brief were *G. Eric Brunstad, Jr.*, and *Kate M. O'Keeffe*.

Curtis E. Gannon argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, and *Jeffrey Clair*.*

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*Briefs of *amici curiae* urging reversal were filed for Certain *TOUSA* Defendants by *Jonathan D. Hacker*, *Andrew M. Leblanc*, *Atara Miller*, and *Gabrielle L. Ruha*; for Kerr-McGee Corp. by *David B. Salmons*, *P. Sabin Willett*, *Bryan M. Killian*, *Melanie Gray*, and *Lydia Protopapas*; and for the Robert R. McCormick Foundation et al. by *Charles Fried* and *John P. Sieger*.

Briefs of *amici curiae* urging affirmance were filed for the State of New Hampshire et al. by *Joseph A. Foster*, Attorney General of New Hampshire, *Ann M. Rice*, Deputy Attorney General, and *Peter C. L. Roth*, Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *David M. Louie* of Hawaii, *Catherine Cortez Masto* of Nevada, *Ellen F. Rosenblum* of Oregon, *Alan Wilson* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, and *Robert W. Ferguson* of Washington; for the American Bar Association by *James R. Silkenat*, *Catherine Steege*, *Barry Levenstam*, *Melissa Hinds*, and *Sonia O'Donnell*; for the American College of Bankruptcy by *Stephen D. Lerner*, *Pierre H. Bergeron*, and *D. J. Baker*; for the Commercial Law League of America by *Jeffrey T. Kuntz*, *Michael D. Lessne*, and *Peter M. Gannott*; for the National Association of Bankruptcy Trustees by *Lynne F. Riley*; for the National Association of Chapter Thirteen Trustees by *Henry E. Hilde-*

JUSTICE THOMAS delivered the opinion of the Court.

In *Stern* v. *Marshall*, 564 U. S. 462 (2011), this Court held that even though bankruptcy courts are statutorily authorized to enter final judgment on a class of bankruptcy-related claims, Article III of the Constitution prohibits bankruptcy courts from finally adjudicating certain of those claims. *Stern* did not, however, decide how bankruptcy or district courts should proceed when a "*Stern* claim" is identified. We hold today that when, under *Stern*'s reasoning, the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court. Because the District Court in this case conducted the *de novo* review that petitioner demands, we affirm the judgment of the Court of Appeals upholding the District Court's decision.

I

Nicolas Paleveda and his wife owned and operated two companies—Aegis Retirement Income Services, Inc. (ARIS), and Bellingham Insurance Agency, Inc. (BIA). By early 2006, BIA had become insolvent, and on January 31, 2006, the company ceased operation. The next day, Paleveda used BIA funds to incorporate Executive Benefits Insurance Agency, Inc. (EBIA), petitioner in this case. Paleveda and

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brand III; for the *TOUSA* Liquidation Trustee by *Lawrence S. Robbins*, *Roy T. Englert, Jr.*, and *Michael L. Waldman*; for Richard Aaron et al. by *Richard Lieb* and *John Collen*; for S. Todd Brown et al. by *Craig Goldblatt*, *Danielle Spinelli*, and *Sonya L. Lebsack*; and for Irving H. Picard by *David B. Rivkin, Jr.*, *Andrew M. Grossman*, *Lee A. Casey*, and *David J. Sheehan*.

Briefs of *amici curiae* were filed for the Business Law Section of the Florida Bar by *Paul Steven Singerman*; and for NVIDIA Corp. by *Mark S. Davies*, *Frederick D. Holden, Jr.*, *Karen G. Johnson-McKewan*, and *Justin M. Lichterman*.

others initiated a scheme to transfer assets from BIA to EBIA. The assets were deposited into an account held jointly by ARIS and EBIA and ultimately credited to EBIA at the end of the year.

On June 1, 2006, BIA filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. Peter Arkison, the bankruptcy trustee and respondent in this case, filed a complaint in the same Bankruptcy Court against EBIA and others. As relevant here, the complaint alleged that Paleveda used various methods to fraudulently convey BIA assets to EBIA.[1] EBIA filed an answer and denied many of the trustee's allegations.

After some disagreement as to whether the trustee's claims should continue in the Bankruptcy Court or instead proceed before a jury in Federal District Court, the trustee filed a motion for summary judgment against EBIA in the Bankruptcy Court. The Bankruptcy Court granted summary judgment for the trustee on all claims, including the fraudulent conveyance claims. EBIA then appealed that determination to the District Court. The District Court conducted *de novo* review, affirmed the Bankruptcy Court's decision, and entered judgment for the trustee.

EBIA appealed to the United States Court of Appeals for the Ninth Circuit. After EBIA filed its opening brief, this Court decided *Stern*, *supra*. In *Stern*, we held that Article III of the Constitution did not permit a bankruptcy court to enter final judgment on a counterclaim for tortious interference, *id.*, at 487, even though final adjudication of that claim by the Bankruptcy Court was authorized by statute, see Part II–B, *infra*.[2] In light of *Stern*, EBIA moved to dismiss

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[1] The trustee asserted claims of fraudulent conveyance under 11 U. S. C. § 548, and under state law, Wash. Rev. Code, ch. 19.40 (2012).

[2] As we explain below, see Part II–B, *infra*, the statutory scheme at issue both in *Stern* and in this case grants bankruptcy courts the authority to "hear and determine" and "enter appropriate orders and judgments" in

its appeal in the Ninth Circuit for lack of jurisdiction, contending that Article III did not permit Congress to vest authority in a bankruptcy court to finally decide the trustee's fraudulent conveyance claims.

The Ninth Circuit rejected EBIA's motion and affirmed the District Court. *In re Bellingham Ins. Agency, Inc.*, 702 F. 3d 553 (2012). As relevant here, the court held that *Stern*, *supra*, and *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989),[3] taken together, lead to the conclusion that Article III does not permit a bankruptcy court to enter final judgment on a fraudulent conveyance claim against a noncreditor unless the parties consent. 702 F. 3d, at 565. The Ninth Circuit concluded that EBIA had impliedly consented to the Bankruptcy Court's jurisdiction, and that the Bankruptcy Court's adjudication of the fraudulent conveyance claim was therefore permissible. *Id.*, at 566, 568. The Court of Appeals also observed that the Bankruptcy Court's judgment could instead be treated as proposed findings of fact and conclusions of law, subject to *de novo* review by the District Court. *Id.*, at 565–566.

We granted certiorari, 570 U. S. 916 (2013).

II

In *Stern*, we held that Article III prohibits Congress from vesting a bankruptcy court with the authority to finally adjudicate certain claims. 564 U. S., at 487. But we did not address how courts should proceed when they encounter one of these "*Stern* claims"—a claim designated for final adjudication in the bankruptcy court as a statutory matter, but

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"core" proceedings. 28 U. S. C. §157(b)(1). The statute lists counterclaims like the one brought in *Stern* as "core" claims. §157(b)(2)(C).

[3] *Granfinanciera* held that a fraudulent conveyance claim under Title 11 is not a matter of "public right" for purposes of Article III, 492 U. S., at 55, and that the defendant to such a claim is entitled to a jury trial under the Seventh Amendment, *id.*, at 64.

prohibited from proceeding in that way as a constitutional matter.[4]

As we explain in greater detail below, when a bankruptcy court is presented with such a claim, the proper course is to issue proposed findings of fact and conclusions of law. The district court will then review the claim *de novo* and enter judgment. This approach accords with the bankruptcy statute and does not implicate the constitutional defect identified by *Stern*.

A

We begin with an overview of modern bankruptcy legislation. Prior to 1978, federal district courts could refer matters within the traditional "summary jurisdiction" of bankruptcy courts to specialized bankruptcy referees.[5] See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 53 (1982) (plurality opinion). Summary jurisdiction covered claims involving "property in the actual or constructive possession of the [bankruptcy] court," *ibid.*, *i. e.*, claims regarding the apportionment of the existing bankruptcy estate among creditors. See Brubaker, A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After *Stern* v. *Marshall*, 86 Am. Bkrtcy. L. J. 121, 124 (2012). Proceedings to augment the bankruptcy estate, on the other hand, implicated the district court's plenary jurisdiction and were not referred to the bankruptcy courts absent both parties' consent. See *Mac-*

[4] Because we conclude that EBIA received the *de novo* review and entry of judgment to which it claims constitutional entitlement, see Part IV–B, *infra*, this case does not require us to address whether EBIA in fact consented to the Bankruptcy Court's adjudication of a *Stern* claim and whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim. We reserve that question for another day.

[5] Bankruptcy referees were designated "judges" in 1973. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 53, n. 2 (1982) (plurality opinion).

Donald v. *Plymouth County Trust Co.*, 286 U. S. 263, 266 (1932); see also Brubaker, *supra*, at 128.

In 1978, Congress enacted sweeping changes to the federal bankruptcy laws. See 92 Stat. 2549. The Bankruptcy Reform Act eliminated the historical distinction between "'summary'" jurisdiction belonging to bankruptcy courts and "'plenary'" jurisdiction belonging to either a district court or an appropriate state court. *Northern Pipeline*, *supra*, at 54 (plurality opinion); see also 1 W. Norton & W. Norton, Bankruptcy Law and Practice § 4:12, p. 4–44 (3d ed. 2013). Instead, the 1978 Act mandated that bankruptcy judges "shall exercise" jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U. S. C. §§ 1471(b)–(c) (1976 ed., Supp. IV). Under the 1978 Act, bankruptcy judges were "vested with all of the 'powers of a court of equity, law, and admiralty,'" with only a few limited exceptions. *Northern Pipeline*, 458 U. S., at 55 (plurality opinion) (quoting § 1481). Notwithstanding their expanded jurisdiction and authority, these bankruptcy judges were not afforded the protections of Article III—namely, life tenure and a salary that may not be diminished. *Id.*, at 53.

In *Northern Pipeline*, this Court addressed whether bankruptcy judges under the 1978 Act could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity not otherwise a party to the proceeding. *Id.*, at 53, 87, n. 40. The Court concluded that assignment of that claim for resolution by the bankruptcy judge "violates Art. III of the Constitution." *Id.*, at 52, 87 (plurality opinion); see *id.*, at 91 (Rehnquist, J., concurring in judgment). The Court distinguished between cases involving so-called "public rights," which may be removed from the jurisdiction of Article III courts, and cases involving "private rights," which may not. See *id.*, at 69–71 (plurality opinion); *id.*, at 91 (Rehnquist, J., concurring in judgment). Specifically, the plurality noted that "the restructuring of

debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights," which belong in an Article III court. *Id.*, at 71–72, and n. 26.

B

Against that historical backdrop, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984—the Act at issue in this case. See 28 U. S. C. § 151 *et seq.* Under the 1984 Act, federal district courts have "original and exclusive jurisdiction of all cases under title 11," § 1334(a), and may refer to bankruptcy judges any "proceedings arising under title 11 or arising in or related to a case under title 11," § 157(a).[6] Bankruptcy judges serve 14-year terms subject to removal for cause, §§ 152(a)(1), (e), and their salaries are set by Congress, § 153(a).

The 1984 Act largely restored the bifurcated jurisdictional scheme that existed prior to the 1978 Act. The 1984 Act implements that bifurcated scheme by dividing all matters that may be referred to the bankruptcy court into two categories: "core" and "non-core" proceedings. See generally § 157.[7] It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core. § 157(b)(3); cf. Fed. Rule Bkrtcy. Proc. 7012. For core proceedings, the statute contains a nonexhaustive list of examples, including—as relevant here—"proceedings to determine, avoid, or recover fraudulent conveyances." § 157(b)(2)(H). The statute authorizes bankruptcy judges

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[6] In addition, district courts may also withdraw such matters from the bankruptcy courts for "cause shown." § 157(d).

[7] In using the term "core," Congress tracked the *Northern Pipeline* plurality's use of the same term as a description of those claims that fell within the scope of the historical bankruptcy court's power. See 458 U. S., at 71 ("[T]he restructuring of debtor-creditor relations, which is at the *core* of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights . . . " (emphasis added)).

to "hear and determine" such claims and "enter appropriate orders and judgments" on them. § 157(b)(1). A final judgment entered in a core proceeding is appealable to the district court, § 158(a)(1), which reviews the judgment under traditional appellate standards, Rule 8013.

As for "non-core" proceedings—*i. e.*, proceedings that are "not . . . core" but are "otherwise related to a case under title 11"—the statute authorizes a bankruptcy court to "hear [the] proceeding," and then "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). The district court must then review those proposed findings and conclusions *de novo* and enter any final orders or judgments. *Ibid.* There is one statutory exception to this rule: If all parties "consent," the statute permits the bankruptcy judge "to hear and determine and to enter appropriate orders and judgments" as if the proceeding were core. § 157(c)(2).

Put simply: If a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceeding *de novo* and enter final judgment.

C

Stern v. *Marshall*, 564 U. S. 462, confronted an underlying conflict between the 1984 Act and the requirements of Article III. In particular, *Stern* considered a constitutional challenge to the statutory designation of a particular claim as "core." The bankrupt in that case had filed a common-law counterclaim for tortious interference against a creditor to the estate. *Id.*, at 470. Section 157(b)(2)(C), as added by the 1984 Act, lists "counterclaims by the estate against persons filing claims against the estate" as a core proceeding, thereby authorizing the bankruptcy court to adjudicate the

claim to final judgment. See *supra*, at 34. The respondent in *Stern* objected that Congress had violated Article III by vesting the power to adjudicate the tortious interference counterclaim in bankruptcy court. *Stern*, 564 U. S., at 471.

We agreed. *Id.*, at 487. In that circumstance, we held, Congress had improperly vested the Bankruptcy Court with the "'judicial Power of the United States,'" just as in *Northern Pipeline*. *Stern*, 564 U. S., at 487, 503. Because "[n]o 'public right' exception excuse[d] the failure to comply with Article III," we concluded that Congress could not confer on the Bankruptcy Court the authority to finally decide the claim. *Id.*, at 487.

III

Stern made clear that some claims labeled by Congress as "core" may not be adjudicated by a bankruptcy court in the manner designated by § 157(b). *Stern* did not, however, address how the bankruptcy court should proceed under those circumstances. We turn to that question now.

The Ninth Circuit held that the fraudulent conveyance claims at issue here are *Stern* claims—that is, proceedings that are defined as "core" under § 157(b) but may not, as a constitutional matter, be adjudicated as such (at least in the absence of consent), see n. 4, *supra*. See 702 F. 3d, at 562. Neither party contests that conclusion.

The lower courts, including the Ninth Circuit in this case, have described *Stern* claims as creating a statutory "gap." See, *e. g.*, 702 F. 3d, at 565. By definition, a *Stern* claim may not be adjudicated to final judgment by the bankruptcy court, as in a typical core proceeding. But the alternative procedure, whereby the bankruptcy court submits proposed findings of fact and conclusions of law, applies only to noncore claims. See § 157(c)(1). Because § 157(b) does not explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a *core proceeding*, the argument goes, *Stern* created a "gap" in the bankruptcy

statute. See 702 F. 3d, at 565. That gap purportedly renders the bankruptcy court powerless to act on *Stern* claims, see Brief for Petitioner 46–48, thus requiring the district court to hear all *Stern* claims in the first instance.

We disagree. The statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c). In particular, the statute contains a severability provision that accounts for decisions, like *Stern*, that invalidate certain applications of the statute:

> "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby." 98 Stat. 344, note following 28 U. S. C. § 151.

The plain text of this severability provision closes the so-called "gap" created by *Stern* claims. When a court identifies a claim as a *Stern* claim, it has necessarily "held invalid" the "application" of § 157(b)—*i. e.*, the "core" label and its attendant procedures—to the litigant's claim. Note following § 151. In that circumstance, the statute instructs that "the remainder of th[e] Act . . . is not affected thereby." *Ibid.* That remainder includes § 157(c), which governs non-core proceedings. With the "core" category no longer available for the *Stern* claim at issue, we look to § 157(c)(1) to determine whether the claim may be adjudicated as a non-core claim—specifically, whether it is "not a core proceeding" but is "otherwise related to a case under title 11." If the claim satisfies the criteria of § 157(c)(1), the bankruptcy court simply treats the claims as non-core: The bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.

The conclusion that the remainder of the statute may continue to apply to *Stern* claims accords with our general ap-

proach to severability. We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it "remains '"fully operative as a law,"'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 509 (2010) (quoting *New York* v. *United States*, 505 U. S. 144, 186 (1992)), and so long as it is not "'evident'" from the statutory text and context that Congress would have preferred no statute at all, 561 U. S., at 509 (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987)). Neither of those concerns applies here. Thus, § 157(c) may be applied naturally to *Stern* claims. And, EBIA has identified "nothing in the statute's text or historical context" that makes it "evident" that Congress would prefer to suspend *Stern* claims in limbo. 561 U. S., at 509.[8]

IV

A

Now we must determine whether the procedures set forth in § 157(c)(1) apply to the fraudulent conveyance claims at issue in this case. The Court of Appeals held, and we assume without deciding, that the fraudulent conveyance claims in this case are *Stern* claims. See Part III, *supra*. For purposes of this opinion, the "application" of both the "core" label and the procedures of § 157(b) to the trustee's claims has therefore been "held invalid." Note following § 151. Accordingly, we must decide whether the fraudulent conveyance claims brought by the trustee are within the scope of § 157(c)(1)—that is, "not . . . core" proceedings but "otherwise related to a case under title 11." We hold that

[8] To the contrary, we noted in *Stern* that removal of claims from core bankruptcy jurisdiction does not "meaningfully chang[e] the division of labor in the current statute." 564 U. S., at 502. Accepting EBIA's contention that district courts are required to hear all *Stern* claims in the first instance, see Brief for Petitioner 46–48, would dramatically alter the division of responsibility set by Congress.

this language encompasses the trustee's claims of fraudulent conveyance.

First, the fraudulent conveyance claims in this case are "not . . . core." The Ninth Circuit held—and no party disputes—that Article III does not permit these claims to be treated as "core." See Part III, *supra*. Second, the fraudulent conveyance claims are self-evidently "related to a case under title 11." At bottom, a fraudulent conveyance claim asserts that property that should have been part of the bankruptcy estate and therefore available for distribution to creditors pursuant to Title 11 was improperly removed. That sort of claim is "related to a case under title 11" under any plausible construction of the statutory text, and no party contends otherwise. See, *e. g.*, *Celotex Corp.* v. *Edwards*, 514 U. S. 300, 307, n. 5, 308 (1995) ("Proceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate"). Accordingly, because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i. e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*.

B

Although this case did not proceed in precisely that fashion, we affirm nonetheless. A brief procedural history of the case helps explain why.

As noted, § 157 permits a bankruptcy court to adjudicate a claim to final judgment in two circumstances—in core proceedings, see § 157(b), and in non-core proceedings "with the consent of all the parties," § 157(c)(2). In this case, the Bankruptcy Court entered judgment in favor of the bankruptcy trustee without specifying in its order whether it was acting pursuant to § 157(b) (core) or § 157(c)(2) (non-core with consent). EBIA immediately appealed to the District Court, see § 158, but it did not argue that the Bankruptcy

Court lacked constitutional authority to grant summary judgment. As a result, the District Court did not analyze whether there was a *Stern* problem and did not, as some district courts have done, relabel the bankruptcy order as mere proposed findings of fact and conclusions of law. See, *e. g.*, *In re Parco Merged Media Corp.*, 489 B. R. 323, 326 (Me. 2013) (collecting cases). The District Court did, however, review *de novo* the Bankruptcy Court's grant of summary judgment for the trustee—a legal question—and issued a reasoned opinion affirming the Bankruptcy Court. The District Court then separately entered judgment in favor of the trustee. See 28 U. S. C. § 1334(b) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11").

EBIA now objects on constitutional grounds to the Bankruptcy Court's disposition of the fraudulent conveyance claims. EBIA contends that it was constitutionally entitled to review of its fraudulent conveyance claims by an Article III court regardless of whether the parties consented to adjudication by a bankruptcy court. Brief for Petitioner 25–27. In an alternative argument, EBIA asserts that even if the Constitution permitted the Bankruptcy Court to adjudicate its claim with the consent of the parties, it did not in fact consent. *Id.*, at 38.

In light of the procedural posture of this case, however, we need not decide whether EBIA's contentions are correct on either score. At bottom, EBIA argues that it was entitled to have an Article III court review *de novo* and enter judgment on the fraudulent conveyance claims asserted by the trustee. In effect, EBIA received exactly that. The District Court conducted *de novo* review of the summary judgment claims, concluding in a written opinion that there were no disputed issues of material fact and that the trustee was entitled to judgment as a matter of law. In accordance with its statutory authority over matters related to the bankruptcy, see § 1334(b), the District Court then separately

entered judgment in favor of the trustee. EBIA thus received the same review from the District Court that it would have received if the Bankruptcy Court had treated the fraudulent conveyance claims as non-core proceedings under § 157(c)(1). In short, even if EBIA is correct that the Bankruptcy Court's entry of judgment was invalid, the District Court's *de novo* review and entry of its own valid final judgment cured any error. Cf. *Carter* v. *Kubler*, 320 U. S. 243, 248 (1943) (bankruptcy commissioner's error was cured after the District Court "made an independent and complete review of the conflicting evidence").

Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

Syllabus

SCIALABBA, ACTING DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL. *v.* CUELLAR DE OSORIO ET AL.

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

No. 12–930. Argued December 10, 2013—Decided June 9, 2014

The Immigration and Nationality Act permits qualifying U. S. citizens and lawful permanent residents (LPRs) to petition for certain family members to obtain immigrant visas. A sponsored individual, known as the principal beneficiary, is placed into a "family preference" category based on his relationship with the petitioner. 8 U. S. C. §§ 1153(a)(1)–(4). The principal beneficiary's spouse and minor children in turn qualify as derivative beneficiaries, "entitled to the same status" and "order of consideration" as the principal. § 1153(d). The beneficiaries then become eligible to apply for visas in order of "priority date"—that is, the date a petition was filed. § 1153(e)(1). Because the immigration process often takes years or decades to complete, a child seeking to immigrate may "age out"—*i. e.*, reach adulthood and lose her immigration status—before she reaches the front of the visa queue. The Child Status Protection Act (CSPA) sets forth a remedy in that circumstance, providing that "[i]f the age of an alien is determined . . . to be 21 years of age or older," notwithstanding certain allowances for bureaucratic delay, §§ 1153(h)(1)–(2), "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition," § 1153(h)(3).

Respondents, principal beneficiaries who became LPRs, filed petitions for their aged-out children, asserting that the newly filed petitions should receive the same priority date as their original petitions. Instead, U. S. Citizenship and Immigration Services (USCIS) gave the new petitions current priority dates. The District Court granted the Government summary judgment, deferring to the Board of Immigration Appeals' (BIA's) determination that only those petitions that can be seamlessly converted from one family preference category to another without the need for a new sponsor are entitled to conversion under § 1153(h)(3). The en banc Ninth Circuit reversed, holding that the provision unambiguously entitled all aged-out derivative beneficiaries to automatic conversion and priority date retention.

Held: The judgment is reversed, and the case is remanded.

695 F. 3d 1003, reversed and remanded.

Syllabus

JUSTICE KAGAN, joined by JUSTICE KENNEDY and JUSTICE GINSBURG, concluded that the BIA's textually reasonable construction of § 1153(h)(3)'s ambiguous language was entitled to deference. Pp. 56–75.

(a) Because § 1153(h)(3) does not speak unambiguously to the issue here, a court must defer to the BIA's reasonable interpretation. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844. The first clause of § 1153(h)(3) states a condition that encompasses every aged-out beneficiary of a family preference petition. The second clause, however, does not easily cohere with the first. It prescribes a remedy that can apply to only a subset of the beneficiaries described in the first clause. This remedial prescription directs immigration officials to take the alien's petition and convert it from a category benefiting a child to an appropriate category for adults, without any change in the petition, including its sponsor, or any new filing. Moreover, this conversion is to be "automati[c]"—that is, one involving no additional decisions, contingencies, or delays. Thus, the only aliens who may benefit from § 1153(h)(3)'s back half are those for whom automatic conversion is possible.

The understanding that "automatic conversion" entails nothing more than picking up the petition from one category and dropping it into another for which the alien now qualifies matches the exclusive way immigration law used the term when § 1153(h)(3) was enacted. See 8 CFR §§ 204.2(i)(1)–(3) (2002). And Congress used the word "conversion" in the identical way elsewhere in the CSPA. See, *e. g.*, §§ 1151(f)(2), (3).

If the term meant more than that in § 1153(h)(3), it would undermine the family preference system's core premise: that each immigrant must have a qualified and willing sponsor. See §§ 1154(a), (b). If an original sponsor does not have a legally recognized relationship with the aged-out derivative beneficiary, another sponsor, *e. g.*, the old principal beneficiary, must be swapped in for the alien to qualify for a new family preference category. But immigration officials cannot assume that a new sponsor is eligible and willing to petition on the alien's behalf, given the numerous requirements the law imposes on family preference petitioners. See, *e. g.*, § 1154(a)(1)(B)(i)(II). Neither can they figure out whether a valid sponsor exists unless he files and USCIS approves a new petition—the very thing § 1153(h)(3) says is not required.

In any case, a new qualified sponsor will rarely exist at the requisite time. An alien is deemed to age out on "the date on which an immigrant visa number became available for the alien's parent." § 1153(h)(1)(A). Since aging out triggers automatic conversion, the date of automatic conversion is best viewed as the same. But at that time, the aged-out beneficiary's parent cannot yet be a citizen or LPR, and so no new, qualified sponsor will be ready to step into the old one's shoes.

On the above account, § 1153(h)(3)'s second clause provides a remedy to those principal and derivative beneficiaries who had a qualifying relationship with an LPR both before and after they aged out. In contrast, aliens like respondents' children—the nieces, nephews, and grandchildren of the initial sponsors—cannot qualify for "automatic conversion": They lacked a qualifying preference relationship with the initial petitioner, and so cannot fit into a new preference category without obtaining a new sponsor.

The ambiguity created by § 1153(h)(3)'s ill-fitting clauses left the BIA to choose how to reconcile the statute's different commands. It reasonably opted to abide by the inherent limits of § 1153(h)(3)'s remedial clause, rather than go beyond those limits so as to match the sweep of the first clause's condition. When an agency thus resolves statutory tension, ordinary principles of administrative deference require this Court to defer. See *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 666. Pp. 56–64.

(b) Respondents take issue with the BIA's interpretation, but none of their contentions is persuasive. Pp. 65–75.

(1) Respondents aver that every aged-out beneficiary could be automatically converted if immigration officials substituted new sponsors and managed the timing of conversion so that a new sponsor existed on the relevant date. These administrative maneuvers are not in keeping with the natural and long-established meaning of "automatic conversion," they require conversion to occur on a date that has no connection to the alien's aging out, and they demand administrative juggling to make automatic conversion work. And that painstakingly managed process still cannot succeed because a derivative's parent may never become able to sponsor a visa—and immigration officials cannot practicably tell whether a given parent has done so. Pp. 65–69.

(2) Respondents argue that the word "and" in the second clause of § 1153(h)(3) indicates that priority date retention is a benefit wholly independent of automatic conversion. But "and" does not necessarily disjoin two phrases, and context suggests that the instructions work in tandem. In other statutory and regulatory provisions respecting "conversions," retention of a priority date is conditional on a conversion occurring. See, *e. g.*, §§ 1154(k)(1)–(3). Respondents' reading would make priority date retention conditional on something the statute nowhere mentions. And it would engender unusual results that, without some clearer statement, the Court cannot conclude that Congress intended. Pp. 69–72.

(3) Finally, respondents contend that, assuming § 1153(h)(3) is ambiguous, the BIA acted unreasonably in choosing the more restrictive reading. But the BIA's interpretation benefits from administrative simplicity and fits with immigration law's basic first-come-first-served

rule. By contrast, respondents would scramble the priority order Congress established by allowing aged-out derivative beneficiaries, like respondents' sons and daughters, to enter the visa queue ahead of beneficiaries who had a qualifying relationship with an LPR for a far longer time. Pp. 73–75.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, agreed that the BIA's interpretation was reasonable, but not because an agency has authority to resolve direct conflicts within a statute. There is no conflict or internal tension in § 1153(h)(3). The first clause of the provision defines the persons potentially affected, but does not grant anything to anyone. The particular benefit provided by the statute—automatic conversion and retention of priority date—is found exclusively in the second clause, and that relief requires, at minimum, that an aged-out beneficiary have his own eligible sponsor who is committed to providing financial support for the beneficiary. Beyond that, Congress did not speak clearly to which petitions can be automatically converted. The BIA's reasonable interpretation of § 1153(h)(3) is consistent with the ordinary meaning of the statutory terms, with the established meaning of automatic conversion in immigration law, and with the structure of the family-based immigration system. Pp. 76–79.

KAGAN, J., announced the judgment of the Court and delivered an opinion, in which KENNEDY and GINSBURG, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 76. ALITO, J., filed a dissenting opinion, *post*, p. 79. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER, J., joined, and in which THOMAS, J., joined except as to footnote 3, *post*, p. 81.

Elaine J. Goldenberg argued the cause for petitioners. With her on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, and *Gisela A. Westwater*.

Mark C. Fleming argued the cause for respondents. With him on the brief were *Harriet A. Hoder*, *Paul R. Q. Wolfson*, *Megan Barbero*, *Christina Manfredi McKinley*, *Jason D. Hirsch*, *Carl Shusterman*, *Amy Prokop*, *Nancy E. Miller*, and *Robert L. Reeves*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Catholic Legal Immigration Network, Inc., by *Brian J. Murray*; for Immigration Advocacy Organizations by *Lori Alvino McGill*, *Nicole Ries Fox*, *Mary Kenney*, *Meredith S. H. Higashi*, *Charles Roth*, and *Nina Perales*; and for Current and Former Members of Congress by *Scott P. Martin*.

JUSTICE KAGAN announced the judgment of the Court and delivered an opinion, in which JUSTICE KENNEDY and JUSTICE GINSBURG join.

Under the Immigration and Nationality Act, 8 U. S. C. § 1101 *et seq.*, citizens and lawful permanent residents (LPRs) of the United States may petition for certain family members—spouses, siblings, and children of various ages—to obtain immigrant visas. Such a sponsored individual is known as the petition's principal beneficiary. In turn, any principal beneficiary's minor child—meaning an unmarried child under the age of 21—qualifies as a derivative beneficiary, "entitled to the same [immigration] status" and "order of consideration" as his parent. § 1153(d). Accordingly, when a visa becomes available to the petition's principal beneficiary, one also becomes available to her minor child.

But what happens if, sometime after the relevant petition was filed, a minor child (whether a principal or a derivative beneficiary) has turned 21—or, in immigration lingo, has "aged out"? The immigration process may take years or even decades to complete, due in part to bureaucratic delays associated with reviewing immigration documents and in (still greater) part to long queues for the limited number of visas available each year. So someone who was a youngster at the start of the process may be an adult at the end, and no longer qualify for an immigration status given to minors. The Child Status Protection Act (CSPA), 116 Stat. 927, ensures that the time Government officials have spent processing immigration papers will not count against the beneficiary in assessing his status. See 8 U. S. C. § 1153(h)(1). But even with that provision, the beneficiary may age out solely because of the time he spent waiting in line for a visa to become available.

The question presented in this case is whether the CSPA grants a remedy to all aliens who have thus outpaced the immigration process—that is, all aliens who counted as child beneficiaries when a sponsoring petition was filed, but no

longer do so (even after excluding administrative delays) by the time they reach the front of the visa queue. The Board of Immigration Appeals (BIA or Board) said no. It interpreted the CSPA as providing relief to only a subset of that group—specifically, those aged-out aliens who qualified or could have qualified as principal beneficiaries of a visa petition, rather than only as derivative beneficiaries piggybacking on a parent. We now uphold the Board's determination as a permissible construction of the statute.

I

A

An alien needs an immigrant visa to enter and permanently reside in the United States. See § 1181(a).[1] To obtain that highly sought-after document, the alien must fall within one of a limited number of immigration categories. See §§ 1151(a)–(b). The most favored is for the "immediate relatives" of U. S. citizens—their parents, spouses, and unmarried children under the age of 21. See §§ 1151(b)(2)(A)(i), 1101(b)(1). Five other categories—crucial to this case, and often denominated "preference" categories—are for "family-sponsored immigrants," who include more distant or independent relatives of U. S. citizens, and certain close relatives of LPRs.[2] Specifically, those family preference categories are:

> F1: the unmarried, adult (21 or over) sons and daughters of U. S. citizens;

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[1] An alien already in the United States—for example, on a student or temporary worker visa—must obtain "adjustment of status" rather than an immigrant visa to become an LPR. See 8 U. S. C. § 1255(a). Because the criteria for securing adjustment of status and obtaining an immigrant visa are materially identical, we use the single term "immigrant visa" to refer to both.

[2] The "family preference" label, as used by immigration officials, applies only to these five classifications, and not to the category for "immediate relatives" of U. S. citizens. See Brief for Petitioners 3, n. 1.

F2A: the spouses and unmarried, minor (under 21) children of LPRs;

F2B: the unmarried, adult (21 or over) sons and daughters of LPRs;

F3: the married sons and daughters of U. S. citizens;

F4: the brothers and sisters of U. S. citizens. §§ 1151(a)(1), 1153(a)(1)–(4).[3]

(A word to the wise: Dog-ear this page for easy reference, because these categories crop up regularly throughout this opinion.)

The road to obtaining any family-based immigrant visa begins when a sponsoring U. S. citizen or LPR files a petition on behalf of a foreign relative, termed the principal beneficiary. See §§ 1154(a)(1)(A)(i), (a)(1)(B)(i)(I), (b); 8 CFR § 204.1(a)(1) (2014). The sponsor (otherwise known as the petitioner—we use the words interchangeably) must provide U. S. Citizenship and Immigration Services (USCIS) with evidence showing, among other things, that she has the necessary familial relationship with the beneficiary, see §§ 204.2(a)(2), (d)(2), (g)(2), and that she has not committed any conduct disqualifying her from sponsoring an alien for a visa, see, *e. g.*, 8 U. S. C. § 1154(a)(1)(B)(i)(II) (barring an LPR from submitting a petition if she has committed certain offenses against minors). USCIS thereafter reviews the petition, and approves it if found to meet all requirements. See § 1154(b).

For a family preference beneficiary, that approval results not in getting a visa then and there, but only in getting a place in line. (The case is different for "immediate relatives" of U. S. citizens, who can apply for and receive a visa

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[3] Immigrant visas can also go to aliens with special, marketable skills, see §§ 1151(a)(2), 1153(b), or to aliens from countries with historically low immigration to the United States, see §§ 1151(a)(3), 1153(c). None of the respondents here sought visas under those "employment-based" or "diversity" categories.

as soon as a sponsoring petition is approved.) The law caps the number of visas issued each year in the five family preference categories, see §§ 1151(c)(1), 1152, 1153(a)(1)–(4), and demand regularly exceeds the supply. As a consequence, the principal beneficiary of an approved petition is placed in a queue with others in her category (F1, F2A, or what have you) in order of "priority date"—that is, the date a petition was filed with USCIS. See § 1153(e)(1); 8 CFR § 204.1(b); 22 CFR 42.53(a) (2013). Every month, the Department of State sets a cut-off date for each family preference category, indicating that visas (sometimes referred to by "visa numbers") are available for beneficiaries with priority dates earlier than the cut-off. See 8 CFR § 245.1(g)(1); 22 CFR § 42.51(b). The system is thus first-come, first-served within each preference category, with visas becoming available in order of priority date.

Such a date may benefit not only the principal beneficiary of a family preference petition, but also her spouse and minor children. Those persons, labeled the petition's "derivative beneficiar[ies]," are "entitled to the same status, and the same order of consideration," as the principal. 8 U. S. C. §§ 1153(d), (h). Accordingly, when a visa becomes available for the principal, one becomes available for her spouse and minor children too. And that is so even when (as is usually but not always the case) the spouse and children would not qualify for any family preference category on their own. For example, the child of an F4 petition's principal beneficiary is the niece or nephew of a U. S. citizen, and federal immigration law does not recognize that relationship. Nonetheless, the child can piggy-back on his qualifying parent in seeking an immigrant visa—although, as will be further discussed, he may not immigrate without her. See 22 CFR § 40.1(a)(2); *infra*, at 49, 63–64, 74.

Once visas become available, the principal and any derivative beneficiaries must separately file visa applications. See 8 U. S. C. § 1202(a). Such an application requires an alien to

demonstrate in various ways her admissibility to the United States. See, *e. g.*, § 1182(a)(1)(A) (alien may not have serious health problems); § 1182(a)(2)(A) (alien may not have been convicted of certain crimes); § 1182(a)(3)(B) (alien may not have engaged in terrorist activity). Notably, one necessary showing involves the U. S. citizen or LPR who filed the initial petition: To mitigate any possibility of becoming a "public charge," the visa applicant (whether a principal or derivative beneficiary) must append an "affidavit of support" executed by that sponsoring individual. §§ 1182(a)(4)(C)(ii), 1183a(a)(1). Such an affidavit legally commits the sponsor to support the alien, usually for at least 10 years, with an annual income "not less than 125% of the federal poverty line." § 1183a(a)(1)(A); see §§ 1183a(a)(2)–(3).

After the beneficiaries have filed their applications, a consular official reviews the documents and, if everything is in order, schedules in-person interviews. See § 1202(h). The interviews for a principal and her children (or spouse) usually occur back-to-back, although those for the children may also come later.[4] The consular official will determine first whether the principal should receive a visa; if (but only if) the answer is yes, the official will then consider the derivatives' applications. See 22 CFR §§ 40.1(a)(2), 42.62, 42.81(a). Provided all goes well, everyone exits the consulate with visas in hand—but that still does not make them LPRs. See 8 U. S. C. § 1154(e). Each approved alien must then travel to the United States within a set time, undergo inspection, and confirm her admissibility. See §§ 1201(c), 1222, 1225(a)–(b). Once again, a derivative's fate is tied to the principal's: If the principal cannot enter the country, neither can her children (or spouse). See § 1153(d); 22 CFR § 40.1(a)(2). When, but

[4] See Dept. of State, The Immigrant Visa Process: Visa Applicant Interview, online at http://travel.state.gov/content/visas/english/immigrate/immigrant-process/interview/applicant_interview.html (all Internet materials as visited June 5, 2014, and available in Clerk of Court's case file).

only when, an alien with an immigrant visa is approved at the border does she finally become an LPR.[5]

B

All of this takes time—and often a lot of it. At the front end, many months may go by before USCIS approves the initial sponsoring petition.[6] On the back end, several additional months may elapse while a consular official considers the alien's visa application and schedules an interview.[7] And the middle is the worst. After a sponsoring petition is approved but before a visa application can be filed, a family-sponsored immigrant may stand in line for years—or even decades—just waiting for an immigrant visa to become available. See, *e. g.*, Dept. of State, Bureau of Consular Affairs, 9 Visa Bulletin, Immigrant Numbers for December 2013 (Nov. 8, 2013).

And as the years tick by, young people grow up, and thereby endanger their immigration status. Remember that not all offspring, but only those under the age of 21 can qualify as an "immediate relative" of a U. S. citizen, or as the principal beneficiary of an LPR's F2A petition, or (most crucially here) as the derivative beneficiary of any family preference petition. See *supra*, at 47, 48. So an alien eligible to immigrate at the start of the process (when a sponsor files a petition) might not be so at the end (when an immigra-

[5] The last part of the immigration process is streamlined for aliens already residing in the United States who have applied for adjustment of status. See n. 1, *supra*. The immigration officer interviewing such an alien, upon finding her visa-eligible, may declare her an LPR on the spot. See 8 U. S. C. § 1255(i)(2). But here too, the officer will not make a derivative beneficiary an LPR unless and until he approves that status for the principal. See 22 CFR § 40.1(a)(2).

[6] See USCIS, Processing Time Information, online at https://egov.uscis.gov/cris/processingTimesDisplayInit.do.

[7] See The Immigrant Visa Process: Interview, online at http://travel.state.gov/content/visas/english/immigrate/immigrant-process/interview.html.

tion official reviews his documents for admission). He may have "aged out" of his original immigration status by the simple passage of time.

In 2002, Congress enacted the Child Status Protection Act (CSPA), 116 Stat. 927, to address the treatment of those once-but-no-longer-minor aliens. One section of the Act neatly eliminates the "aging out" problem for the offspring of U. S. citizens seeking to immigrate as "immediate relatives." Under that provision, the "determination of whether [such] an alien satisfies the [immigration law's] age requirement . . . shall be made using [his] age" on the date the initial petition was filed. 8 U. S. C. § 1151(f)(1). The section thus halts the flow of time for that group of would-be immigrants: If an alien was young when a U. S. citizen sponsored his entry, then Peter Pan-like, he remains young throughout the immigration process.

A different scheme—and one not nearly so limpid—applies to the offspring of LPRs and aliens who initially qualified as either principal beneficiaries of F2A petitions or derivative beneficiaries of any kind of family preference petition. Section 3 of the CSPA, now codified at 8 U. S. C. § 1153(h), contains three interlinked paragraphs that mitigate the "aging out" problem for those prospective immigrants. The first two are complex but, with some perseverance, comprehensible. The third—the key provision here—is through and through perplexing.[8]

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[8] The full text of these three paragraphs, for the masochists among this opinion's readers, is as follows:

"(h) Rules for determining whether certain aliens are children

"(1) In general

"For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

"(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for

The first paragraph, § 1153(h)(1), contains a formula for calculating the age of an alien "[f]or purposes of subsections (a)(2)(A) and (d)"—that is, for any alien seeking an immigrant visa directly under F2A or as a derivative beneficiary of any preference category. The "determination of whether [such] an alien satisfies the [immigration law's] age requirement"—that is, counts as under 21—"shall be made using—

> "(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of [derivative beneficiaries], the date on which an immigrant visa number became available for the alien's parent) . . . ; reduced by
>
> "(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending." § 1153(h)(1).

The cross-referenced second paragraph, § 1153(h)(2), then explains that the "applicable petition" mentioned is the petition

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the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

"(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

"(2) Petitions described

"The petition described in this paragraph is—

"(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or

"(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

"(3) Retention of priority date

"If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U. S. C. § 1153(h).

covering the given alien—so again, either an F2A petition filed on his own behalf or any petition extending to him as a derivative.

Taken together, those two paragraphs prevent an alien from "aging out" because of—but only because of—bureaucratic delays: the time Government officials spend reviewing (or getting around to reviewing) paperwork at what we have called the front and back ends of the immigration process. See *supra*, at 49–51. The months that elapse before USCIS personnel approve a family preference petition ("the period during which the applicable petition described in paragraph (2) was pending") do not count against an alien in determining his statutory "age." Neither do the months a consular officer lets pass before adjudicating the alien's own visa application (the period after "an immigrant visa number becomes available for such alien (or . . . [his] parent)"). But the time in between—the months or, more likely, years the alien spends simply waiting for a visa to become available—is not similarly excluded in calculating his age: Every day the alien stands in that line is a day he grows older, under the immigration laws no less than in life. And so derivative beneficiaries, as well as principal beneficiaries of F2A petitions, can still "age out"—in other words, turn 21, notwithstanding § 1153(h)(1)'s dual age adjustments—prior to receiving an opportunity to immigrate.

What happens then (if anything) is the subject of § 1153(h)'s third paragraph—the provision at issue in this case. That paragraph states:

> "If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

The provision thus first references the aged-out beneficiaries of family preference petitions, and then directs immigration officials to do something whose meaning this opinion will further consider—*i. e.*, "automatically convert" an alien's petition to an "appropriate category."

The Board of Immigration Appeals (BIA) addressed the meaning of § 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. 28 (2009); its interpretation there is what we review in this case. Wang was the principal beneficiary of an F4 petition that his sister, a U. S. citizen, filed in 1992. At that time, Wang's daughter was 10 years old, and thus qualified as a derivative beneficiary. But Wang waited in line for a visa for more than a decade, and by the time his priority date finally came up, his daughter had turned 22 (even after applying § 1153(h)(1)'s age-reduction formula). Wang thus obtained a visa for himself, boarded a plane alone, and entered the United States as an LPR. He then filed a new preference petition on his daughter's behalf—this one under F2B, the category for LPRs' adult sons and daughters. USCIS approved that petition, with a priority date corresponding to the date of Wang's filing. Wang contended that under § 1153(h)(3), his daughter was instead entitled to "retain the original priority date" given to his sister's old F4 petition, because that petition could "automatically be converted" to the F2B category.

The Board rejected that argument. It explained that "the language of [§ 1153(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Id.*, at 33. Given that "ambiguity," the BIA looked to the "recognized meaning" of "the phrase 'automatic conversion'" in immigration statutes and regulations—which it "presume[d]" Congress understood when enacting the CSPA. *Id.*, at 33–35. "Historically," the BIA showed, that language applied only when a petition could move seamlessly from one family preference category to another—not when a new sponsor was needed to fit a benefi-

ciary into a different category. *Id.*, at 35. Some aged-out aliens' petitions could accomplish that maneuver, because the alien had a qualifying relationship with the original sponsor, and continued to do so upon aging out; in that event, the Board held, § 1153(h)(3) ensured that the alien would retain his original priority date. See *id.*, at 34–35. But the F4 petition filed by Wang's sister could not "automatically be converted" in that way because Wang's daughter never had a qualifying relationship with the sponsor: "[N]o category exists for the niece of a United States citizen." *Id.*, at 35–36. That is why Wang himself had to file a new petition on his daughter's behalf once she aged out and could no longer ride on his sibling status. The Board saw no evidence that Congress meant "to expand the use of the concept[ ] of automatic conversion" to reach such a case. *Id.*, at 36. And the Board thought such an expansion unwarranted because it would allow aliens like Wang's daughter, who lacked any independent entitlement to a visa during the years her father spent standing on the F4 queue, to "cut[ ] in line ahead of others awaiting visas in other preference categories." *Id.*, at 38.

C

The respondents in this case are similarly situated to Wang, and they seek the same relief. Each was once the principal beneficiary of either an F3 petition filed by a U. S. citizen parent or an F4 petition filed by a U. S. citizen sibling. Each also has a son or daughter who, on the date of filing, was under 21 and thus qualified as a derivative beneficiary of the petition. But as was true of Wang's daughter, the respondents' offspring had all turned 21 (even accounting for § 1153(h)(1)'s age adjustments) by the time visas became available. Accordingly, the respondents immigrated to the United States alone and, as new LPRs, filed F2B petitions for their sons and daughters. Each argued that under § 1153(h)(3), those petitions should get the same priority date as the original F3 and F4 petitions once had. USCIS in-

stead gave the new F2B petitions current priority dates, meaning that the sons and daughters could not leapfrog over others in the F2B line.

This case began as two separate suits, one joining many individual plaintiffs and the other certified as a class action. In each suit, the District Court deferred to the BIA's interpretation of § 1153(h)(3) in *Wang*, and accordingly granted summary judgment to the Government. See *Zhang* v. *Napolitano*, 663 F. Supp. 2d 913, 919 (CD Cal. 2009); *Costelo* v. *Chertoff*, No. SA08–00688, 2009 WL 4030516 (CD Cal., Nov. 10, 2009). After consolidating the two cases on appeal, a panel of the Ninth Circuit affirmed: Like the lower courts, it found § 1153(h)(3) ambiguous and acceded to the BIA's construction. 656 F. 3d 954, 965–966 (2011). The Ninth Circuit then granted rehearing en banc and reversed in a 6-to-5 decision. 695 F. 3d 1003 (2012). The majority concluded that "the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to [all] aged-out derivative beneficiaries," and that the Board's contrary conclusion "is not entitled to deference." *Id.*, at 1006.

We granted certiorari, 570 U. S. 916 (2013), to resolve a Circuit split on the meaning of § 1153(h)(3),[9] and we now reverse the Ninth Circuit's decision.

II

Principles of *Chevron* deference apply when the BIA interprets the immigration laws. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844 (1984); *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 424–425 (1999). Indeed, "judicial deference to the Executive Branch is especially appropriate in the immigration context," where

[9] Compare 695 F. 3d 1003, 1006 (CA9 2012) (case below) (holding that § 1153(h)(3) extends relief to all aged-out derivative beneficiaries); *Khalid* v. *Holder*, 655 F. 3d 363, 365 (CA5 2011) (same), with *Li* v. *Renaud*, 654 F. 3d 376, 385 (CA2 2011) (holding that § 1153(h)(3) not merely permits, but requires the Board's contrary interpretation).

decisions about a complex statutory scheme often implicate foreign relations. *Id.*, at 425. (Those hardy readers who have made it this far will surely agree with the "complexity" point.) Under *Chevron*, the statute's plain meaning controls, whatever the Board might have to say. See 467 U. S., at 842–843. But if the law does not speak clearly to the question at issue, a court must defer to the Board's reasonable interpretation, rather than substitute its own reading. *Id.*, at 844.

And § 1153(h)(3) does not speak unambiguously to the issue here—or more precisely put, it addresses that issue in divergent ways. We might call the provision Janus-faced. Its first half looks in one direction, toward the sweeping relief the respondents propose, which would reach every aged-out beneficiary of a family preference petition. But as the BIA recognized, and we will further explain, the section's second half looks another way, toward a remedy that can apply to only a subset of those beneficiaries—and one not including the respondents' offspring. The two faces of the statute do not easily cohere with each other: Read either most naturally, and the other appears to mean not what it says. That internal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts. And when that is so, *Chevron* dictates that a court defer to the agency's choice—here, to the Board's expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme.

Begin by reading the statute from the top—the part favoring the respondents. Section 1153(h)(3)'s first clause—"If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)"—states a condition that every aged-out beneficiary of a preference petition satisfies. That is because all those beneficiaries have had their ages "determined under paragraph (1)" (and have come up wanting): Recall

that the age formula of § 1153(h)(1) applies to each alien child who originally qualified (under "subsections (a)(2)(A) and (d)") as the principal beneficiary of an F2A petition or the derivative beneficiary of any family preference petition. On its own, then, § 1153(h)(3)'s opening clause encompasses the respondents' sons and daughters, along with every other once-young beneficiary of a family preference petition now on the wrong side of 21. If the next phrase said something like "the alien shall be treated as though still a minor" (much as the CSPA did to ensure U. S. citizens' children, qualifying as "immediate relatives," would stay forever young, see *supra*, at 51), all those aged-out beneficiaries would prevail in this case.

But read on, because § 1153(h)(3)'s second clause instead prescribes a remedy containing its own limitation on the eligible class of recipients. "[T]he alien's petition," that part provides, "shall automatically be converted to the appropriate category and the alien shall retain the original priority date." That statement directs immigration officials to take the initial petition benefiting an alien child, and now that he has turned 21, "convert[ ]" that same petition from a category for children to an "appropriate category" for adults (while letting him keep the old priority date). The "conversion," in other words, is merely from one category to another; it does not entail any change in the petition, including its sponsor, let alone any new filing. And more, that category shift is to be "automatic"—that is, one involving no additional decisions, contingencies, or delays. See, *e. g.*, Random House Webster's Unabridged Dictionary 140 (2d ed. 2001) (defining "automatic" as "having the capability of starting, operating, moving, etc., independently"); American Heritage Dictionary 122 (4th ed. 2000) ("[a]cting or operating in a manner essentially independent of external influence"). The operation described is, then, a mechanical cut-and-paste job—moving a petition, without any substantive alteration, from one (no-longer-appropriate, child-based) category to an-

other (now-appropriate, adult) compartment. And so the aliens who may benefit from § 1153(h)(3)'s back half are only those for whom that procedure is possible. The clause offers relief not to every aged-out beneficiary, but just to those covered by petitions that can roll over, seamlessly and promptly, into a category for adult relatives.

That understanding of § 1153(h)(3)'s "automatic conversion" language matches the exclusive way immigration law used the term when Congress enacted the CSPA. For many years before then (as today), a regulation entitled "Automatic conversion of preference classification" instructed immigration officials to change the preference category of a petition's principal beneficiary when either his or his sponsor's status changed in specified ways. See 8 CFR §§ 204.2(i)(1)–(3) (2002). For example, the regulation provided that when a U. S. citizen's child aged out, his "immediate relative" petition converted to an F1 petition, with his original priority date left intact. See § 204.2(i)(2). Similarly, when a U. S. citizen's adult son married, his original petition migrated from F1 to F3, see § 204.2(i)(1)(i); when, conversely, such a person divorced, his petition converted from F3 to F1, see § 204.2(i)(1)(iii); and when a minor child's LPR parent became a citizen, his F2A petition became an "immediate relative" petition, see § 204.2(i)(3)—all again with their original priority dates. Most notable here, what all of those authorized changes had in common was that they could occur without any change in the petitioner's identity, or otherwise in the petition's content. In each circumstance, the "automatic conversion" entailed nothing more than picking up the petition from one category and dropping it into another for which the alien now qualified.[10]

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[10] JUSTICE SOTOMAYOR's dissent responds to this fact only with a pair of non sequiturs. *Post*, at 97–98 (hereinafter the dissent). First, the dissent cites a statutory provision that does not use the word "conversion" at all, so can hardly attest to its meaning. See 8 U. S. C. § 1154(a)(1)(D)(i)(III). And next, the dissent cites a regulation that post-dated the CSPA

Congress used the word "conversion" (even without the modifier "automatic") in the identical way in two other sections of the CSPA. See *Law* v. *Siegel*, 571 U. S. 415, 422 (2014) ("[W]ords repeated in different parts of the same statute generally have the same meaning"). Section 2 refers to occasions on which, by virtue of the above-described regulation, a petition "converted" from F2A to the "immediate relative" category because of the sponsor parent's naturalization, or from the F3 to the F1 box because of the beneficiary's divorce. §§ 1151(f)(2), (3). Then, in § 6, Congress authorized an additional conversion of the same nature: It directed that when an LPR parent-sponsor naturalizes, the petition he has filed for his adult son or daughter "shall be converted," unless the beneficiary objects, from the F2B to the F1 compartment—again with the original priority date unchanged. §§ 1154(k)(1)–(3). (That opt-out mechanism itself underscores the otherwise mechanical nature of the conversion.) Once again, in those cases, all that is involved is a recategorization—moving the same petition, filed by the same petitioner, from one preference classification to another, so as to reflect a change in either the alien's or his sponsor's status. In the rest of the CSPA, as in the prior immigration regulation, that is what "conversion" means.

And if the term meant more than that in § 1153(h)(3), it would undermine the family preference system's core premise: that each immigrant must have a qualified sponsor. Consider the alternative addressed in *Wang*—if "automatic conversion" were also to encompass the substitution of a new

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by years, and thus is equally irrelevant to what Congress intended. See 71 Fed. Reg. 35732, 35749 (2006) (adding 8 CFR § 204.2(i)(1)(iv)). Moreover, both provisions relate to a *sui generis* circumstance in which a person can *self*-petition for a visa because her U. S. citizen or LPR relative either died or engaged in domestic abuse. In that situation, the alien's eligibility rests throughout on her connection to the deceased or abusive relative; no new party must ever come in, as one has to in a case like *Wang*, to salvage a no-longer-effective petition. See *infra* this page and 61 (addressing the problems that the substitution of a new petitioner raises).

petitioner for the old one, to make sure the aged-out alien's petition fits into a new preference category. In a case like *Wang*, recall, the original sponsor does not have a legally recognized relationship with the aged-out derivative beneficiary (they are aunt and niece); accordingly, the derivative's father—the old principal beneficiary—must be swapped in as the petitioner to enable his daughter to immigrate. But what if, at that point, the father is in no position to sponsor his daughter? Suppose he decided in the end not to immigrate, or failed to pass border inspection, or died in the meanwhile. Or suppose he entered the country, but cannot sponsor a relative's visa because he lacks adequate proof of parentage or committed a disqualifying crime. See § 1154(a)(1)(B)(i)(II); 8 CFR § 204.2(d)(2); *supra*, at 47. Or suppose he does not want to—or simply cannot—undertake the significant financial obligations that the law imposes on someone petitioning for an alien's admission. See 8 U. S. C. §§ 1183a(a)(1)(A), (f)(1)(D); *supra*, at 49. Immigration officials cannot assume away all those potential barriers to entry: That would run counter to the family preference system's insistence that a qualified and willing sponsor back every immigrant visa. See §§ 1154(a)–(b). But neither can they easily, or perhaps at all, figure out whether such a sponsor exists unless he files and USCIS approves a new petition—the very thing § 1153(h)(3) says is not required.

Indeed, in cases like *Wang*, the problem is broader: Under the statute's most natural reading, a new qualified sponsor will hardly *ever* exist at the moment the petition is to be "converted." Section 1153(h)(3), to be sure, does not explicitly identify that point in time. But § 1153(h)(1) specifies the date on which a derivative beneficiary is deemed to have either aged out or not: It is "the date on which an immigrant visa number became available for the alien's parent." See §§ 1153(h)(1)(A)–(B). Because that statutory aging out is the one and only thing that triggers automatic conversion for eligible aliens, the date of conversion is best viewed as the

same. That reading, moreover, comports with the "automatic conversion" regulation on which Congress drew in enacting the CSPA, see *supra*, at 59–60: The rule authorizes conversions "upon" or "as of the date" of the relevant change in the alien's status (including turning 21)—regardless when USCIS may receive notice of the change. 8 CFR §204.2(i); but cf. *post,* at 95 (SOTOMAYOR, J., dissenting) (wrongly stating that under that rule conversion occurs upon the agency's receipt of proof of the change). But on that date, no new petitioner will be ready to step into the old one's shoes if such a substitution is needed to fit an aged-out beneficiary into a different category. The beneficiary's parent, on the day a "visa number became available," cannot yet be an LPR or citizen; by definition, she has just become eligible to *apply* for a visa, and faces a wait of at least several months before she can sponsor an alien herself. Nor, except in a trivial number of cases, is any hitherto unidentified person likely to have a legally recognized relationship to the alien. So if an aged-out beneficiary has lost his qualifying connection to the original petitioner, no conversion to an "appropriate category" can take place at the requisite time. As long as immigration law demands some valid sponsor, §1153(h)(3) cannot give such an alien the designated relief.

On the above account—in which conversion entails a simple reslotting of an original petition into a now-appropriate category—§1153(h)(3)'s back half provides a remedy to two groups of aged-out beneficiaries. First, any child who was the principal beneficiary of an F2A petition (filed by an LPR parent on his behalf) can take advantage of that clause after turning 21. He is, upon aging out, the adult son of the same LPR who sponsored him as a child; his petition can therefore be moved seamlessly—without the slightest alteration or delay—into the F2B category. Second, any child who was the derivative beneficiary of an F2A petition (filed by an LPR on his *spouse's* behalf) can similarly claim relief, pro-

vided that under the statute, he is not just the spouse's but also the petitioner's child.[11] Such an alien is identically situated to the aged-out *principal* beneficiary of an F2A petition; indeed, for the price of another filing fee, he could just as easily have been named a principal himself. He too is now the adult son of the original LPR petitioner, and his petition can also be instantly relabeled an F2B petition, without any need to substitute a new sponsor or make other revisions. In each case, the alien had a qualifying relationship before he was 21 and retains it afterward; all that must be changed is the label affixed to his petition.[12]

In contrast, as the Board held in *Wang*, the aged-out derivative beneficiaries of the other family preference categories—like the sons and daughters of the respondents here—cannot qualify for "automatic conversion." Recall that the respondents themselves were principal beneficiaries of F3 and F4 petitions; their children, when under 21, counted as derivatives, but lacked any qualifying preference relationship of their own. The F3 derivatives were the petitioners' grandsons and granddaughters; the F4 derivatives their nephews and nieces; and none of those are relationships Congress has recognized as warranting a family preference. See 8 U. S. C. §§ 1153(a)(3)–(4). Now that the respondents' children have turned 21, and they can no longer ride on their parents' coattails, that lack of independent eligibility makes a difference. For them, unlike for the F2A beneficiaries, it is impossible simply to slide the original petitions from a

[11] Given the statute's broad definition of "child," the only F2A derivative beneficiaries who fall outside that proviso are stepchildren who were over the age of 18 when the petitioner married the spousal beneficiary. See § 1101(b)(1)(B). The Government represents that thousands of children are designated as F2A derivatives every year. See Reply Brief 18, n. 13.

[12] It is, therefore, impossible to understand the dissent's statement that conversion of such a petition to an appropriate category requires "'substantive alteration' to [the] petition." See *post*, at 98, n. 8 (opinion of SOTOMAYOR, J.).

(no-longer-appropriate) child category to a (now-appropriate) adult one. To fit into a new category, those aged-out derivatives, like Wang's daughter, must have new sponsors—and for all the reasons already stated, that need means they cannot benefit from "automatic conversion."

All that said, we hold only that § 1153(h)(3) permits—not that it requires—the Board's decision to so distinguish among aged-out beneficiaries. That is because, as we explained earlier, the two halves of § 1153(h)(3) face in different directions. See *supra*, at 57. Section 1153(h)(3)'s first part—its conditional phrase—encompasses every aged-out beneficiary of a family preference petition, and thus points toward broad-based relief. But as just shown, § 1153(h)(3)'s second part—its remedial prescription—applies only to a narrower class of beneficiaries: those aliens who naturally qualify for (and so can be "automatically converted" to) a new preference classification when they age out. Were there an interpretation that gave each clause full effect, the Board would have been required to adopt it. But the ambiguity those ill-fitting clauses create instead left the Board with a choice—essentially of how to reconcile the statute's different commands. The Board, recognizing the need to make that call, opted to abide by the inherent limits of § 1153(h)(3)'s remedial clause, rather than go beyond those limits so as to match the sweep of the section's initial condition. On the Board's reasoned view, the only beneficiaries entitled to statutory relief are those capable of obtaining the remedy designated. When an agency thus resolves statutory tension, ordinary principles of administrative deference require us to defer. See *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 666 (2007) (When a statutory scheme contains "a fundamental ambiguity" arising from "the differing mandates" of two provisions, "it is appropriate to look to the implementing agency's expert interpretation" to determine which "must give way").

III

The respondents urge us to overturn the Board's judgment for three independent reasons. First, and principally, they take issue with the Board's—and now our—view of the limits associated with "automatic conversion": They argue that every aged-out beneficiary's petition *can* "automatically be converted" to an "appropriate category," and that the two halves of § 1153(h)(3) are thus reconcilable. Second, the respondents contend that even if "automatic conversion" does not extend so far, § 1153(h)(3) separately entitles each such beneficiary to the benefit of his original petition's priority date. And third, they claim that the Board's way of resolving whatever ambiguity inheres in § 1153(h)(3) is arbitrary and capricious. The dissenting opinion reiterates the first two arguments, though with slight variation and in opposite order, while forgoing the third. See *post*, at 88–98 (opinion of SOTOMAYOR, J.) (hereinafter the dissent). We find none of the contentions persuasive.

A

The respondents (and the dissent) initially aver that every aged-out beneficiary (including their own sons and daughters) can "automatically be converted" to an "appropriate" immigration category, if only immigration officials try hard enough. The Government, in the respondents' view, can accomplish that feat by substituting new sponsors for old ones, and by "managing the timing" of every conversion to ensure such a new petitioner exists on the relevant date. Brief for Respondents 33. And because, the respondents say, it is thus possible to align the two halves of § 1153(h)(3)—even if through multiple administrative maneuvers—immigration officials are under an obligation to do so. We disagree, for reasons that should sound familiar: Several are the same as those we have just given for upholding the Board's interpretation. But still, we walk through the respondents' ar-

gument step-by-step, to show how far it departs from any ordinary understanding of "automatic conversion."

The first (and necessary) premise of that argument does not augur well for the remainder: It is the view that the "automatic conversion" procedure permits a change in the petitioner's identity. According to the respondents, the aged-out beneficiaries' parents, upon becoming LPRs, can be subbed in for the original sponsors (*i. e.*, the beneficiaries' grandparents, aunts, and uncles), and the petitions then converted to the F2B category. But as we have shown, the "automatic conversion" language—as most naturally read and as long used throughout immigration law—contemplates merely moving a petition into a new and valid category, not changing its most essential feature. See *supra*, at 58–60. That alone defeats the respondents' position.

And a further problem follows—this one concerning the date of automatic conversion. The respondents need that date to come at a time when the derivative beneficiaries' parents (the substitute petitioners) are already living in the United States as LPRs; otherwise, the petitions could not qualify for the F2B box. In an attempt to make that possible, the respondents propose that conversion be viewed as taking place when "the derivative beneficiary's visa . . . application is adjudicated." Brief for Respondents 29. But as we have (again) demonstrated, the statute is best read as establishing a different date: that "on which an immigrant visa number became available for the alien's parent"—when, by definition, the parent is not yet an LPR. § 1153(h)(1); see *supra*, at 61–62. That is the moment when a derivative ages out, which is the single change conversion reflects. By contrast, the respondents' suggested date has no connection to that metamorphosis; the date of adjudication is merely when an immigration official later *discovers* that a child has turned 21. And that date is itself fortuitous, reflecting no more than when an immigration officer got around to reviewing a visa application: The possibility of conversion would thus de-

pend on bureaucratic vagaries attending the visa process. So the respondents' mistaken view of the timing of conversion is another off-ramp from their argument.[13]

Yet there is more—because even after substituting a new petitioner and delaying the conversion date in a way the statute does not contemplate, the respondents must propose yet further fixes to make "automatic" conversion work for

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[13] Still, the respondents' view of the timing of conversion is better than the dissent's. As an initial matter, the dissent's objection to assessing conversion as of the date a visa becomes available hinges on an imaginary difficulty. That approach, the dissent complains, cannot be right because that date always "occurs before the point at which the child is determined to have aged out." *Post*, at 95. Well, yes. The date a visa becomes available is, under the statute, the date an alien ages out (or not); and that status change of course occurs before an immigration official, reviewing a visa application, finds that it has done so. But what of it? When an official determines that an alien was no longer a child on the date a visa became available, he also assesses whether automatic conversion was available to the alien *as of* that prior date. In other words, here as elsewhere in immigration law, conversion occurs (or not) upon the date of the relevant status change—and no other. See *supra*, at 61–62. And once that is understood, the supposed difficulties the dissent throws up all melt away. At the time of the status change, F2A petitions can be converted without further contingencies, decisions, or delays, whereas no other petitions can. But cf. *post*, at 95, 96–97, n. 7 (countering, irrelevantly, that *after* an F2A petition is automatically converted, additional steps remain in the immigration process). And immigration officials later reviewing visa applications know that fact, and can treat the different classes of aged-out beneficiaries accordingly.

Further, the dissent compounds its error by suggesting a baseless alternative date: "the moment when USCIS receives proof," no matter how far in the future, that a new petitioner stands ready and willing to sponsor an aged-out beneficiary. *Post*, at 94. Not even the respondents propose such a date, and for good reason. It has no grounding in the CSPA or in any regulatory practice, and it bears no connection to the timing of the status change (aging out) that triggers conversion (or even, as the respondents' date does, to the later determination of that change). The only thing appearing to support the dissent's date is a single-minded resolve, statutory text and administrative practice notwithstanding, to grant relief to every possible aged-out beneficiary.

their sons and daughters. The respondents' next problem is that even on the conversion date they propose, most of them (and other derivatives' parents) were not yet LPRs, and so could not possibly be sponsors. In the ordinary course, principal and derivative beneficiaries living abroad apply for their visas at the same time and go to the consulate together for back-to-back interviews. See *supra*, at 49. And even if the parent is approved first, that alone does not make her an LPR; she still must come to this country, demonstrate her continued eligibility, and pass an inspection. See *ibid.* Thus, the respondents must recommend changes to the visa process to get the timing to work—essentially, administrative juggling to hold off the derivative beneficiary's visa adjudication until his parent has become an LPR. In particular, they suggest that the consular official defer the derivative's interview, or that the official nominally "reject the application" and then instruct the derivative to "reapply after the principal beneficiary immigrates." Brief for Respondents 30. But the need for that choreography (which, in any event, few if any of the respondents conformed to) renders the conversion process only less "automatic," because now it requires special intervention, purposeful delay, and deviation from standard administrative practice. Conversion has become not a machine that would go of itself, but a process painstakingly managed.

And after all this fancy footwork, the respondents' scheme still cannot succeed, because however long a visa adjudication is postponed, a derivative's parent may never become able to sponsor a relative's visa—and immigration officials cannot practicably tell whether a given parent has done so. We have noted before the potential impediments to serving as a petitioner—including that a parent may not immigrate, may not qualify as a sponsor, or may not be able to provide the requisite financial support. See *supra*, at 60–61. The respondents offer no way to deal with those many contingencies. Require the parent to submit a new petition? But the entire point of automatic conversion (as the respondents

themselves agree) is to obviate the need for such a document. See Brief for Respondents 30, 42. Investigate the parent's eligibility in some other way? But even were that possible (which we doubt) such an inquiry would not square with the essential idea of an automatic process. Disregard the possibility that no legal sponsor exists? But then visas would go, inevitably and not infrequently, to ineligible aliens. And so the workarounds have well and truly run out on the respondents' argument.[14]

That leaves us with the same statutory inconsistency with which we began. Having followed each step of the respondents' resourceful (if Rube Goldbergish) argument, we still see no way to apply the concept of automatic conversion to the respondents' children and others like them. And that means we continue to face a statute whose halves do not correspond to each other—giving rise to an ambiguity that calls for *Chevron* deference.

B

The respondents, however, have another idea for reconciling § 1153(h)(3)'s front and back parts (and this back-up claim

[14] Nor does the dissent offer any serious aid to the respondents. The dissent initially acknowledges that automatic conversion cannot involve "additional decisions, contingencies, or delays." *Post*, at 92. But no worries, the dissent continues: "[O]nce [an alien's parent] provides confirmation of her eligibility to sponsor" the aged-out alien, the original petition "can automatically be converted to an F2B petition, with no additional decision or contingency" or (presumably) delay. *Post*, at 93. Think about that: Once every decision, contingency, and delay we have just described is over (and a parent has at long last turned out to be a viable sponsor), the dissent assures us that no further decisions, contingencies, and delays remain. Or, put differently, there are no contingencies after all the contingencies have been resolved; no decisions after all the decisions have been made; and no delay after all the delay has transpired. And as if that argument were not awkward enough, consider that it would make automatic conversion turn on the filing of a new document that shows the parent's eligibility to sponsor her aged-out son or daughter—the very thing, as all parties agree, that conversion is supposed to render unnecessary. See *supra*, at 61, 68.

becomes the dissent's principal argument). Recall that the section's remedial clause instructs that "the alien's petition shall automatically be converted to the appropriate category *and the alien shall retain the original priority date issued upon receipt of the original petition*." The respondents (and the dissent) ask us to read the italicized language as conferring a benefit wholly independent of automatic conversion. On that view, aged-out derivatives, even though ineligible for conversion, could "retain the[ir] original priority date[s]" if their parents file a *new* petition (as the respondents in fact did here "as a protective matter," Tr. of Oral Arg. 55). And then, everyone encompassed in § 1153(h)(3)'s first clause would get at least some form of relief (even if not both forms) from the section's second. For this argument, the respondents principally rely on the word "and": "Where the word 'and' connects two" phrases as in § 1153(h)(3)'s back half, the respondents contend, those terms "operate independently." Brief for Respondents 39; see *post*, at 89.

But the conjunction "and" does not necessarily *disjoin* two phrases in the way the respondents say. In some sentences, no doubt, the respondents have a point. They use as their primary example: "[I]f the boat takes on water, then you shall operate the bilge pump and you shall distribute life jackets." Brief for Respondents 39; see also *post*, at 89 (offering further examples). We agree that "you shall distribute life jackets" functions in that sentence as an independent command. But we can come up with many paired dictates in which the second is conditional on the first. "If the price is reasonable, buy two tickets and save a receipt." "If you have time this summer, read this book and give me a report." Or, shades of this case: "If your cell-phone contract expires, buy a new phone and keep the old number."[15] In each case,

[15] The dissent appears to think that something helpful to its view follows from repeating the word "shall" and changing the subject of the commands. See *post*, at 89–90. But that is not so, as some further examples show. "If you advance to the next round, my assistant shall schedule an

the second command functions only once the first is accomplished. Whether "and" works in that way or in the respondents' depends, like many questions of usage, on the context. See, *e. g.*, *Caraco Pharmaceutical Laboratories, Ltd.* v. *Novo Nordisk A/S*, 566 U. S. 399, 413–417 (2012).

Here, we think, context compels the Board's view that the instructions work in tandem. The first phrase instructs immigration officials to convert a petition (when an "appropriate category" exists); the next clarifies that such a converted petition will retain the original priority date, rather than receive a new one corresponding to the date of conversion. That reading comports with the way retention figures in other statutory and regulatory provisions respecting "conversions"; there too, retention of a priority date is conditional on a conversion occurring. See 8 U. S. C. §§ 1154(k)(1)–(3); 8 CFR § 204.2(i); *supra*, at 59. The respondents wish to unhook the "retention" phrase from that mooring, and use it to explain what will attend a *different* event—that is, the filing of a new petition. But that is to make "retention" conditional on something the statute nowhere mentions—a highly improbable thing for Congress to have done. (If, once again, a teacher says to "read this book and give me a report," no one would think he wants a report

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interview and you shall come in to answer questions." "If the plane is low on fuel, the tanks shall be refilled and the pilot shall fly the route as scheduled." In these sentences, as in our prior ones, the second command is conditional on the first; all that differs is that these sentences are (much like statutes) more formal and stilted. And the dissent's citation of *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235 (1989), adds nothing to its argument. There, we construed the following provision: "[T]here shall be allowed to the holder of [a secured] claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." *Id.*, at 241. We held that the phrase "provided for under the agreement" qualifies the words "any reasonable fees, costs, or charges," but not the words "interest on such claim." *Id.*, at 241–242. What relevance that interpretation bears to this case eludes us.

on some unidentified subject.) And indeed, the respondents' and dissent's own examples prove this point: In not a single one of their proffered sentences is the second command contingent on the occurrence of some additional, unstated event, as it would have to be under the respondents' construction of § 1153(h)(3); rather, each such command (*e. g.*, "distribute life jackets") flows directly from the stated condition (*e. g.*, "if the boat takes on water"). So by far the more natural understanding of § 1153(h)(3)'s text is that retention follows conversion, and nothing else.

The respondents' contrary view would also engender unusual results, introducing uncertainty into the immigration system's operation and thus interfering with statutory goals. Were their theory correct, an aged-out alien could hold on to a priority date for years or even decades while waiting for a relative to file a new petition. Even if that filing happened, say, 20 years after the alien aged out, the alien could take out his priority-date token, and assert a right to spring to the front of any visa line. At that point, USCIS could well have a hard time confirming the old priority date, in part because the names of derivative beneficiaries need not be listed on a visa petition. And the possibility of such leapfrogging from many years past would impede USCIS's publication of accurate waiting times. As far as we know, immigration law nowhere else allows an alien to keep in his pocket a priority date untethered to any existing valid petition. Without some clearer statement, we cannot conclude Congress intended here to create such a free-floating, open-ended entitlement to a defunct petition's priority date. See *Wang*, 25 I. & N. Dec., at 36.[16]

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[16] The dissent claims that USCIS "administered priority date retention in exactly this manner" before the CSPA's enactment, *post*, at 90, but that confident assertion is just not so—or at least not in any way that assists the respondents. The dissent principally relies on 8 CFR § 204.2(a)(4), which prior to the CSPA's enactment permitted an aged-out F2A derivative beneficiary to retain his old priority date "if [a] subsequent petition

C

Finally, the respondents contend that even if § 1153(h)(3) points at once in two directions—toward a broader scope in its first half and a narrower one in its second—the BIA acted unreasonably in choosing the more restrictive reading. In their view, the Board has offered no valid reason, consistent with "the purposes and concerns of the immigration laws," to treat their own sons and daughters less favorably than aliens who were principal and derivative beneficiaries of F2A petitions. Brief for Respondents 47. Indeed, the respondents suggest that the BIA, "for its own unfathomable reasons, disapproves of Congress's decision to allow *any* aged-out" aliens to get relief, and has thus "limited [§ 1153(h)(3)] to as few derivative beneficiaries as possible." *Id.*, at 55.

We cannot agree. At the least, the Board's interpretation has administrative simplicity to recommend it. Under that view, immigration authorities need only perform the kind of straightforward (*i. e.*, "automatic") conversion they have done for decades—moving a petition from one box to another to reflect a given status change like aging out. See *Wang*, 25 I. & N. Dec., at 36. The respondents, as we have shown, would transform conversion into a managed, multi-stage process, requiring immigration and consular officials around

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is filed *by the same petitioner*" as filed the original. Far from authorizing an open-ended, free-floating entitlement, that now-superseded regulation allowed an alien to keep his priority date only if he (unlike the respondents' offspring) had a qualifying relationship with the initial petitioner—that is, only if he fell within the group that the BIA in *Wang* thought entitled to relief. See 25 I. & N. Dec., at 34–35. And the other provisions the dissent cites (which, unlike § 204.2(a)(4), continue to operate) similarly fail to support the dissent's position, because they enable an alien to retain a priority date only if attached to an existing valid petition. See 8 U. S. C. § 1154(k)(3) (permitting an alien to retain a priority date associated with an existing F2B petition); 8 CFR § 204.5(e) (permitting an alien to retain a priority date associated with an existing employment-based petition); § 204.12(f)(1) (permitting an alien to retain a priority date associated with an existing employment-based petition for immigrating physicians).

the world to sequence and delay every aged-out alien's visa adjudication until they are able to confirm that one of his parents had become a qualifying and willing F2B petitioner. And according to the Government's (incomplete) statistics, that would have to happen in, at a minimum, tens of thousands of cases every year. See Reply Brief 18, n. 13.

Still more important, the Board offered a cogent argument, reflecting statutory purposes, for distinguishing between aged-out beneficiaries of F2A petitions and the respondents' sons and daughters. See *Wang*, 35 I. & N. Dec., at 38. As earlier explained, the F2A beneficiaries have all had a qualifying relationship with an LPR for the entire period they have waited in line—*i. e.*, since their original priority dates. See *supra*, at 62–63. That means that when immigration authorities convert their petitions, they will enter the F2B line at the same place as others who have had a comparable relationship for an equal time. The conversion thus fits with the immigration law's basic first-come-first-served rule. See 8 U. S. C. § 1153(e); *supra*, at 48. By contrast, the derivative beneficiaries of F3 and F4 petitions, like the respondents' sons and daughters, lacked any qualifying relationship with a citizen or LPR during the period they waited in line. See *supra*, at 63–64. They were, instead, the grandchildren, nieces, or nephews of citizens, and those relationships did not independently entitle them to visas. If such aliens received relief under § 1153(h)(3), they would jump over thousands of others in the F2B line who had a qualifying relationship with an LPR for a far longer time. That displacement would, the Board reasonably found, scramble the priority order Congress prescribed.

The argument to the contrary assumes that the respondents' sons and daughters should "receive credit" for all the time the respondents themselves stood in line. Brief for Respondents 50. But first, the time the respondents spent waiting for a visa may diverge substantially from the time their children did. Suppose, for example, that one of the

respondents had stood in the F4 queue for 15 years, and with just 4 years to go, married someone with a 17-year-old son. Under the respondents' reading, that derivative beneficiary, after aging out, would get the full benefit of his new parent's wait, and so displace many thousands of aliens who (unlike him) had stood in an immigration queue for nearly two decades. And second, even when the derivative qualified as such for all the time his parent stood in line, his status throughout that period hinged on his being that parent's minor child. If his parent had obtained a visa before he aged out, he would have been eligible for a visa too, because the law does not demand that a prospective immigrant abandon a minor child. But if the parent had died while waiting for a visa, or had been found ineligible, or had decided not to immigrate after all, the derivative would have gotten nothing for the time spent in line. See *supra*, at 48–49. Similarly, the Board could reasonably conclude, he should not receive credit for his parent's wait when he has become old enough to live independently. In the unavoidably zero-sum world of allocating a limited number of visas, the Board could decide that he belongs behind any alien who has had a lengthier stand-alone entitlement to immigrate.

IV

This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting § 1153(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board.

We therefore reverse the judgment of the Ninth Circuit and remand the case for further proceedings.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA joins, concurring in the judgment.

I agree with much of the plurality's opinion and with its conclusion that the Board of Immigration Appeals reasonably interpreted 8 U. S. C. § 1153(h)(3). I write separately because I take a different view of what makes this provision "ambiguous" under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

As the plurality reads section 1153(h)(3), the statute's two clauses address the issue before the Court "in divergent ways" and "do not easily cohere with each other." *Ante*, at 57. For the plurality, the first clause looks "toward the sweeping relief the respondents propose, which would reach every aged-out beneficiary of a family preference petition," while the second clause offers narrower relief that can help "only a subset of those beneficiaries." *Ibid.* Such "ill-fitting clauses," the plurality says, "left the Board with a choice—essentially of how to reconcile the statute's different commands." *Ante*, at 64.

To the extent the plurality's opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong. Courts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency. *Chevron*, *supra*, at 843–844. But when Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and that it should not. Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.[1]

[1] *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644 (2007), is not to the contrary. There the Court confronted two different statutes, enacted to address different problems, that presented

I see no conflict, or even "internal tension," *ante,* at 57, in section 1153(h)(3). See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000) (we must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a[ ] harmonious whole'" (citation omitted)).

The statute reads:

> "If the age of an alien is determined under [section 1153(h)(1)] to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." § 1153(h)(3).

The first clause states a condition—one that beneficiaries from any preference category can meet—and thereby defines the persons potentially affected by this provision. But the clause does not *grant* anything to anyone. I disagree with the plurality that the first clause "points toward broad-based relief," *ante,* at 64, because I do not think the first clause points toward any relief at all.[2]

Imagine a provision of the Tax Code that read: "If a student is determined to be enrolled at an accredited university, the student's cost of off-campus housing shall be deductible on her tax return." It would be immediately apparent from that provision that an enrolled student who lives on campus

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"seemingly categorical—and, at first glance, irreconcilable—legislative commands." *Id.*, at 661. We deferred to an agency's reasonable interpretation, which "harmonize[d] the statutes," in large part because of our strong presumption that one statute does not impliedly repeal another. *Id.*, at 662–669. *Home Builders* did not address the consequences of a single statutory provision that appears to give divergent commands.

[2] For the same reason, I do not agree with the contention in JUSTICE SOTOMAYOR's dissent that the first clause of section 1153(h)(3) unambiguously "answers the precise question in this case." *Post,* at 85.

is not entitled to the deduction, even though the student falls within the conditional first clause. And yet no one would describe the two clauses as being in tension. If the Internal Revenue Service then interpreted the term "cost of off-campus housing" to exclude payments by a student who rents a home from his parents, a court would determine whether that interpretation was reasonable. The same is true in this case.[3]

The particular benefit provided by section 1153(h)(3) is found exclusively in the second clause—the only operative provision. There we are told what an aged-out beneficiary (from whatever preference category) is entitled to: His petition "shall automatically be converted to the appropriate category and the alien shall retain the original priority date." § 1153(h)(3). But automatic conversion is not possible for every beneficiary in every preference category, as the plurality convincingly demonstrates. *Ante*, at 58–62. Automatic conversion requires, at minimum, that the beneficiary have his own sponsor, who demonstrates that he is eligible to act as a sponsor, and who commits to providing financial support for the beneficiary. *Ante*, at 61. Some aged-out children will not meet those prerequisites, and they cannot benefit

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[3] JUSTICE SOTOMAYOR's dissent accuses me of "ignor[ing]" the first clause of section 1153(h)(3), "treating [that] clause as a nullity," and denying the clause "effect." *Post*, at 99. But that point is correct only if the reader adopts JUSTICE SOTOMAYOR's own premise, that the first clause has operative effect on its own. I give the statute's first clause precisely the (limited) effect it is meant to have: It defines who is *potentially* affected by section 1153(h)(3). JUSTICE SOTOMAYOR's response to the campus housing example proves my point by acknowledging that who gets relief under a statute depends entirely on the meaning of the statute's operative provision, not on the reach of the introductory clause. See *post*, at 100. The Court would not reject a reasonable interpretation of the term "cost of off-campus housing," as JUSTICE SOTOMAYOR's dissent would, simply because the IRS could have interpreted the term to cover more students who fall within the prefatory clause.

from automatic conversion even under respondents' interpretation of the statute.[4]

Beyond those requirements, however, Congress did not speak clearly to which petitions can "automatically be converted." § 1153(h)(3). Whatever other interpretations of that provision might be possible, it was reasonable, for the reasons explained by the plurality, for the Board to interpret section 1153(h)(3) to provide relief only to a child who was a principal or derivative beneficiary of an F2A petition. That interpretation is consistent with the ordinary meaning of the statutory terms, with the established meaning of automatic conversion in immigration law, and with the structure of the family-based immigration system. *Ante*, at 58–63. It also avoids the problems that would flow from respondents' proposed alternative interpretations, including the suggestion that retention of the original priority date provides a benefit wholly separate from automatic conversion. *Ante*, at 60–62, 65–75.

I concur in the judgment.

JUSTICE ALITO, dissenting.

I agree with many of JUSTICE SOTOMAYOR's criticisms of the plurality opinion. I also agree with THE CHIEF JUSTICE's critique of the plurality's suggestion that, when two halves of a statute "do not easily cohere with each other," an agency administering the statute is free to decide which half it will obey. *Ante*, at 57. After all, "[d]irect conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice." *Ante*, at 76 (ROBERTS, C. J., concurring in judgment). While I, like JUSTICE

[4] JUSTICE SOTOMAYOR's dissent is wrong that "the relief promised in § 1153(h)(3) (priority date retention and automatic conversion) *can* be given" to every aged-out child in every preference category, *post*, at 100, and it therefore follows that the statute is ambiguous.

SOTOMAYOR, would affirm the Court of Appeals, my justification for doing so differs somewhat from hers.

As I see it, the question before us is whether there is or is not an "appropriate category" to which the petitions for respondents' children may be converted. If there is, the agency was obligated by the clear text of 8 U. S. C. § 1153(h)(3) to convert the petitions and leave the children with their original priority dates. Any such conversion would be "automatic," because the agency's obligation to convert the petitions follows inexorably, and without need for any additional action on the part of either respondents or their children, from the fact that the children's ages have been calculated to be 21 or older.[1] If there is not an appropriate category, then the agency was not required to convert the petitions.

By the time respondents became legal permanent residents and filed new petitions for their children (if not sooner), there existed an appropriate category to which the original petitions could be converted. That is because at that point the children all qualified for F2B preference status, as unmarried, adult children of legal permanent residents. Accordingly, the agency should have converted respondents' children's petitions and allowed them to retain their original priority dates.[2]

Section 1153(h)(3) is brief and cryptic. It may well contain a great deal of ambiguity, which the Board of Immigration Appeals in its expertise is free to resolve, so long as its resolution is a "permissible construction of the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council*,

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[1] I do not believe the term "converted" demands the interpretation the plurality gives it, for the reasons advanced in JUSTICE SOTOMAYOR's dissenting opinion.

[2] The Government does not argue that respondents' children were ineligible for relief because, as a factual matter, their ages were never "determined . . . to be 21 years of age or older," § 1153(h)(3), after an appropriate category became available. I therefore do not opine on this issue.

Inc., 467 U. S. 837, 843 (1984). But the statute is clear on at least one point: "If the age of an alien is determined under [§ 1153(h)(1)] to be 21 years of age or older . . . , the alien's petition *shall* automatically be converted to the appropriate category and the alien *shall* retain the original priority date issued upon receipt of the original petition." (Emphasis added.) The Board was not free to disregard this clear statutory command.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, and with whom JUSTICE THOMAS joins except as to footnote 3, dissenting.

Although the workings of our Nation's immigration system are often complex, the narrow question of statutory interpretation at the heart of this case is straightforward. Which aged-out children are entitled to retain their priority dates: derivative beneficiaries of visa petitions in all five family-preference categories, or derivative beneficiaries of petitions in only one category? The initial clause of 8 U. S. C. § 1153(h)(3) provides a clear answer: Aged-out children may retain their priority dates so long as they meet a single condition—they must be "determined . . . to be 21 years of age or older for purposes of" derivative beneficiary status. Because all five categories of aged-out children satisfy this condition, all are entitled to relief.

Notwithstanding this textual command, the Board of Immigration Appeals (BIA) ruled that four of the five categories of aged-out children to whom § 1153(h)(3) unambiguously promises priority date retention, are, in fact, entitled to no relief at all. See *Matter of Wang*, 25 I. & N. Dec. 28, 38–39 (2009). The plurality defers to that interpretation today. In doing so, the plurality does not identify any ambiguity in the dispositive initial clause of § 1153(h)(3). Indeed, it candidly admits that the clause mandates relief for "every aged-out beneficiary of a family preference petition" in any of the five categories. *Ante*, at 64. The plurality nevertheless

holds that the BIA was free to ignore this unambiguous text on the ground that § 1153(h)(3) also offers aged-out derivative beneficiaries a type of relief—automatic conversion—that it thinks can apply only to one of the five categories. The plurality thus perceives a conflict in the statute that, in its view, permits the BIA to override § 1153(h)(3)'s initial eligibility clause.

In reaching this conclusion, the plurality fails to follow a cardinal rule of statutory interpretation: When deciding whether Congress has "specifically addressed the question at issue," thereby leaving no room for an agency to fill a statutory gap, courts must "interpret the statute 'as a . . . coherent regulatory scheme' and 'fit, if possible, all parts into [a] harmonious whole.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132–133 (2000) (citation omitted). Because the plurality and the BIA ignore obvious ways in which § 1153(h)(3) can operate as a coherent whole and instead construe the statute as a self-contradiction that was broken from the moment Congress wrote it, I respectfully dissent.

I

Under *Chevron*, the first question we ask when reviewing an agency's construction of a statute is whether "Congress has directly spoken to the precise question at issue." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). If it has, then "the court, as well as the agency, must give effect to th[at] unambiguously expressed intent." *Id.*, at 842–843. Congress has spoken directly to the question in this case.

United States citizens and lawful permanent residents (LPRs) may petition for certain relatives who reside abroad (known as the "principal beneficiaries" of such petitions) to receive immigrant visas. Congress has defined five categories of eligible relatives—referred to as family-preference categories—with annual limits on the number of visas that

may be issued within each category.[1] Because the demand for visas outstrips supply, the wait for a visa can often last many years. While a principal beneficiary waits, her place in line is determined based on her "priority date," the date on which her petition was filed. See § 1153(e)(1); 8 CFR § 204.1(b) (2014); 22 CFR § 42.53(a) (2013). Priority dates are therefore crucial—the earlier one's priority date, the sooner one's place will come up in line and a visa will be available. Significantly, when the wait ends and a principal beneficiary finally becomes eligible to apply for a visa, 8 U. S. C. § 1153(d) enables the beneficiary's spouse and minor children (known as "derivative beneficiaries") to do so too.

This case arises from a common problem: Given the lengthy period prospective immigrants must wait for a visa, a principal beneficiary's child—although younger than 21 when her parent's petition was initially filed—often will have turned 21 by the time the parent's priority date comes up in line. Such a child is said to have "aged out" of derivative beneficiary treatment under § 1153(d). By way of example, respondent Norma Uy was the principal beneficiary of an F4 family-preference petition filed by her U. S. citizen sister in February 1981. That petition listed Norma's daughter, Ruth, who was then two years old, as a derivative beneficiary. If Norma had reached the front of the visa line at any time before Ruth's 21st birthday, § 1153(d) would have enabled Ruth to accompany Norma to the United States. Unfortunately, it took more than two decades for Norma's priority date to become current, by which point Ruth was 23 and thus too old for derivative beneficiary status under § 1153(d). Norma therefore immigrated alone to the United States, where she filed a new F2B petition (for unmarried

[1] The five categories are F1 (unmarried adult children of U. S. citizens); F2A (spouses and unmarried minor children of LPRs); F2B (unmarried adult children of LPRs); F3 (married children of U. S. citizens); and F4 (brothers and sisters of U. S. citizens). 8 U. S. C. §§ 1153(a)(1)–(4).

children of LPRs) on Ruth's behalf. Before § 1153(h)(3) was enacted, however, an immigrant in Ruth's position would have been unable to retain the February 1981 priority date from her original petition; the law would have instead required her to receive a new priority date all the way at the back of the F2B line.

Congress responded to this problem by enacting § 1153(h)(3), a provision entitled "[r]etention of priority date." It states:

> "If the age of an alien is determined under [the formula specified in] paragraph (1)[2] to be 21 years of age or older for the purpos[e] of [§ 1153(d)] of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

The provision's structure is crucial to its meaning. The initial clause (call it the "eligibility clause") specifies who is eligible for relief. The concluding clause (call it the "relief clause") describes the two forms of relief to which eligible persons are entitled. As the title of the provision suggests, the main form of relief is the right of an aged-out derivative beneficiary to retain the priority date of her original petition. In Ruth Uy's case, such relief would mean the difference between resuming her wait near the front of the F2B line (which would allow her to receive a visa in short order) and being sent to the back of the line (where she would potentially have to wait an additional 27 years). Brief for Respondents 52.

The question in this case is *which* aged-out beneficiaries of family-preference petitions are eligible for priority date

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[2] As the plurality explains, *ante*, at 53, the formula specified in paragraph (1) subtracts out bureaucratic delays resulting from the Government's review of the relevant immigration paperwork. That formula is not at issue in this case.

retention: the aged-out beneficiaries of petitions in all five family-preference categories (which would include respondents' children, who were derivative beneficiaries of F3 and F4 petitions for adult children and adult siblings of U. S. citizens, respectively), or the aged-out beneficiaries of only F2A petitions for spouses and children of LPRs (the interpretation offered by the BIA)?

Congress answered that question in § 1153(h)(3)'s eligibility clause, which specifies that relief is to be conferred on any immigrant who has been "determined under [the formula specified in] paragraph (1) to be 21 years of age or older" for the purpose of § 1153(d). As the plurality concedes, this clause "states a condition that every aged-out beneficiary of a preference petition satisfies"—that is, it makes eligible for relief aged-out children within each of the F1, F2A, F2B, F3, and F4 categories. *Ante*, at 57.

Congress made this clear in two mutually reinforcing ways. First, by referring to the formula set forth in "paragraph (1)," the statute incorporates that paragraph's cross-reference to § 1153(h)(2). Section 1153(h)(2) in turn defines the set of covered petitions to include, "with respect to an alien child who is a derivative beneficiary under [§ 1153(d)], a petition filed . . . for classification of the alien's parent under [§ 1153(a)]." And § 1153(a) encompasses all five family-preference categories. See §§ 1153(a)(1)–(4). Second, § 1153(h)(3) promises relief to those who are found to be 21 "for the purpos[e] of . . . [§ 1153](d)," the provision governing derivative beneficiaries. And that provision also unambiguously covers all five family-preference categories. See § 1153(d) (a minor child is "entitled to the same status" as a parent who is the principal beneficiary of a petition filed under § 1153(a)); § 1153(a) (setting forth the five family-preference categories).

In short, § 1153(h)(3)'s eligibility clause answers the precise question in this case: Aged-out beneficiaries within all five categories are entitled to relief. "[T]he intent of Con-

gress is clear," so "that is the end of the matter." *Chevron*, 467 U. S., at 842.

II

A

Because it concedes that § 1153(h)(3)'s eligibility clause unambiguously "encompasses every aged-out beneficiary of a family preference petition," *ante*, at 64, the plurality tries to fit this case into a special pocket of *Chevron* jurisprudence in which it says we must defer to an agency's decision to ignore a clear statutory command due to a conflict between that command and another statutory provision. See *ante*, at 57, 64. Thus, unlike in the usual *Chevron* case, where ambiguity derives from the fact that the text does not speak with sufficient specificity to the question at issue, the plurality argues that this is a case in which ambiguity can only arise—if it is to arise at all—if Congress has spoken clearly on the issue in diametrically opposing ways.[3] As the plurality frames it, § 1153(h)(3)'s eligibility and relief clauses are "Janus-faced," and that conflict "makes possible alternative reasonable constructions." *Ante*, at 57.

[3] To understand the kind of conflict that can make deference appropriate to an agency's decision to override unambiguous statutory text, consider the provisions at issue in *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644 (2007). One provision, § 402(b) of the Clean Water Act, 33 U. S. C. § 1342(b), commanded, "without qualification, that the [Environmental Protection Agency] 'shall approve' a transfer application" whenever nine exclusive criteria were satisfied. 551 U. S., at 661. A second provision, § 7(a)(2) of the Endangered Species Act of 1973, 16 U. S. C. § 1536(a)(2), was "similarly imperative," ordering "'[e]ach Federal agency'" to ensure that its actions were "'not likely to jeopardize'" an endangered species. 551 U. S., at 662. "[A]pplying [§ 7(a)(2)'s] language literally," we observed, would contravene the "mandatory and exclusive list of [nine] criteria set forth in § 402(b)," because it would "engraf[t] a tenth criterion onto" the statute. *Id.*, at 662–663. The agency accordingly could not "simultaneously obey" both commands: It could consider 9 criteria or 10, but not both. *Id.*, at 666. In that circumstance, we found it appropriate to defer to the agency's choice as to "which command must give way." *Ibid.*

In rushing to find a conflict within the statute, the plurality neglects a fundamental tenet of statutory interpretation: We do not lightly presume that Congress has legislated in self-contradicting terms. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously" (boldface deleted)). That is especially true where, as here, the conflict that Congress supposedly created is not between two different statutes or even two separate provisions within a single statute, but between two clauses in the same sentence. See *ibid.* ("[I]t is invariably true that intelligent drafters do not contradict themselves"). Thus, time and again we have stressed our duty to "fit, if possible, all parts [of a statute] into [a] harmonious whole." *FTC* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 389 (1959); see also *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974) (when two provisions "are capable of coexistence, it is the duty of the courts . . . to regard each as effective"). In reviewing an agency's construction of a statute, courts "must," we have emphasized, "interpret the statute 'as a . . . coherent regulatory scheme'" rather than an internally inconsistent muddle, at war with itself and defective from the day it was written. *Brown & Williamson*, 529 U. S., at 133. And in doing so, courts should "[e]mplo[y] traditional tools of statutory construction." *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446 (1987). Each of these cautions springs from a common well: As judicious as it can be to defer to administrative agencies, our foremost duty is, and always has been, to give effect to the law as drafted by Congress.

The plurality contends that deference is appropriate here because, in its view, 8 U. S. C. § 1153(h)(3)'s two clauses are "self-contradictory." *Ante,* at 75. But far from it being unworkable (or even difficult) for the agency to obey both

clauses, traditional tools of statutory construction reveal that § 1153(h)'s clauses are entirely compatible.

B

The plurality argues that although § 1153(h)(3)'s eligibility clause clearly encompasses aged-out beneficiaries within all five preference categories, the relief clause implies a conflicting "limitation on the eligible class of recipients." *Ante,* at 58. The plurality infers that limitation from two premises. First, it contends that no aged-out child may retain her priority date unless her petition is also eligible for automatic conversion. And second, it asserts that only aged-out F2A beneficiaries may receive automatic conversion. As a result, the plurality concludes, it was reasonable for the BIA to exclude aged-out children in the four other categories from receiving *both* automatic conversion and priority date retention, thereby rendering § 1153(h)(3)'s eligibility clause defunct.

The plurality's conclusion is wrong because its premises are wrong. For one, § 1153(h)(3) is naturally read to confer priority date retention as an independent form of relief to all aged-out children, regardless of whether automatic conversion is separately available. And even if that were wrong, the plurality's supposition that only F2A beneficiaries can receive automatic conversion is incorrect on its own terms. Because either of these interpretations would treat § 1153(h)(3) as a coherent whole, the BIA's construction was impermissible.

1

The most obvious flaw in the plurality's analysis is its presumption that § 1153(h)(3) permits an aged-out child to retain her original priority date only if her petition can be automatically converted. That is incorrect for many reasons.

When an immigrant is determined to have aged out of derivative beneficiary status, § 1153(h)(3) prescribes two forms of relief: "[T]he alien's petition shall automatically be con-

verted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." We have held that when a statute provides two forms of relief in this manner, joined by the conjunction "and," the two remedies are "distinct." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241–242 (1989). That understanding makes particular sense here, where Congress used the mandatory word "shall" twice, once before each form of relief. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) ("[T]he mandatory [term] 'shall' . . . normally creates an obligation impervious to judicial discretion"). Moreover, the two "shall" commands operate on different subjects, further reinforcing that they prescribe distinct remedies: An aged-out "alien's *petition* shall automatically be converted," but it is "the alien" *herself* who, in all events, "shall retain" her original priority date. § 1153(h)(3) (emphasis added).

The plurality responds with a series of examples in which the word "and" is used to join two commands, one of which is—as the plurality asserts here—dependent on another. *Ante*, at 70–71, and n. 15. But as the plurality recognizes, *ante*, at 70–71, that is hardly the only way the word can be used. For example: "If today's baseball game is rained out, your ticket shall automatically be converted to a ticket for next Saturday's game, and you shall retain your free souvenir from today's game." Or: "If you provide the DMV with proof of your new address, your voter registration shall automatically be converted to the correct polling location, and you shall receive in the mail an updated driver's license." It is plain in both of these examples that the two commands are distinct—the fan in the first example can keep her free souvenir even if she cannot attend next Saturday's game; the new resident will receive an updated driver's license even if she is ineligible to vote. What the plurality does not explain is why we should forgo the same understanding of § 1153(h)(3)'s relief clause when that would treat the statute

as a coherent whole (and when the plurality's alternative interpretation would render the statute a walking self-contradiction within the span of a few words).

With the text unavailing, the plurality turns to a policy argument. The plurality worries that if automatic conversion and priority date retention are independent benefits, aged-out beneficiaries will be able to "hold on to a priority date for years . . . while waiting for a relative to file a new petition," which might hamper U. S. Citizenship and Immigration Services (USCIS) operations. *Ante*, at 72. But the plurality's fears of administrative inconvenience are belied by the fact that USCIS has administered priority date retention in exactly this manner for years, with no apparent problems. Well before § 1153(h)(3) was enacted, a regulation provided aged-out F2A derivative beneficiaries the ability to retain their priority dates without also providing automatic conversion. See 8 CFR § 204.2(a)(4) (permitting priority date retention after a "separate petition" is filed); 57 Fed. Reg. 41053, 41059 (1992) (adopting this provision). Indeed, USCIS continues to instruct field officers that a "separate petition" must be filed in order for such beneficiaries to "retain" their "original priority date[s]." Adjudicator's Field Manual, ch. 21.2(c)(5), online at http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (all Internet materials as visited June 5, 2014, and available in Clerk of Court's case file). The notion that it is somehow impossible for an immigrant to retain her priority date contingent upon the filing of a separate petition is therefore contradicted by years of agency experience.[4]

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[4] The plurality does not dispute that USCIS has administered priority date retention as a form of relief independent from automatic conversion for years. *Ante*, at 73, n. 16. It nonetheless argues that the same approach is impermissible here for the counterintuitive reason that a pre-existing regulation used express language limiting priority date retention to derivative beneficiaries of F2A petitions alone. See *ante*, at 72–73, n. 16 (noting that 8 CFR § 204.2(a)(4) permitted an aged-out beneficiary to retain her priority date " 'if the subsequent petition is filed by the same

In the end, the plurality suggests that we should defer to the BIA's all-or-nothing approach because "context compels" it. *Ante*, at 71. Yet fatally absent from the plurality's discussion of context is any mention of the first clause of the very same provision, which, as the plurality admits, unambiguously confers relief upon all five categories of aged-out children. That clause is dispositive, because—assuming that F2A beneficiaries alone can receive automatic conversion—a reading that treats automatic conversion and priority date retention as independent benefits is the only one that would "produc[e] a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988); see also *Home Builders*, 551 U. S., at 666 ("'It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"'").

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petitioner'"). Congress included no such language to limit the scope of priority date retention in 8 U. S. C. § 1153(h)(3), however, which just reinforces what the eligibility clause already makes clear: Priority date retention is independently available for aged-out derivative beneficiaries of all family-preference petitions, not just F2A petitions.

The plurality also fails to account for the numerous other contexts in which USCIS has administered priority date retention as a benefit distinct from automatic conversion. See, *e. g.*, § 1154(k)(3) (providing priority date retention to unmarried adult children of LPRs whose parents become naturalized citizens "[r]egardless of whether a petition is converted"); 8 CFR § 204.5(e) ("A petition approved on behalf of an alien under [the employment-based immigration provisions of § 1153(b)] accords the alien the priority date of the approved petition for any subsequently filed [employment] petition"); § 204.12(f)(1) (a "physician beneficiary" who finds a "new employer [who] desir[es] to petition [USCIS] on the physician's behalf" must submit a new petition, but "will retain the priority date from the initial" petition). Finally, the plurality suggests that priority date retention can operate independently of automatic conversion only if the date to be retained is attached to a valid petition. *Ante*, at 73, n. 16. But that cannot be squared with USCIS' longstanding practice of allowing F2A beneficiaries to retain the priority dates from their no-longer valid petitions upon the filing of a new petition.

2

Even if it were somehow impossible for an aged-out child to retain her priority date independently of automatic conversion, the plurality is wrong to view automatic conversion as a benefit that F2A beneficiaries alone may enjoy.

Section 1153(h)(3) provides that if an aged-out child qualifies for relief under the statute's eligibility clause, "the alien's petition shall automatically be converted to the appropriate category." Whether an aged-out beneficiary in a given preference category may enjoy this relief turns on how one understands the words "automatically" and "converted." Because the statute does not define the terms, we apply their ordinary meaning. See *Burrage* v. *United States*, 571 U. S. 204, 210 (2014).

The ordinary meaning of "automatic" is "'having the capability of starting, operating, moving, etc., independently'" based upon some predetermined predicate event, with no "additional decisions, contingencies, or delays." *Ante*, at 58 (quoting Random House Webster's Unabridged Dictionary 140 (2d ed. 2001)). The ordinary meaning of "convert" is "to change (something) into a different form." *Id.*, at 444. Here, the statute specifies the form into which an aged-out child's petition shall be changed: another petition in the "appropriate category." § 1153(h)(3). Tying the terms together, then, "automatic conversion" means changing an old petition into a new petition in an appropriate category upon the occurrence of some predicate event, without a further decision or contingency.

All aged-out beneficiaries can have their petitions automatically converted under this definition. Perhaps most sensibly, all five categories of petitions may be converted to an appropriate category, without any further decision or contingency, upon a logical predicate event: when USCIS receives confirmation that an appropriate category exists. To see how this would work, recall the case of Norma Uy and

her daughter, Ruth. Norma was the principal beneficiary of an F4 petition filed by her U. S. citizen sister; Ruth was a derivative beneficiary of the same petition. Because Ruth had aged out of derivative beneficiary status prior to Norma's reaching the front of the visa line, Norma immigrated to the United States without Ruth. Once Norma became an LPR, however, she also became eligible to file a new petition on Ruth's behalf under the F2B category (unmarried adult children of LPRs), § 1153(a)(2)(B). Thus, once Norma provides confirmation of that eligibility to sponsor Ruth (*i. e.*, that she is an LPR, that Ruth is her daughter, and that she has not committed disqualifying criminal conduct, see *ante*, at 47), Ruth's original F4 petition can automatically be converted to an F2B petition, with no additional decision or contingency.[5]

Indeed, this is how USCIS already applies automatic conversion in other contexts. For example, when an LPR has filed an F2A petition on behalf of a spouse or child, and the LPR subsequently becomes a U. S. citizen, a provision entitled "*[a]utomatic conversion of preference classification*," 8 CFR § 204.2(i), permits the F2A petition to be automatically converted to an "immediate relative" petition, § 204.2(i)(3). See *ante*, at 60. Significantly, the predicate event that triggers this conversion is the agency's receipt of proof that the petition's sponsor has become a U. S. citizen—proof, in other words, that there is an appropriate category into which

[5] Of course, just like any other beneficiary of a family visa petition, one whose petition has been automatically converted must still satisfy the requirements for actually obtaining a visa. See *ante*, at 48–49. For example, all visa applicants must attach an "affidavit of support" from their sponsors. 8 U. S. C. § 1182(a)(4)(C)(ii). As is true for any other beneficiary, nothing stops a sponsor from declining to swear their support for the beneficiary of an automatically converted petition after a visa has become available. Converting petitions upon proof of an appropriate category therefore produces no uncertainties or contingencies that do not already exist for all family visa applicants to begin with.

the petition can be converted.[6] Section 1153(h)(3)'s automatic conversion remedy can sensibly be administered in the same way.

The plurality's contrary conclusion that automatic conversion is impossible for all but one category of family-preference petitions hinges on three basic misunderstandings. First, the plurality contends that automatic conversion is triggered not by confirmation of the existence of an appropriate category, but rather by a different predicate event: the moment when "'an immigrant visa number bec[omes] available for the alien's parent.'" *Ante*, at 61. This is a curious argument, not least because nothing in § 1153(h)(3) suggests it. That provision simply makes automatic conversion available "[i]f the age of an alien is determined . . . to be 21 years of age or older" for purposes of § 1153(d). Section 1153(h)(3) thus states the condition that an immigrant must satisfy to be eligible for automatic conversion, but it nowhere commands when the conversion should occur. There is no reason why conversion cannot occur at the logical point just described: the moment when USCIS receives proof that an appropriate category exists.

The plurality acknowledges that § 1153(h)(3) "does not explicitly identify th[e] point in time" at which a "petition is to be 'converted.'" *Ante*, at 61. It nevertheless suggests that the date when a conversion occurs "is best viewed" as the date when a visa became available for the aged-out child's parent. *Ibid.* But Congress could not have intended con-

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[6] See Dept. of State, If You Were an LPR and Are Now a U. S. Citizen: Upgrading a Petition, online at http://travel.state.gov/visa/immigrants/types/types_2991.html#5. The regulation cited by the plurality, 8 CFR § 204.2(i), is not to the contrary; it merely establishes that when an automatic conversion occurs, it shall be treated as "[e]ffective upon the date of naturalization," § 204.2(i)(3). As the State Department's instructions make clear, the conversion itself takes place after the new citizen "send[s] proof of [her] U. S. citizenship to the National Visa Center." Dept. of State, If You Were an LPR and Are Now a U. S. Citizen: Upgrading a Petition.

version to occur at that point for a glaring reason: The date on which a visa becomes available for an aged-out child's parent occurs before the point at which the child is determined to have aged out under § 1153(d)—the very requirement § 1153(h)(3) prescribes for the aged-out child to be eligible for automatic conversion in the first place. As the plurality explains, *ante,* at 48–49, such age determinations occur when an immigration official reviews the child's derivative visa application, which invariably happens *after* a visa became available for the child's parent as the principal beneficiary. At best, then, the plurality's interpretation requires USCIS to convert petitions at a time when it does not know which petitions are eligible for conversion; at worst, it requires the automatic conversion of petitions benefiting immigrants who will never even qualify for such relief (*i. e.*, aged-out immigrants who, for any number of reasons, never file a visa application and so are never determined by officials to be older than 21).

Faced with this fact, the plurality falls back to the position that automatic conversion must merely be viewed as having occurred "*as of* th[e] . . . date" when a parent's visa becomes available, although the actual "assess[ment]" of the conversion will necessarily occur at some future point in time. *Ante*, at 67, n. 13. That approach, however, introduces precisely the kind of "additional decisions, contingencies, and delays" that the plurality regards as inconsistent with the ordinary meaning of "automatic," *ante,* at 58. For even under the plurality's view, automatic conversion cannot actually be "assesse[d]" until and unless the aged-out child decides to apply for a visa and officials assessing the child's application deem her to have aged out (events which may themselves be contingent on the child's parent first filing her own successful visa application, see *ante,* at 49). The far simpler approach is for conversion to occur automatically upon the most logical moment suggested by the statute: the moment when USCIS confirms that an "appropriate category"

exists, § 1153(h)(3). Indeed, the plurality fails to explain why this cannot be the proper predicate; it simply dismisses such an approach as supported "only" by "a single-minded resolve . . . to grant relief to every possible aged-out beneficiary." *Ante*, at 67, n. 13. But that criticism is revealing: The "single-minded resolve" the plurality maligns is Congress' own, for it is Congress that expressly provided, in the eligibility clause, for aged-out beneficiaries in all five categories to be granted relief.

The plurality's second argument is a corollary of its first. If automatic conversion must occur when a visa first becomes available for a parent, the plurality frets, that will mean an aged-out child will have her petition automatically converted before immigration officials can ascertain whether her parent is even qualified to sponsor her. See *ante*, at 60–61. True enough, but that only confirms that it makes no sense to force USCIS to convert petitions so prematurely. The plurality's fears can all be averted by having automatic conversion occur, as with petitions sponsored by LPRs who later become U. S. citizens, *supra*, at 92–95, when USCIS receives confirmation that conversion is appropriate.[7]

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[7] The plurality is unsatisfied with this approach to automatic conversion on the theory that, in order to eliminate all additional "decisions, contingencies, or delays" in the process, this solution postpones the moment of "conversion" until the necessary contingencies are satisfied. Yet the plurality's approach does the same thing, because even on its account, some "decisions, contingencies, or delays" must occur before conversion can actually be assessed by immigration officials (*i. e.*, a parent's visa must become available, the child must apply for a visa, and immigration officials must deem her to have aged out, see *supra* this page). So the only question is whether the "conversion" should be considered to occur after all "decisions, contingencies, or delays" are in the past such that there is an appropriate category for conversion, or after only some. The former understanding would allow the unambiguous language of the eligibility clause to be carried into effect; the latter would preclude relief for four categories of derivative beneficiaries. In support of its restrictive interpretation, the plurality offers only the argument that converting a petition upon proof of an appropriate category would require the "filing of a new document . . . that shows the parent's eligibility to sponsor her aged-out

The plurality's final argument is that something about the term "conversion" precludes relief for all but the aged-out derivative beneficiaries of F2A petitions. The plurality accepts that "conversion" will always require changing some aspects of a petition, including its preference category (*e. g.*, from F2A to F2B) and the identity of its principal beneficiary (*e. g.*, from an aged-out child's parent to the child). But the plurality asserts that a related kind of change is entirely off the table: a change to the identity of the petition's sponsor. *Ante*, at 58. If a converted petition requires a different sponsor than the original petition, the plurality suggests, then it cannot be "converted" at all.

The plurality points to nothing in the plain meaning of "conversion" that supports this distinction. It instead argues that a "conversion" cannot entail a change to the identity of a petition's sponsor because that is "the exclusive way immigration law used the term when Congress enacted the CSPA." *Ante*, at 59. But immigration law has long allowed petitions to be converted from one category to another in contexts where doing so requires changing the sponsor's identity. In 2006, for example, the Secretary of Homeland Security promulgated a regulatory provision entitled "automatic conversion of preference classification," 8 CFR § 204.2(i)(1)(iv), which allows the automatic conversion of a petition filed by a U. S. citizen on behalf of her spouse to a widower petition if the citizen dies before the petition is approved. That conversion requires changing the sponsor from the citizen to the widower himself. The fact that the agency used the word "conversion" to refer to a process in which the petition's sponsor was changed, just a few years after 8 U. S. C. § 1153(h)(3) was enacted, strongly suggests that the term did not have the exclusive meaning that the plurality suggests. Similarly, § 1154(a)(1)(D)(i)(III), a provision enacted two years before § 1153(h)(3), see Victims of

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[child]." *Ante*, at 69, n. 14. The fact that a statute may require an agency to process a form is not a reason to disregard a coherent reading of a statute in favor of a self-contradictory one.

Trafficking and Violence Protection Act of 2000, 114 Stat. 1522, provides that a petition filed by a battered spouse on behalf of her child "shall be considered" a self-petition filed by the child herself if the child ages out—a conversion that obviously requires changing the identity of the sponsor from the battered spouse to the aged-out child. And § 1153(h)(4) confirms that such "self-petitioners" are entitled to § 1153(h)(3)'s automatic conversion remedy. The plurality never explains how it can be mandatory to "convert" the identity of the sponsors in these contexts yet impermissible to "convert" the sponsors of the petitions at issue here—an understanding that is especially implausible in light of Congress' command that such petitions "shall automatically be converted to the appropriate category." § 1153(h)(3).[8]

III

The concurrence reaches the same result as the plurality does, but for a different reason. It begins by recognizing

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[8] Moreover, had Congress actually intended to permit relief only where a new petition has the same sponsor as the original petition, it had a ready model in the language of a pre-existing regulation. See 8 CFR § 204.2(a)(4) (conferring priority date retention on a derivative beneficiary only "if the subsequent petition is filed by the same petitioner"). If it had wanted to limit § 1153(h)(3) to just the beneficiaries preferred by the BIA, "Congress could easily have said so." *Kucana* v. *Holder*, 558 U. S. 233, 248 (2010).

The plurality's argument that a "conversion" cannot entail a change to a petition's sponsor ultimately boils down to this: A "conversion" cannot include "any substantive alteration" to a petition, *ante*, at 58, except when it can. For example, a "conversion" can (indeed, must) entail changing a petition's family-preference category and changing the petition's principal beneficiary (from the aged-out child's parent to the child herself). And the plurality concedes that in other contexts, conversion must entail changing the identity of a petition's sponsor from the beneficiary's qualifying relative to the beneficiary himself. *Ante*, at 59–60, n. 10. The plurality does not explain why the word "conversion" can encompass all of these other substantive alterations, but not a change to the identity of a petition's sponsor in just this case.

that § 1153(h)(3)'s eligibility clause "states a condition" that is satisfied by aged-out "beneficiaries from any preference category." *Ante*, at 77 (ROBERTS, C. J., concurring in judgment). The concurrence thus acknowledges that the eligibility clause encompasses aged-out beneficiaries of family-preference petitions in the F1, F2A, F2B, F3, and F4 categories.

The concurrence nonetheless concludes that the BIA was free to exclude F1, F2B, F3, and F4 beneficiaries from the clear scope of the eligibility clause because of a perceived ambiguity as to which beneficiaries can receive "automatic conversion." See *ante*, at 79 ("Congress did not speak clearly to which petitions can 'automatically be converted' "). In other words, the concurrence concludes that it was reasonable for the agency to ignore the clear text of the eligibility clause because the phrase "automatic conversion" *might* be read in a manner that would benefit F2A beneficiaries alone.

This is an unusual way to interpret a statute. The concurrence identifies no case in which we have deferred to an agency's decision to use ambiguity in one portion of a statute as a license to ignore another statutory provision that is perfectly clear. To the contrary, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.*, 484 U. S., at 371.

The concurrence justifies its conclusion only by treating the eligibility clause as a nullity. The concurrence is quite candid about its approach, arguing that § 1153(h)(3)'s relief clause is its "only operative provision" and that the eligibility clause does not "*grant* anything to anyone." *Ante*, at 77. Yet "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute.' " *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955). And there is an easy way to give

meaning to the eligibility clause: The clause identifies who is entitled to the benefits specified in the ensuing relief clause.

The concurrence relies ultimately on an irrelevant hypothetical: "If a student is determined to be enrolled at an accredited university, the student's cost of off-campus housing shall be deductible on her tax return." *Ante*, at 77. In this example, the concurrence points out, it is "apparent . . . that an enrolled student who lives on campus is not entitled to the deduction, even though the student falls within the conditional first clause." *Ante*, at 77–78. That is correct, but it says nothing about this case. For in the hypothetical, it is plain that the promised relief (a tax deduction for off-campus housing) cannot apply to the persons at issue (students who live on campus). Here, however, the relief promised in § 1153(h)(3) (priority date retention and automatic conversion) *can* be given to persons specified in the initial eligibility clause (aged-out children in all five family-preference categories). See *supra*, at 88–99. And once one recognizes that aged-out children in each category unambiguously covered by the eligibility clause can receive relief, the BIA's view that *no* children in four of those categories can ever receive *any* relief cannot be reasonable.[9]

[9] More fundamentally, the concurrence's hypothetical is irrelevant because it altogether ignores a critical feature of the statute before us: § 1153(h)(2)'s express enumeration of the covered petitions to include petitions filed within the F1, F2A, F2B, F3, and F4 preference categories. See *supra*, at 85. A proper analogy would therefore be a provision that says the following: "If a student is determined to be enrolled at an accredited junior college, community college, or 4-year college, the student's room and board shall be tax-deductible and the student shall receive financial aid." Is there any permissible reading of this provision under which, although expressly covered in the eligibility clause, all junior and community college students are categorically forbidden to receive *both* the tax deduction and financial aid? Of course not. And that would be true even if the term "room and board" were ambiguous and thus open to an interpretation under which only 4-year students could receive the tax deduction. Likewise here, where F1, F2B, F3, and F4 derivative benefici-

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Congress faced a difficult choice when it enacted § 1153(h)(3). Given the "zero-sum world of allocating a limited number of visas," *ante*, at 75, Congress could have required aged-out children like Ruth Uy to lose their place in line and wait many additional years (or even decades) before being reunited with their parents, or it could have enabled such immigrants to retain their place in line—albeit at the cost of extending the wait for other immigrants by some shorter amount. Whatever one might think of the policy arguments on each side, however, this much is clear: Congress made a choice. The plurality's contrary view—that Congress actually delegated the choice to the BIA in a statute that unambiguously encompasses aged-out children in all five preference categories and commands that they "shall retain the[ir] original priority date[s]," § 1153(h)(3)—is untenable.

In the end, then, this case should have been resolved under a commonsense approach to statutory interpretation: Using traditional tools of statutory construction, agencies and courts should try to give effect to a statute's clear text before concluding that Congress has legislated in conflicting and unintelligible terms. Here, there are straightforward interpretations of § 1153(h)(3) that allow it to function as a coherent whole. Because the BIA and the Court ignore these interpretations and advance a construction that contravenes the language Congress wrote, I respectfully dissent.

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aries may not be categorically excluded from relief because they are indisputably covered by § 1153(h)(3)'s eligibility clause and able to receive the relief described in the relief clause.

Syllabus

POM WONDERFUL LLC *v.* COCA-COLA CO.

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

No. 12–761. Argued April 21, 2014—Decided June 12, 2014

This case involves the intersection of two federal statutes. The Lanham Act permits one competitor to sue another for unfair competition arising from false or misleading product descriptions. 15 U. S. C. § 1125. The Federal Food, Drug, and Cosmetic Act (FDCA) prohibits the misbranding of food and drink. 21 U. S. C. §§ 321(f), 331. To implement the FDCA's provisions, the Food and Drug Administration (FDA) has promulgated regulations regarding food and beverage labeling, including one concerning juice blends. Unlike the Lanham Act, which relies in large part for its enforcement on private suits brought by injured competitors, the FDCA and its regulations give the United States nearly exclusive enforcement authority and do not permit private enforcement suits. The FDCA also pre-empts certain state misbranding laws.

Petitioner POM Wonderful LLC, which produces, markets, and sells, *inter alia*, a pomegranate-blueberry juice blend, filed a Lanham Act suit against respondent Coca-Cola Company, alleging that the name, label, marketing, and advertising of one of Coca-Cola's juice blends mislead consumers into believing the product consists predominantly of pomegranate and blueberry juice when it in fact consists predominantly of less expensive apple and grape juices, and that the ensuing confusion causes POM to lose sales. The District Court granted partial summary judgment to Coca-Cola, ruling that the FDCA and its regulations preclude Lanham Act challenges to the name and label of Coca-Cola's juice blend. The Ninth Circuit affirmed in relevant part.

Held: Competitors may bring Lanham Act claims like POM's challenging food and beverage labels regulated by the FDCA. Pp. 111–121.

(a) This result is based on the following premises. First, this is not a pre-emption case, for it does not raise the question whether state law is pre-empted by a federal law, see *Wyeth* v. *Levine*, 555 U. S. 555, 563, but instead concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute. Pre-emption principles may nonetheless be instructive insofar as they are designed to assess the interaction of laws bearing on the same subject. Second, this is a statutory interpretation case; and analysis of the statutory text, aided by established interpretation rules, controls. See *Chickasaw Nation* v. *United States*, 534 U. S. 84, 94. While a principle

of interpretation may be countered "by some maxim pointing in a different direction," *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 115, this Court need not decide what maxim establishes the proper framework here: Even assuming that Coca-Cola is correct that the Court's task is to reconcile or harmonize the statutes instead of to determine whether one statute is an implied repeal in part of another statute, Coca-Cola is incorrect that the best way to do that is to bar POM's Lanham Act claim. Pp. 111–113.

(b) Neither the Lanham Act nor the FDCA, in express terms, forbids or limits Lanham Act claims challenging labels that are regulated by the FDCA. The absence of such a textual provision when the Lanham Act and the FDCA have coexisted for over 70 years is "powerful evidence that Congress did not intend FDA oversight to be the exclusive means" of ensuring proper food and beverage labeling. See *Wyeth*, *supra*, at 575. In addition, and contrary to Coca-Cola's argument, Congress, by taking care to pre-empt only some state laws, if anything indicated it did not intend the FDCA to preclude requirements arising from other sources. See *Setser* v. *United States*, 566 U. S. 231, 238–239. The structures of the FDCA and the Lanham Act reinforce this conclusion. Where two statutes are complementary, it would show disregard for the congressional design to hold that Congress intended one federal statute nonetheless to preclude the operation of the other. See *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124, 144. The Lanham Act and the FDCA complement each other in major respects, for each has its own scope and purpose. Both touch on food and beverage labeling, but the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety. They also complement each other with respect to remedies. The FDCA's enforcement is largely committed to the FDA, while the Lanham Act empowers private parties to sue competitors to protect their interests on a case-by-case basis. Allowing Lanham Act suits takes advantage of synergies among multiple methods of regulation. A holding that the FDCA precludes Lanham Act claims challenging food and beverage labels also could lead to a result that Congress likely did not intend. Because the FDA does not necessarily pursue enforcement measures regarding all objectionable labels, preclusion of Lanham Act claims could leave commercial interests—and indirectly the public at large—with less effective protection in the food and beverage labeling realm than in other less regulated industries. Pp. 113–116.

(c) Coca-Cola's arguments do not support its claim that preclusion is proper because Congress intended national uniformity in food and beverage labeling. First, the FDCA's delegation of enforcement authority to the Federal Government does not indicate that Congress intended to

foreclose private enforcement of other federal statutes. Second, the FDCA's express pre-emption provision applies by its terms to state, not federal, law. Even if it were proper to stray from that text, it is not clear that Coca-Cola's national uniformity assertions reflect the congressional design. Finally, the FDCA and its implementing regulations may address food and beverage labeling with more specificity than the Lanham Act, but this specificity would matter only if the two Acts cannot be implemented in full at the same time. Here, neither the statutory structure nor the empirical evidence of which the Court is aware indicates there will be any difficulty in fully enforcing each statute according to its terms. Pp. 116–118.

(d) The Government's intermediate position—that a Lanham Act claim is precluded "to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label," and that this rule precludes POM's challenge to the name of Coca-Cola's product—is flawed, for the Government assumes that the FDCA and its regulations are a ceiling on the regulation of food and beverage labeling when Congress intended the Lanham Act and the FDCA to complement each other with respect to labeling. Though the FDA's rulemaking alludes at one point to a balance of interests, it neither discusses nor cites the Lanham Act; and the Government points to no other statement suggesting that the FDA considered the full scope of interests protected by the Lanham Act. Even if agency regulations with the force of law that purport to bar other legal remedies may do so, it is a bridge too far to accept an agency's after-the-fact statement to justify that result here. An agency may not reorder federal statutory rights without congressional authorization. Pp. 118–121.

679 F. 3d 1170, reversed and remanded.

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

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Randolph D. Moss*, *Brian M. Boynton*, *Felicia H. Ellsworth*, *Francesco Valentini*, *Craig B. Cooper*, and *Andrew S. Clare*.

Melissa Arbus Sherry argued the cause for the United States as *amicus curiae* supporting vacatur and remand. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General*

Kneedler, *Mark B. Stern*, *Sushma Soni*, and *William B. Schultz*.

Kathleen M. Sullivan argued the cause for respondent. With her on the brief were *Faith E. Gay*, *Sanford I. Weisburst*, *Todd Anten*, *Yelena Konanova*, *Steven A. Zalesin*, and *Travis J. Tu*.*

JUSTICE KENNEDY delivered the opinion of the Court.

POM Wonderful LLC makes and sells pomegranate juice products, including a pomegranate-blueberry juice blend. App. 23a. One of POM's competitors is The Coca-Cola Company. Coca-Cola's Minute Maid Division makes a juice blend sold with a label that, in describing the contents, displays the words "pomegranate blueberry" with far more prominence than other words on the label that show the juice to be a blend of five juices. In truth, the Coca-Cola product contains but 0.3% pomegranate juice and 0.2% blueberry juice.

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *Michael C. Geraghty*, Attorney General of Alaska, *Laura Fox*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *David M. Louie* of Hawaii, *Gregory F. Zoeller* of Indiana, *Janet T. Mills* of Maine, *Martha Coakley* of Massachusetts, *Chris Koster* of Missouri, *Catherine Cortez Masto* of Nevada, *Joseph A. Foster* of New Hampshire, *Ellen F. Rosenblum* of Oregon, and *Robert E. Cooper, Jr.*, of Tennessee; for the International Trademark Association by *Saul H. Perloff*, *Mark Emery*, and *Steven B. Pokotilow*; for Public Citizen, Inc., et al. by *Allison M. Zieve* and *Scott L. Nelson*; and for Donald Kennedy by *Jonathan S. Massey*.

Briefs of *amici curiae* urging affirmance were filed for the American Beverage Association by *Paul D. Clement*, *Jeffrey M. Harris*, and *Amy E. Hancock*; for the Chamber of Commerce of the United States et al. by *Bert W. Rein*, *William S. Consovoy*, *Kate Comerford Todd*, *Tyler R. Green*, and *Karin F. R. Moore*; for DRI–The Voice of the Defense Bar by *J. Michael Weston*, *Mary Massaron Ross*, and *Josephine A. DeLorenzo*; and for Michael Friedman by *Partha P. Chattoraj*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Peter J. Sullivan*; and for the Generic Pharmaceutical Association by *William M. Kay* and *Ira J. Levy*.

Alleging that the use of that label is deceptive and misleading, POM sued Coca-Cola under § 43 of the Lanham Act. 60 Stat. 441, as amended, 15 U. S. C. § 1125. That provision allows one competitor to sue another if it alleges unfair competition arising from false or misleading product descriptions. The Court of Appeals for the Ninth Circuit held that, in the realm of labeling for food and beverages, a Lanham Act claim like POM's is precluded by a second federal statute. The second statute is the Federal Food, Drug, and Cosmetic Act (FDCA), which forbids the misbranding of food, including by means of false or misleading labeling. §§ 301, 403, 52 Stat. 1042, 1047, as amended, 21 U. S. C. §§ 331, 343.

The ruling that POM's Lanham Act cause of action is precluded by the FDCA was incorrect. There is no statutory text or established interpretive principle to support the contention that the FDCA precludes Lanham Act suits like the one brought by POM in this case. Nothing in the text, history, or structure of the FDCA or the Lanham Act shows the congressional purpose or design to forbid these suits. Quite to the contrary, the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels. Competitors, in their own interest, may bring Lanham Act claims like POM's that challenge food and beverage labels that are regulated by the FDCA.

I

A

This case concerns the intersection and complementarity of these two federal laws. A proper beginning point is a description of the statutes.

Congress enacted the Lanham Act nearly seven decades ago. See 60 Stat. 427 (1946). As the Court explained earlier this Term, it "requires no guesswork" to ascertain Congress' intent regarding this federal law, for Congress included a "detailed statement of the statute's purposes." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572

U. S. 118, 131 (2014). Section 45 of the Lanham Act provides:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations." 15 U. S. C. § 1127.

The Lanham Act's trademark provisions are the primary means of achieving these ends. But the Act also creates a federal remedy "that goes beyond trademark protection." *Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 539 U. S. 23, 29 (2003). The broader remedy is at issue here.

The Lanham Act creates a cause of action for unfair competition through misleading advertising or labeling. Though in the end consumers also benefit from the Act's proper enforcement, the cause of action is for competitors, not consumers.

The term "competitor" is used in this opinion to indicate all those within the class of persons and entities protected by the Lanham Act. Competitors are within the class that may invoke the Lanham Act because they may suffer "an injury to a commercial interest in sales or business reputation proximately caused by [a] defendant's misrepresentations." *Lexmark*, *supra*, at 140. The petitioner here asserts injury as a competitor.

The cause of action the Act creates imposes civil liability on any person who "uses in commerce any word, term, name,

symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U. S. C. § 1125(a)(1). As the Court held this Term, the private remedy may be invoked only by those who "allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act." *Lexmark*, 572 U. S., at 132. This principle reflects the Lanham Act's purpose of "'protect[ing] persons engaged in [commerce within the control of Congress] against unfair competition.'" *Id.*, at 131. POM's cause of action would be straightforward enough but for Coca-Cola's contention that a separate federal statutory regime, the FDCA, allows it to use the label in question and in fact precludes the Lanham Act claim.

So the FDCA is the second statute to be discussed. The FDCA statutory regime is designed primarily to protect the health and safety of the public at large. See *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596 (1951); FDCA, § 401, 52 Stat. 1046, 21 U. S. C. § 341 (agency may issue certain regulations to "promote honesty and fair dealing in the interest of consumers"). The FDCA prohibits the misbranding of food and drink. §§ 321(f), 331. A food or drink is deemed misbranded if, *inter alia*, "its labeling is false or misleading," § 343(a), information required to appear on its label "is not prominently placed thereon," § 343(f), or a label does not bear "the common or usual name of the food, if any there be," § 343(i). To implement these provisions, the Food and Drug Administration (FDA) promulgated regulations regarding food and beverage labeling, including the labeling of mixes of different types of juice into one juice blend. See 21 CFR

§ 102.33 (2013). One provision of those regulations is particularly relevant to this case: If a juice blend does not name all the juices it contains and mentions only juices that are not predominant in the blend, then it must either declare the percentage content of the named juice or "[i]ndicate that the named juice is present as a flavor or flavoring," *e. g.*, "raspberry and cranberry flavored juice drink." § 102.33(d). The Government represents that the FDA does not preapprove juice labels under these regulations. See Brief for United States as *Amicus Curiae* in Opposition 16. That contrasts with the FDA's regulation of other types of labels, such as drug labels, see 21 U. S. C. § 355(d), and is consistent with the less extensive role the FDA plays in the regulation of food than in the regulation of drugs.

Unlike the Lanham Act, which relies in substantial part for its enforcement on private suits brought by injured competitors, the FDCA and its regulations provide the United States with nearly exclusive enforcement authority, including the authority to seek criminal sanctions in some circumstances. §§ 333(a), 337. Private parties may not bring enforcement suits. § 337. Also unlike the Lanham Act, the FDCA contains a provision pre-empting certain state laws on misbranding. That provision, which Congress added to the FDCA in the Nutrition Labeling and Education Act of 1990, § 6, 104 Stat. 2362, forecloses a "State or political subdivision of a State" from establishing requirements that are of the type but "not identical to" the requirements in some of the misbranding provisions of the FDCA. 21 U. S. C. § 343–1(a). It does not address, or refer to, other federal statutes or the preclusion thereof.

B

POM Wonderful LLC is a grower of pomegranates and a distributor of pomegranate juices. Through its POM Wonderful brand, POM produces, markets, and sells a variety of pomegranate products, including a pomegranate-blueberry juice blend. App. 23a.

POM competes in the pomegranate-blueberry juice market with The Coca-Cola Company. Coca-Cola, under its Minute Maid brand, created a juice blend containing 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice. *Id.*, at 38a; Brief for Respondent 8. Despite the minuscule amount of pomegranate and blueberry juices in the blend, the front label of the Coca-Cola product displays the words "pomegranate blueberry" in all capital letters, on two separate lines. App. 38a. Below those words, Coca-Cola placed the phrase "flavored blend of 5 juices" in much smaller type. *Ibid.* And below that phrase, in still smaller type, were the words "from concentrate with added ingredients"—and, with a line break before the final phrase—"and other natural flavors." *Ibid.* The product's front label also displays a vignette of blueberries, grapes, and raspberries in front of a halved pomegranate and a halved apple. *Ibid.*

Claiming that Coca-Cola's label tricks and deceives consumers, all to POM's injury as a competitor, POM brought suit under the Lanham Act. POM alleged that the name, label, marketing, and advertising of Coca-Cola's juice blend mislead consumers into believing the product consists predominantly of pomegranate and blueberry juice when it in fact consists predominantly of less expensive apple and grape juices. *Id.*, at 27a. That confusion, POM complained, causes it to lose sales. *Id.*, at 28a. POM sought damages and injunctive relief. *Id.*, at 32a–33a.

The District Court granted partial summary judgment to Coca-Cola on POM's Lanham Act claim, ruling that the FDCA and its regulations preclude challenges to the name and label of Coca-Cola's juice blend. The District Court reasoned that in the juice-blend regulations the "FDA has directly spoken on the issues that form the basis of Pom's Lanham Act claim against the naming and labeling of" Coca-Cola's product, but has not prohibited any, and indeed expressly has permitted some, aspects of Coca-Cola's label. 727 F. Supp. 2d 849, 871–873 (CD Cal. 2010).

The Court of Appeals for the Ninth Circuit affirmed in relevant part. Like the District Court, the Court of Appeals reasoned that Congress decided "to entrust matters of juice beverage labeling to the FDA"; the FDA has promulgated "comprehensive regulation of that labeling"; and the FDA "apparently" has not imposed the requirements on Coca-Cola's label that are sought by POM. 679 F. 3d 1170, 1178 (2012). "[U]nder [Circuit] precedent," the Court of Appeals explained, "for a court to act when the FDA has not—despite regulating extensively in this area—would risk undercutting the FDA's expert judgments and authority." *Id.*, at 1177. For these reasons, and "[o]ut of respect for the statutory and regulatory scheme," the Court of Appeals barred POM's Lanham Act claim. *Id.*, at 1178.

II

A

This Court granted certiorari to consider whether a private party may bring a Lanham Act claim challenging a food label that is regulated by the FDCA. 571 U. S. 1118 (2014). The answer to that question is based on the following premises.

First, this is not a pre-emption case. In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action. See *Wyeth* v. *Levine*, 555 U. S. 555, 563 (2009). This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute. So the state-federal balance does not frame the inquiry. Because this is a preclusion case, any "presumption against pre-emption," *id.*, at 565, n. 3, has no force. In addition, the preclusion analysis is not governed by the Court's complex categorization of the types of pre-emption. See *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372–373 (2000). Although the Court's pre-emption precedent does not govern preclusion analysis in this case,

its principles are instructive insofar as they are designed to assess the interaction of laws that bear on the same subject.

Second, this is a statutory interpretation case and the Court relies on traditional rules of statutory interpretation. That does not change because the case involves multiple federal statutes. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 137–139 (2000). Nor does it change because an agency is involved. See *ibid.* Analysis of the statutory text, aided by established principles of interpretation, controls. See *Chickasaw Nation* v. *United States*, 534 U. S. 84, 94 (2001).

A principle of interpretation is "often countered, of course, by some maxim pointing in a different direction." *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 115 (2001). It is thus unsurprising that in this case a threshold dispute has arisen as to which of two competing maxims establishes the proper framework for decision. POM argues that this case concerns whether one statute, the FDCA as amended, is an "implied repeal" in part of another statute, *i. e.*, the Lanham Act. See, *e. g.*, *Carcieri* v. *Salazar*, 555 U. S. 379, 395 (2009). POM contends that in such cases courts must give full effect to both statutes unless they are in "irreconcilable conflict," see *ibid.*, and that this high standard is not satisfied here. Coca-Cola resists this canon and its high standard. Coca-Cola argues that the case concerns whether a more specific law, the FDCA, clarifies or narrows the scope of a more general law, the Lanham Act. See, *e. g.*, *United States* v. *Fausto*, 484 U. S. 439, 453 (1988); Brief for Respondent 18. The Court's task, it claims, is to "reconcil[e]" the laws, *ibid.*, and it says the best reconciliation is that the more specific provisions of the FDCA bar certain causes of action authorized in a general manner by the Lanham Act.

The Court does not need to resolve this dispute. Even assuming that Coca-Cola is correct that the Court's task is to reconcile or harmonize the statutes and not, as POM urges, to enforce both statutes in full unless there is a genu-

inely irreconcilable conflict, Coca-Cola is incorrect that the best way to harmonize the statutes is to bar POM's Lanham Act claim.

B

Beginning with the text of the two statutes, it must be observed that neither the Lanham Act nor the FDCA, in express terms, forbids or limits Lanham Act claims challenging labels that are regulated by the FDCA. By its terms, the Lanham Act subjects to suit any person who "misrepresents the nature, characteristics, qualities, or geographic origin" of goods or services. 15 U. S. C. § 1125(a). This comprehensive imposition of liability extends, by its own terms, to misrepresentations on labels, including food and beverage labels. No other provision in the Lanham Act limits that understanding or purports to govern the relevant interaction between the Lanham Act and the FDCA. And the FDCA, by its terms, does not preclude Lanham Act suits. In consequence, food and beverage labels regulated by the FDCA are not, under the terms of either statute, off limits to Lanham Act claims. No textual provision in either statute discloses a purpose to bar unfair competition claims like POM's.

This absence is of special significance because the Lanham Act and the FDCA have coexisted since the passage of the Lanham Act in 1946. 60 Stat. 427 (1946); ch. 675, 52 Stat. 1040. If Congress had concluded, in light of experience, that Lanham Act suits could interfere with the FDCA, it might well have enacted a provision addressing the issue during these 70 years. See *Wyeth*, *supra*, at 574 ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history"). Congress enacted amendments to the FDCA and the Lanham Act, see, *e. g.*, Nutrition Labeling and Education Act of 1990, 104 Stat. 2353; Trademark Law Revision Act of 1988, § 132, 102 Stat. 3946, including an amendment that added to the FDCA an express pre-emption provision with respect to

state laws addressing food and beverage misbranding, § 6, 104 Stat. 2362. Yet Congress did not enact a provision addressing the preclusion of other federal laws that might bear on food and beverage labeling. This is "powerful evidence that Congress did not intend FDA oversight to be the exclusive means" of ensuring proper food and beverage labeling. See *Wyeth*, 555 U. S., at 575.

Perhaps the closest the statutes come to addressing the preclusion of the Lanham Act claim at issue here is the pre-emption provision added to the FDCA in 1990 as part of the Nutrition Labeling and Education Act. See 21 U. S. C. § 343–1. But, far from expressly precluding suits arising under other federal laws, the provision if anything suggests that Lanham Act suits are not precluded.

This pre-emption provision prohibits a "State or political subdivision of a State" from imposing requirements that are of the type but "not identical to" corresponding FDCA requirements for food and beverage labeling. *Ibid.* It is significant that the complex pre-emption provision distinguishes among different FDCA requirements. It forbids state-law requirements that are of the type but not identical to only certain FDCA provisions with respect to food and beverage labeling. See §§ 343–1(a)(1)–(5) (citing some but not all of the subsections of § 343); § 6, 104 Stat. 2362 (codified at 21 U. S. C. § 343–1, and note following). Just as significant, the provision does not refer to requirements imposed by other sources of law, such as federal statutes. For purposes of deciding whether the FDCA displaces a regulatory or liability scheme in another statute, it makes a substantial difference whether that other statute is state or federal. By taking care to mandate express pre-emption of some state laws, Congress if anything indicated it did not intend the FDCA to preclude requirements arising from other sources. See *Setser* v. *United States*, 566 U. S. 231, 238–239 (2012) (applying principle of *expressio unius est exclusio alterius*). Pre-emption of some state requirements does not suggest an intent to preclude federal claims.

The structures of the FDCA and the Lanham Act reinforce the conclusion drawn from the text. When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other. See *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124, 144 (2001) ("[W]e can plainly regard each statute as effective because of its different requirements and protections"); see also *Wyeth*, *supra*, at 578–579. The Lanham Act and the FDCA complement each other in major respects, for each has its own scope and purpose. Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety. Compare *Lexmark*, 572 U. S., at 131–132, with *62 Cases of Jam*, 340 U. S., at 596. The two statutes impose "different requirements and protections." *J. E. M. Ag Supply*, *supra*, at 144.

The two statutes complement each other with respect to remedies in a more fundamental respect. Enforcement of the FDCA and the detailed prescriptions of its implementing regulations is largely committed to the FDA. The FDA, however, does not have the same perspective or expertise in assessing market dynamics that day-to-day competitors possess. Competitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies. Their awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators. Lanham Act suits draw upon this market expertise by empowering private parties to sue competitors to protect their interests on a case-by-case basis. By "serv[ing] a distinct compensatory function that may motivate injured persons to come forward," Lanham Act suits, to the extent they touch on the same subject matter as the FDCA, "provide incentives" for manufacturers to behave well. See *Wyeth*, *supra*, at 579. Allowing Lanham Act suits takes advantage

of synergies among multiple methods of regulation. This is quite consistent with the congressional design to enact two different statutes, each with its own mechanisms to enhance the protection of competitors and consumers.

A holding that the FDCA precludes Lanham Act claims challenging food and beverage labels would not only ignore the distinct functional aspects of the FDCA and the Lanham Act but also would lead to a result that Congress likely did not intend. Unlike other types of labels regulated by the FDA, such as drug labels, see 21 U. S. C. §355(d), it would appear the FDA does not preapprove food and beverage labels under its regulations and instead relies on enforcement actions, warning letters, and other measures. See Brief for United States as *Amicus Curiae* in Opposition 16. Because the FDA acknowledges that it does not necessarily pursue enforcement measures regarding all objectionable labels, *ibid.*, if Lanham Act claims were to be precluded then commercial interests—and indirectly the public at large—could be left with less effective protection in the food and beverage labeling realm than in many other, less regulated industries. It is unlikely that Congress intended the FDCA's protection of health and safety to result in less policing of misleading food and beverage labels than in competitive markets for other products.

C

Coca-Cola argues the FDCA precludes POM's Lanham Act claim because Congress intended national uniformity in food and beverage labeling. Coca-Cola notes three aspects of the FDCA to support that position: delegation of enforcement authority to the Federal Government rather than private parties; express pre-emption with respect to state laws; and the specificity of the FDCA and its implementing regulations. But these details of the FDCA do not establish an intent or design to preclude Lanham Act claims.

Coca-Cola says that the FDCA's delegation of enforcement authority to the Federal Government shows Congress' intent

to achieve national uniformity in labeling. But POM seeks to enforce the Lanham Act, not the FDCA or its regulations. The centralization of FDCA enforcement authority in the Federal Government does not indicate that Congress intended to foreclose private enforcement of other federal statutes.

Coca-Cola next appeals to the pre-emption provision added to the FDCA in 1990. See § 343–1. It argues that allowing Lanham Act claims to proceed would undermine the pre-emption provision's goal of ensuring that food and beverage manufacturers can market nationally without the burden of complying with a patchwork of requirements. A significant flaw in this argument is that the pre-emption provision by its plain terms applies only to certain state-law requirements, not to federal law. See Part II–B, *supra*. Coca-Cola in effect asks the Court to ignore the words "State or political subdivision of a State" in the statute.

Even if it were proper to stray from the text in this way, it is far from clear that Coca-Cola's assertions about national uniformity in fact reflect the congressional design. Although the application of a federal statute such as the Lanham Act by judges and juries in courts throughout the country may give rise to some variation in outcome, this is the means Congress chose to enforce a national policy to ensure fair competition. It is quite different from the disuniformity that would arise from the multitude of state laws, state regulations, state administrative agency rulings, and state-court decisions that are partially forbidden by the FDCA's pre-emption provision. Congress not infrequently permits a certain amount of variability by authorizing a federal cause of action even in areas of law where national uniformity is important. Compare *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 162 (1989) ("One of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property"), with 35 U. S. C. § 281 (private right

of action for patent infringement); see *Wyeth*, 555 U. S., at 570 ("[T]he [FDCA] contemplates that federal juries will resolve most misbranding claims"). The Lanham Act itself is an example of this design: Despite Coca-Cola's protestations, the Act is uniform in extending its protection against unfair competition to the whole class it describes. It is variable only to the extent that those rights are enforced on a case-by-case basis. The variability about which Coca-Cola complains is no different from the variability that any industry covered by the Lanham Act faces. And, as noted, Lanham Act actions are a means to implement a uniform policy to prohibit unfair competition in all covered markets.

Finally, Coca-Cola urges that the FDCA, and particularly its implementing regulations, addresses food and beverage labeling with much more specificity than is found in the provisions of the Lanham Act. That is true. The pages of FDA rulemakings devoted only to juice-blend labeling attest to the level of detail with which the FDA has examined the subject. *E. g.*, Food Labeling; Declaration of Ingredients; Common or Usual Name for Nonstandardized Foods; Diluted Juice Beverages, 58 Fed. Reg. 2897–2926 (1993). Because, as we have explained, the FDCA and the Lanham Act are complementary and have separate scopes and purposes, this greater specificity would matter only if the Lanham Act and the FDCA cannot be implemented in full at the same time. See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645–646 (2012). But neither the statutory structure nor the empirical evidence of which the Court is aware indicates there will be any difficulty in fully enforcing each statute according to its terms. See Part II–B, *supra*.

D

The Government disagrees with both Coca-Cola and POM. It submits that a Lanham Act claim is precluded "to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label." Brief for

United States as *Amicus Curiae* 11. Applying that standard, the Government argues that POM may not bring a Lanham Act challenge to the name of Coca-Cola's product, but that other aspects of the label may be challenged. That is because, the Government argues, the FDA regulations specifically authorize the names of juice blends but not the other aspects of the label that are at issue.

In addition to raising practical concerns about drawing a distinction between regulations that "specifically . . . authorize" a course of conduct and those that merely tolerate that course, *id.*, at 10–11, the flaw in the Government's intermediate position is the same as that in Coca-Cola's theory of the case. The Government assumes that the FDCA and its regulations are at least in some circumstances a ceiling on the regulation of food and beverage labeling. But, as discussed above, Congress intended the Lanham Act and the FDCA to complement each other with respect to food and beverage labeling.

The Government claims that the "FDA's juice-naming regulation reflects the agency's 'weigh[ing of] the competing interests relevant to the particular requirement in question.'" *Id.*, at 19 (quoting *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 501 (1996)). The rulemaking indeed does allude, at one point, to a balancing of interests: It styles a particular requirement as "provid[ing] manufacturers with flexibility for labeling products while providing consumers with information that they need." 58 Fed. Reg. 2919–2920. But that rulemaking does not discuss or even cite the Lanham Act, and the Government cites no other statement in the rulemaking suggesting that the FDA considered the full scope of the interests the Lanham Act protects. In addition, and contrary to the language quoted above, the FDA explicitly encouraged manufacturers to include material on their labels that is not required by the regulations. *Id.*, at 2919. A single isolated reference to a desire for flexibility is not sufficient to transform a rulemaking that is otherwise at best inconclusive as

to its interaction with other federal laws into one with preclusive force, even on the assumption that a federal regulation in some instances might preclude application of a federal statute. Cf. *Williamson* v. *Mazda Motor of America, Inc.*, 562 U. S. 323, 334–336 (2011).

In addition, *Geier* v. *American Honda Motor Co.*, 529 U. S. 861 (2000), does not support the Government's argument. In *Geier*, the agency enacted a regulation deliberately allowing manufacturers to choose between different options because the agency wanted to encourage diversity in the industry. A subsequent lawsuit challenged one of those choices. The Court concluded that the action was barred because it directly conflicted with the agency's policy choice to encourage flexibility to foster innovation. *Id.*, at 875. Here, by contrast, the FDA has not made a policy judgment that is inconsistent with POM's Lanham Act suit. This is not a case where a lawsuit is undermining an agency judgment, and in any event the FDA does not have authority to enforce the Lanham Act.

It is necessary to recognize the implications of the United States' argument for preclusion. The Government asks the Court to preclude private parties from availing themselves of a well-established federal remedy because an agency enacted regulations that touch on similar subject matter but do not purport to displace that remedy or even implement the statute that is its source. Even if agency regulations with the force of law that purport to bar other legal remedies may do so, see *id.*, at 874; see also *Wyeth*, *supra*, at 576, it is a bridge too far to accept an agency's after-the-fact statement to justify that result here. An agency may not reorder federal statutory rights without congressional authorization.

* * *

Coca-Cola and the United States ask the Court to elevate the FDCA and the FDA's regulations over the private cause of action authorized by the Lanham Act. But the FDCA

and the Lanham Act complement each other in the federal regulation of misleading labels. Congress did not intend the FDCA to preclude Lanham Act suits like POM's. The position Coca-Cola takes in this Court that because food and beverage labeling is involved it has no Lanham Act liability here for practices that allegedly mislead and trick consumers, all to the injury of competitors, finds no support in precedent or the statutes. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Syllabus

CLARK ET UX. *v.* RAMEKER, TRUSTEE, ET AL.

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

No. 13–299. Argued March 24, 2014—Decided June 12, 2014

When petitioners filed for Chapter 7 bankruptcy, they sought to exclude roughly $300,000 in an inherited individual retirement account (IRA) from the bankruptcy estate using the "retirement funds" exemption. See 11 U. S. C. § 522(b)(3)(C). The Bankruptcy Court concluded that an inherited IRA does not share the same characteristics as a traditional IRA and disallowed the exemption. The District Court reversed, explaining that the exemption covers any account in which the funds were originally accumulated for retirement purposes. The Seventh Circuit disagreed and reversed the District Court.

Held: Funds held in inherited IRAs are not "retirement funds" within the meaning of § 522(b)(3)(C). Pp. 127–133.

(a) The ordinary meaning of "retirement funds" is properly understood to be sums of money set aside for the day an individual stops working. Three legal characteristics of inherited IRAs provide objective evidence that they do not contain such funds. First, the holder of an inherited IRA may never invest additional money in the account. 26 U. S. C. § 219(d)(4). Second, holders of inherited IRAs are required to withdraw money from the accounts, no matter how far they are from retirement. §§ 408(a)(6), 401(a)(9)(B). Finally, the holder of an inherited IRA may withdraw the entire balance of the account at any time—and use it for any purpose—without penalty. Pp. 127–129.

(b) This reading is consistent with the purpose of the Bankruptcy Code's exemption provisions, which effectuate a careful balance between the creditor's interest in recovering assets and the debtor's interest in protecting essential needs. Allowing debtors to protect funds in traditional and Roth IRAs ensures that debtors will be able to meet their basic needs during their retirement years. By contrast, nothing about an inherited IRA's legal characteristics prevent or discourage an individual from using the entire balance immediately after bankruptcy for purposes of current consumption. The "retirement funds" exemption should not be read in a manner that would convert the bankruptcy objective of protecting debtors' basic needs into a "free pass," *Schwab* v. *Reilly*, 560 U. S. 770, 791. Pp. 129–130.

(c) Petitioners' counterarguments do not overcome the statute's text and purpose. Their claim that funds in an inherited IRA are retire-

ment funds because, at some point, they were set aside for retirement, conflicts with ordinary usage and would render the term "retirement funds," as used in § 522(b)(3)(C), superfluous. Congress could have achieved the exact same result without specifying the funds as "retirement funds." And the absence of the phrase "debtor's interest," which appears in many other § 522 exemptions, does not indicate that § 522(b)(3)(C) covers funds intended for someone else's retirement. Where used, that phrase works to limit the value of the asset that the debtor may exempt from her estate, not to distinguish between a debtor's assets and the assets of another. Also unpersuasive is petitioners' argument that § 522(b)(3)(C)'s sentence structure—*i. e.*, a broad category, here, "retirement funds," followed by limiting language, here, "to the extent that"—prevents the broad category from performing any independent limiting work. This is not the only way in which the phrase "to the extent that" may be read, and this argument reintroduces the problem that makes the term "retirement funds" superfluous. Finally, the possibility that an accountholder can leave an inherited IRA intact until retirement and take only the required minimum distributions does not mean that an inherited IRA bears the legal characteristics of retirement funds. Pp. 130–133.

714 F. 3d 559, affirmed.

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

Kannon K. Shanmugam argued the cause for petitioners. With him on the briefs were *Allison B. Jones* and *Denis P. Bartell.*

Danielle Spinelli argued the cause for respondents. With her on the brief were *Craig Goldblatt*, *Kelly P. Dunbar*, *William J. Rameker*, *pro se*, *Jane F. Zimmerman*, *Jennifer M. Krueger*, and *Roger Sage.**

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Consumer Bankruptcy Attorneys by *Tara Twomey*; for the Tribune Company 401(k) Savings Plan et al. by *Douglas Hallward-Driemeier*; and for G. Eric Brunstad, Jr., by *Mr. Brunstad*, *pro se*, and *Kate M. O'Keeffe.*

Briefs of *amici curiae* were filed for the National Association of Bankruptcy Trustees by *Lynne F. Riley*, *Jeffrey J. Cymrot*, and *Donald R. Lassman*; and for Seymour Goldberg by *Matthew S. Hellman*, *Adam G. Unikowsky*, and *Catherine L. Steege.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

When an individual files for bankruptcy, she may exempt particular categories of assets from the bankruptcy estate. One such category includes certain "retirement funds." 11 U. S. C. § 522(b)(3)(C). The question presented is whether funds contained in an inherited individual retirement account (IRA) qualify as "retirement funds" within the meaning of this bankruptcy exemption. We hold that they do not.

I

A

When an individual debtor files a bankruptcy petition, her "legal or equitable interests . . . in property" become part of the bankruptcy estate. § 541(a)(1). "To help the debtor obtain a fresh start," however, the Bankruptcy Code allows debtors to exempt from the estate limited interests in certain kinds of property. *Rousey* v. *Jacoway*, 544 U. S. 320, 325 (2005). The exemption at issue in this case allows debtors to protect "retirement funds to the extent those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code." §§ 522(b)(3)(C), (d)(12).[1] The enumerated sections of the Internal Revenue Code cover many types of accounts, three of which are relevant here.

The first two are traditional and Roth IRAs, which are created by 26 U. S. C. § 408 and § 408A, respectively. Both types of accounts offer tax advantages to encourage individuals to save for retirement. Qualified contributions to traditional IRAs, for example, are tax deductible. § 219(a). Roth IRAs offer the opposite benefit: Although contributions are not tax deductible, qualified distributions are tax free.

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[1] Under § 522, debtors may elect to claim exemptions either under federal law, see § 522(b)(2), or state law, see § 522(b)(3). Both tracks permit debtors to exempt "retirement funds." See § 522(b)(3)(C) (retirement funds exemption for debtors proceeding under state law); § 522(d)(12) (identical exemption for debtors proceeding under federal law). Petitioners elected to proceed under state law, so we refer to § 522(b)(3)(C) throughout.

§§ 408A(c)(1), (d)(1). To ensure that both types of IRAs are used for retirement purposes and not as general tax-advantaged savings vehicles, Congress made certain withdrawals from both types of accounts subject to a 10-percent penalty if taken before an accountholder reaches the age of 59½. See §§ 72(t)(1)–(2); see also n. 4, *infra*.

The third type of account relevant here is an inherited IRA. An inherited IRA is a traditional or Roth IRA that has been inherited after its owner's death. See §§ 408(d)(3)(C)(ii), 408A(a). If the heir is the owner's spouse, as is often the case, the spouse has a choice: He or she may "roll over" the IRA funds into his or her own IRA, or he or she may keep the IRA as an inherited IRA (subject to the rules discussed below). See Internal Revenue Service, Publication 590: Individual Retirement Arrangements (IRAs), p. 18 (Jan. 5, 2014). When anyone other than the owner's spouse inherits the IRA, he or she may not roll over the funds; the only option is to hold the IRA as an inherited account.

Inherited IRAs do not operate like ordinary IRAs. Unlike with a traditional or Roth IRA, an individual may withdraw funds from an inherited IRA at any time, without paying a tax penalty. § 72(t)(2)(A)(ii). Indeed, the owner of an inherited IRA not only may but *must* withdraw its funds: The owner must either withdraw the entire balance in the account within five years of the original owner's death or take minimum distributions on an annual basis. See §§ 408(a)(6), 401(a)(9)(B); 26 CFR § 1.408–8 (2013) (Q–1 and A–1(a) incorporating § 1.401(a)(9)–3 (Q–1 and A–1(a))); see generally D. Cartano, Taxation of Individual Retirement Accounts § 32.02[A] (2013). And unlike with a traditional or Roth IRA, the owner of an inherited IRA may never make contributions to the account. 26 U. S. C. § 219(d)(4).

B

In 2000, Ruth Heffron established a traditional IRA and named her daughter, Heidi Heffron-Clark, as the sole beneficiary of the account. When Heffron died in 2001, her IRA—

which was then worth just over $450,000—passed to her daughter and became an inherited IRA. Heffron-Clark elected to take monthly distributions from the account.

In October 2010, Heffron-Clark and her husband, petitioners in this Court, filed a Chapter 7 bankruptcy petition. They identified the inherited IRA, by then worth roughly $300,000, as exempt from the bankruptcy estate under 11 U. S. C. § 522(b)(3)(C). Respondents, the bankruptcy trustee and unsecured creditors of the estate, objected to the claimed exemption on the ground that the funds in the inherited IRA were not "retirement funds" within the meaning of the statute.

The Bankruptcy Court agreed, disallowing the exemption. *In re Clark*, 450 B. R. 858, 866 (WD Wis. 2011). Relying on the "plain language of § 522(b)(3)(C)," the court concluded that an inherited IRA "does not contain *anyone's* 'retirement funds,' " because unlike with a traditional IRA, the funds are not "segregated to meet the needs of, nor distributed on the occasion of, any person's retirement." *Id.*, at 863.[2] The District Court reversed, explaining that the exemption covers any account containing funds "originally" "accumulated for retirement purposes." *In re Clark*, 466 B. R. 135, 139 (WD Wis. 2012). The Seventh Circuit reversed the District Court's judgment. *In re Clark*, 714 F. 3d 559 (2013). Pointing to the "[d]ifferent rules govern[ing] inherited" and noninherited IRAs, the court concluded that "inherited IRAs represent an opportunity for current consumption, not a fund of retirement savings." *Id.*, at 560, 562.

We granted certiorari to resolve a conflict between the Seventh Circuit's ruling and the Fifth Circuit's decision in

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[2] The Bankruptcy Court also concluded in the alternative that, even if funds in an inherited IRA qualify as retirement funds within the meaning of § 522(b)(3)(C), an inherited IRA is not exempt from taxation under any of the Internal Revenue Code sections listed in the provision. See 450 B. R., at 865. Because we hold that inherited IRAs are not retirement funds to begin with, we have no occasion to pass on the Bankruptcy Court's alternative ground for disallowing petitioners' exemption.

In re Chilton, 674 F. 3d 486 (2012). 571 U. S. 1067 (2013). We now affirm.

II

The text and purpose of the Bankruptcy Code make clear that funds held in inherited IRAs are not "retirement funds" within the meaning of § 522(b)(3)(C)'s bankruptcy exemption.

A

The Bankruptcy Code does not define "retirement funds," so we give the term its ordinary meaning. See *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 553 (2014). The ordinary meaning of "fund[s]" is "sum[s] of money . . . set aside for a specific purpose." American Heritage Dictionary 712 (4th ed. 2000). And "retirement" means "[w]ithdrawal from one's occupation, business, or office." *Id.*, at 1489. Section 522(b)(3)(C)'s reference to "retirement funds" is therefore properly understood to mean sums of money set aside for the day an individual stops working.

The parties agree that, in deciding whether a given set of funds falls within this definition, the inquiry must be an objective one, not one that "turns on the debtor's subjective purpose." Brief for Petitioners 43–44; see also Brief for Respondents 26. In other words, to determine whether funds in an account qualify as "retirement funds," courts should not engage in a case-by-case, fact-intensive examination into whether the debtor actually planned to use the funds for retirement purposes as opposed to current consumption. Instead, we look to the legal characteristics of the account in which the funds are held, asking whether, as an objective matter, the account is one set aside for the day when an individual stops working. Cf. *Rousey*, 544 U. S., at 332 (holding that traditional IRAs are included within § 522(d)(10)(E)'s exemption for "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of . . . age" based on the legal characteristics of traditional IRAs).

Three legal characteristics of inherited IRAs lead us to conclude that funds held in such accounts are not objectively set aside for the purpose of retirement. First, the holder of an inherited IRA may never invest additional money in the account. 26 U. S. C. § 219(d)(4). Inherited IRAs are thus unlike traditional and Roth IRAs, both of which are quintessential "retirement funds." For where inherited IRAs categorically prohibit contributions, the entire purpose of traditional and Roth IRAs is to provide tax incentives for accountholders to contribute regularly and over time to their retirement savings.

Second, holders of inherited IRAs are required to withdraw money from such accounts, no matter how many years they may be from retirement. Under the Tax Code, the beneficiary of an inherited IRA must either withdraw all of the funds in the IRA within five years after the year of the owner's death or take minimum annual distributions every year. See § 408(a)(6); § 401(a)(9)(B); 26 CFR § 1.408–8 (Q–1 and A–1(a) incorporating § 1.401(a)(9)–3 (Q–1 and A–1(a))). Here, for example, petitioners elected to take yearly distributions from the inherited IRA; as a result, the account decreased in value from roughly $450,000 to less than $300,000 within 10 years. That the tax rules governing inherited IRAs routinely lead to their diminution over time, regardless of their holders' proximity to retirement, is hardly a feature one would expect of an account set aside for retirement.

Finally, the holder of an inherited IRA may withdraw the entire balance of the account at any time—and for any purpose—without penalty. Whereas a withdrawal from a traditional or Roth IRA prior to the age of 59½ triggers a 10-percent tax penalty subject to narrow exceptions, see n. 4, *infra*—a rule that encourages individuals to leave such funds untouched until retirement age—there is no similar limit on the holder of an inherited IRA. Funds held in inherited IRAs accordingly constitute "a pot of money that can be

freely used for current consumption," 714 F. 3d, at 561, not funds objectively set aside for one's retirement.

B

Our reading of the text is consistent with the purpose of the Bankruptcy Code's exemption provisions. As a general matter, those provisions effectuate a careful balance between the interests of creditors and debtors. On the one hand, we have noted that "every asset the Code permits a debtor to withdraw from the estate is an asset that is not available to . . . creditors." *Schwab* v. *Reilly*, 560 U. S. 770, 791 (2010). On the other hand, exemptions serve the important purpose of "protect[ing] the debtor's essential needs." *United States* v. *Security Industrial Bank*, 459 U. S. 70, 83 (1982) (Blackmun, J., concurring in judgment).[3]

Allowing debtors to protect funds held in traditional and Roth IRAs comports with this purpose by helping to ensure that debtors will be able to meet their basic needs during their retirement years. At the same time, the legal limitations on traditional and Roth IRAs ensure that debtors who hold such accounts (but who have not yet reached retirement age) do not enjoy a cash windfall by virtue of the exemption—such debtors are instead required to wait until age 59½ before they may withdraw the funds penalty free.

The same cannot be said of an inherited IRA. For if an individual is allowed to exempt an inherited IRA from her bankruptcy estate, nothing about the inherited IRA's legal characteristics would prevent (or even discourage) the individual from using the entire balance of the account on a vacation home or sports car immediately after her bankruptcy proceedings are complete. Allowing that kind of exemption

[3] As the House Judiciary Committee explained in the process of enacting § 522, "[t]he historical purpose" of bankruptcy exemptions has been to provide a debtor "with the basic necessities of life" so that she "will not be left destitute and a public charge." H. R. Rep. No. 95–595, p. 126 (1977).

would convert the Bankruptcy Code's purposes of preserving debtors' ability to meet their basic needs and ensuring that they have a "fresh start," *Rousey*, 544 U. S., at 325, into a "free pass," *Schwab*, 560 U. S., at 791. We decline to read the retirement funds provision in that manner.

III

Although petitioners' counterarguments are not without force, they do not overcome the statute's text and purpose.

Petitioners' primary argument is that funds in an inherited IRA are retirement funds because—regardless of whether they currently sit in an account bearing the legal characteristics of a fund set aside for retirement—they did so at an earlier moment in time. After all, petitioners point out, "the initial owner" of the account "set aside the funds in question for retirement by depositing them in a" traditional or Roth IRA. Brief for Petitioners 21. And "[t]he [initial] owner's death does not in any way affect the funds in the account." *Ibid.*

We disagree. In ordinary usage, to speak of a person's "retirement funds" implies that the funds are currently in an account set aside for retirement, not that they were set aside for that purpose at some prior date by an entirely different person. Under petitioners' contrary logic, if an individual withdraws money from a traditional IRA and gives it to a friend who then deposits it into a checking account, that money should be forever deemed "retirement funds" because it was originally set aside for retirement. That is plainly incorrect.

More fundamentally, the backward-looking inquiry urged by petitioners would render a substantial portion of 11 U. S. C. § 522(b)(3)(C)'s text superfluous. The funds contained in every individual-held account exempt from taxation under the Tax Code provisions enumerated in § 522(b)(3)(C) have been, at some point in time, "retirement funds." So on petitioners' view, rather than defining the exemption to

cover "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under [the enumerated sections] of the Internal Revenue Code," Congress could have achieved the exact same result through a provision covering any "fund or account that is exempt from taxation under [the enumerated sections]." In other words, § 522(b)(3)(C) requires that funds satisfy not one but two conditions in order to be exempt: The funds must be "retirement funds," and they must be held in a covered account. Petitioners' reading would write out of the statute the first element. It therefore flouts the rule that "'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Corley* v. *United States*, 556 U. S. 303, 314 (2009).

Petitioners respond that many of § 522's other exemptions refer to the "debtor's interest" in various kinds of property. See, *e. g.*, § 522(d)(2) (exempting "[t]he debtor's interest, not to exceed [$3,675] in value, in one motor vehicle"). Section 522(b)(3)(C)'s retirement funds exemption, by contrast, includes no such reference. As a result, petitioners surmise, Congress must have meant the provision to cover funds that were at one time retirement accounts, even if they were for someone else's retirement. Brief for Petitioners 33–34. But Congress used the phrase "debtor's interest" in the other exemptions in a different manner—not to distinguish between a debtor's assets and the assets of another person but to set a limit on the value of the particular asset that a debtor may exempt. For example, the statute allows a debtor to protect "[t]he debtor's aggregate interest, not to exceed [$1,550] in value, in jewelry." § 522(d)(4). The phrase "[t]he debtor's aggregate interest" in this provision is just a means of introducing the $1,550 limit; it is not a means of preventing debtors from exempting other persons' jewelry from their own bankruptcy proceedings (an interpretation that would serve little apparent purpose). And Congress had no need to use the same "debtor's interest" formulation

in § 522(b)(3)(C) for the simple reason that it imposed a value limitation on the amount of exemptible retirement funds in a separate provision, § 522(n).

Petitioners next contend that even if their interpretation of "'retirement funds' does not independently *exclude* anything from the scope of the statute," that poses no problem because Congress actually intended that result. Reply Brief 5–6. In particular, petitioners suggest that when a sentence is structured as § 522(b)(3)(C) is—starting with a broad category ("retirement funds"), then winnowing it down through limiting language ("to the extent that" the funds are held in a particular type of account)—it is often the case that the broad category does no independent limiting work. As counsel for petitioners noted at oral argument, if a tax were to apply to "sports teams to the extent that they are members of the major professional sports leagues," the phrase "sports teams" would not provide any additional limitation on the covered entities. Tr. of Oral Arg. 15.

There are two problems with this argument. First, while it is possible to conceive of sentences that use § 522(b)(3)(C)'s "to the extent that" construction in a manner where the initial broad category serves no exclusionary purpose, that is not the only way in which the phrase may be used. For example, a tax break that applies to "nonprofit organizations to the extent that they are medical or scientific" would not apply to a for-profit pharmaceutical company because the initial broad category ("nonprofit organizations") provides its own limitation. Just so here; in order to qualify for bankruptcy protection under § 522(b)(3)(C), funds must be both "retirement funds" and in an account exempt from taxation under one of the enumerated Tax Code sections.

Second, to accept petitioners' argument would reintroduce the surplusage problem already discussed. *Supra*, at 130–131 and this page. And although petitioners are correct that "the only effect of respondents' interpretation of 'retire-

ment funds' would seemingly be to deny bankruptcy exemption to inherited IRAs," Reply Brief 2, as between one interpretation that would render statutory text superfluous and another that would render it meaningful yet limited, we think the latter more faithful to the statute Congress wrote.

Finally, petitioners argue that even under the inquiry we have described, funds in inherited IRAs should still qualify as "retirement funds" because the holder of such an account can leave much of its value intact until her retirement if she invests wisely and chooses to take only the minimum annual distributions required by law. See Brief for Petitioners 27–28. But the possibility that some investors may use their inherited IRAs for retirement purposes does not mean that inherited IRAs bear the defining legal characteristics of retirement funds. Were it any other way, money in an ordinary checking account (or, for that matter, an envelope of $20 bills) would also amount to "retirement funds" because it is possible for an owner to use those funds for retirement.[4]

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit is affirmed.

It is so ordered.

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[4] Petitioners also argue that inherited IRAs are similar enough to Roth IRAs to qualify as retirement funds because "the owner of a Roth IRA may withdraw his contributions . . . without penalty." Brief for Petitioners 44. But that argument fails to recognize that withdrawals of contributions to a Roth IRA are not subject to the 10-percent tax penalty for the unique reason that the contributions have already been taxed. By contrast, all capital gains and investment income in a Roth IRA are subject to the pre-59½ withdrawal penalty (with narrow exceptions for, for example, medical expenses), which incentivizes use of those funds only in one's retirement years.

Syllabus

REPUBLIC OF ARGENTINA *v.* NML CAPITAL, LTD.

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

No. 12–842. Argued April 21, 2014—Decided June 16, 2014

After petitioner, Republic of Argentina, defaulted on its external debt, respondent, NML Capital, Ltd. (NML), one of Argentina's bondholders, prevailed in 11 debt-collection actions that it brought against Argentina in the Southern District of New York. In aid of executing the judgments, NML sought discovery of Argentina's property, serving subpoenas on two nonparty banks for records relating to Argentina's global financial transactions. The District Court granted NML's motions to compel compliance. The Second Circuit affirmed, rejecting Argentina's argument that the District Court's order transgressed the Foreign Sovereign Immunities Act of 1976 (FSIA or Act).

Held: No provision in the FSIA immunizes a foreign-sovereign judgment debtor from postjudgment discovery of information concerning its extraterritorial assets. Pp. 138–146.

(a) This Court assumes without deciding that, in the ordinary case, a district court would have the discretion under Federal Rule of Civil Procedure 69(a)(2) to permit discovery of third-party information bearing on a judgment debtor's extraterritorial assets. Pp. 138–140.

(b) The FSIA replaced an executive-driven, factor-intensive, loosely common-law-based immunity regime with "a comprehensive framework for resolving any claim of sovereign immunity." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 699. Henceforth, any sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act's text. The Act confers on foreign states two kinds of immunity. The first, jurisdictional immunity (28 U. S. C. § 1604), was waived here. The second, execution immunity, generally shields "property in the United States of a foreign state" from attachment, arrest, and execution. §§ 1609, 1610. See also § 1611(a), (b)(1), (b)(2). The Act has no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets. Far from containing the "plain statement" necessary to preclude application of federal discovery rules, *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539, the Act says not a word about postjudgment discovery in aid of execution.

Syllabus

Argentina's arguments are unavailing. Even if Argentina were correct that § 1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity, the latter would not shield from discovery a foreign sovereign's extraterritorial assets, since the text of § 1609 immunizes only foreign-state property "in the United States." The prospect that NML's general request for information about Argentina's worldwide assets may turn up information about property that Argentina regards as immune does not mean that NML cannot pursue discovery of it. Pp. 140–145.

695 F. 3d 201, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. GINSBURG, J., filed a dissenting opinion, *post*, p. 147. SOTOMAYOR, J., took no part in the decision of the case.

Jonathan I. Blackman argued the cause for petitioner. With him on the briefs was *Carmine D. Boccuzzi, Jr.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* supporting reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Elaine J. Goldenberg*, *Mark B. Stern*, *Sharon Swingle*, and *Jeffrey E. Sandberg.*

Theodore B. Olson argued the cause for respondent. With him on the brief were *Matthew D. McGill*, *Scott P. Martin*, *Scott G. Stewart*, and *Robert A. Cohen.**

**Jeffrey B. Wall*, *Joseph E. Neuhaus*, *H. Rodgin Cohen*, and *Bruce E. Clark* filed a brief for The Clearing House as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of South Carolina et al. by *Alan Wilson*, Attorney General of South Carolina, *Robert D. Cook*, Solicitor General, and *James Emory Smith, Jr.*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *George Jepsen* of Connecticut, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Thomas J. Miller* of Iowa, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Michael DeWine*

JUSTICE SCALIA delivered the opinion of the Court.

We must decide whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. §§ 1330, 1602 *et seq.*, limits the scope of discovery available to a judgment creditor in a federal postjudgment execution proceeding against a foreign sovereign.

I. Background

In 2001, petitioner, Republic of Argentina, defaulted on its external debt. In 2005 and 2010, it restructured most of that debt by offering creditors new securities (with less favorable terms) to swap out for the defaulted ones. Most bondholders went along. Respondent, NML Capital, Ltd. (NML), among others, did not.

NML brought 11 actions against Argentina in the Southern District of New York to collect on its debt, and prevailed in every one.[1] It is owed around $2.5 billion, which Argen-

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of Ohio, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, and *William H. Sorrell* of Vermont; for Additional Family Members of Victims of State-Sponsored Terrorism by *William M. Jay*; for Agudas Chasidei Chabad of United States by *Nathan Lewin*, *Alyza D. Lewin*, *Steven Lieberman*, and *Robert P. Parker*; for Aurelius Entities by *Roy T. Englert, Jr.*, and *Mark T. Stancil*; for the Competitive Enterprise Institute et al. by *John Norton Moore* and *Sam Kazman*; for Family Members and Estates of Victims of State-Sponsored Terrorism by *Mark W. Mosier*; for Individual Bondholder Judgment Creditors by *William C. Heuer*; for the Hispanic American Center for Economic Research by *John S. Baker, Jr.*; for the Judicial Crisis Network by *Erin Morrow Hawley* and *Carrie Severino*; for the Judicial Education Project et al. by *Peter B. Rutledge*; for the National Association of Manufacturers by *Catherine E. Stetson*; and for Lester Brickman et al. by *Richard M. Esenberg*, *pro se*.

Jack L. Goldsmith III filed a brief for Montreux Partners, L. P., et al. as *amici curiae*.

[1] The District Court's jurisdiction rested on Argentina's broad waiver of sovereign immunity memorialized in its bond indenture agreement, which states: "To the extent that [Argentina] or any of its revenues, assets or properties shall be entitled . . . to any immunity from suit . . . from attachment prior to judgment . . . from execution of a judgment or from any other legal or judicial process or remedy, . . . [Argentina] has irrevocably

tina has not paid. Having been unable to collect on its judgments from Argentina, NML has attempted to execute them against Argentina's property. That postjudgment litigation "has involved lengthy attachment proceedings before the district court and multiple appeals." *EM Ltd.* v. *Republic of Argentina*, 695 F. 3d 201, 203, and n. 2 (CA2 2012) (referring the reader to prior opinions "[f]or additional background on Argentina's default and the resulting litigation").

Since 2003, NML has pursued discovery of Argentina's property. In 2010, "'[i]n order to locate Argentina's assets and accounts, learn how Argentina moves its assets through New York and around the world, and accurately identify the places and times when those assets might be subject to attachment and execution (whether under [United States law] or the law of foreign jurisdictions),'" *id.*, at 203 (quoting NML brief), NML served subpoenas on two nonparty banks, Bank of America (BOA) and Banco de la Nación Argentina (BNA), an Argentinian bank with a branch in New York City. For the most part, the two subpoenas target the same kinds of information: documents relating to accounts maintained by or on behalf of Argentina, documents identifying the opening and closing dates of Argentina's accounts, current balances, transaction histories, records of electronic fund transfers, debts owed by the bank to Argentina, transfers in and out of Argentina's accounts, and information about transferors and transferees.

Argentina, joined by BOA, moved to quash the BOA subpoena. NML moved to compel compliance but, before the court ruled, agreed to narrow its subpoenas by excluding the names of some Argentine officials from the initial electronic-fund-transfer message search. NML also agreed to treat as confidential any documents that the banks so designated.

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agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the [FSIA] to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . ." App. 106–107.

The District Court denied the motion to quash and granted the motions to compel. Approving the subpoenas in principle, it concluded that extraterritorial asset discovery did not offend Argentina's sovereign immunity, and it reaffirmed that it would serve as a "clearinghouse for information" in NML's efforts to find and attach Argentina's assets. App. to Pet. for Cert. 31. But the court made clear that it expected the parties to negotiate further over specific production requests, which, the court said, must include "some reasonable definition of the information being sought." *Id.*, at 32. There was no point, for instance, in "getting information about something that might lead to attachment in Argentina because that would be useless information," since no Argentinian court would allow attachment. *Ibid.* "Thus, the district court . . . sought to limit the subpoenas to discovery that was reasonably calculated to lead to attachable property." 695 F. 3d, at 204–205.

NML and BOA later negotiated additional changes to the BOA subpoena. NML expressed its willingness to narrow its requests from BNA as well, but BNA neither engaged in negotiation nor complied with the subpoena.

Only Argentina appealed, arguing that the court's order transgressed the Foreign Sovereign Immunities Act because it permitted discovery of Argentina's extraterritorial assets. The Second Circuit affirmed, holding that "because the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed." *Id.*, at 205.

We granted certiorari. 571 U. S. 1118 (2014).

II. Analysis

A

The rules governing discovery in postjudgment execution proceedings are quite permissive. Federal Rule of Civil Procedure 69(a)(2) states that, "[i]n aid of the judgment or

execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located." See 12 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure § 3014, p. 160 (2d ed. 1997) (hereinafter Wright & Miller) (court "may use the discovery devices provided in [the federal rules] or may obtain discovery in the manner provided by the practice of the state in which the district court is held"). The general rule in the federal system is that, subject to the district court's discretion, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. Rule Civ. Proc. 26(b)(1). And New York law entitles judgment creditors to discover "all matter relevant to the satisfaction of [a] judgment," N. Y. Civ. Prac. Law Ann. § 5223 (West 1997), permitting "investigation [of] any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts," D. Siegel, New York Practice § 509, p. 891 (5th ed. 2011).

The meaning of those rules was much discussed at oral argument. What if the assets targeted by the discovery request are beyond the jurisdictional reach of the court to which the request is made? May the court nonetheless permit discovery so long as the judgment creditor shows that the assets are recoverable under the laws of the jurisdictions in which they reside, whether that be Florida or France? We need not take up those issues today, since Argentina has not put them in contention. In the Court of Appeals, Argentina's only asserted ground for objection to the subpoenas was the Foreign Sovereign Immunities Act. See 695 F. 3d, at 208 ("Argentina argues . . . that the normally broad scope of discovery in aid of execution is limited in this case by principles of sovereign immunity"). And Argentina's petition for writ of certiorari asked us to decide only whether that Act "imposes [a] limit on a United States court's authority to order blanket post-judgment execution discovery on

the assets of a foreign state used for any activity anywhere in the world." Pet. for Cert. 14. Plainly, then, this is not a case about the breadth of Rule 69(a)(2).[2] We thus assume without deciding that, as the Government conceded at argument, Tr. of Oral Arg. 24, and as the Second Circuit concluded below, "in a run-of-the-mill execution proceeding . . . the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States." 695 F. 3d, at 208. The single, narrow question before us is whether the Foreign Sovereign Immunities Act specifies a different rule when the judgment debtor is a foreign state.

B

To understand the effect of the Act, one must know something about the regime it replaced. Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983). Accordingly, this Court's practice has been to "defe[r] to the decisions of the political branches" about whether and when to exercise judicial power over foreign states. *Ibid.* For the better part of the last two centuries, the political branch making the determination was the Executive, which typically requested immunity in all suits against friendly foreign states. *Id.*, at 486–487. But then, in 1952, the State Department embraced (in the so-called Tate Letter) the "restrictive" theory of sovereign immunity, which holds that immunity shields only a foreign sovereign's public, noncommercial acts. *Id.*, at 487,

[2] On one of the final pages of its reply brief, Argentina makes for the first time the assertion (which it does not develop, and for which it cites no authority) that the scope of Rule 69 discovery in aid of execution is limited to assets upon which a United States court can execute. Reply Brief 19. We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief.

and n. 9. The Tate Letter "thr[ew] immunity determinations into some disarray," since "political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 690 (2004) (internal quotation marks omitted). Further muddling matters, when in particular cases the State Department did *not* suggest immunity, courts made immunity determinations "generally by reference to prior State Department decisions." *Verlinden*, 461 U. S., at 487. Hence it was that "sovereign immunity decisions were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Id.*, at 488.

Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Ibid.* The key word there—which goes a long way toward deciding this case—is *comprehensive*. We have used that term often and advisedly to describe the Act's sweep: "Congress established [in the FSIA] a comprehensive framework for resolving any claim of sovereign immunity." *Altman*, 541 U. S., at 699. The Act "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden*, *supra*, at 493. This means that "[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar* v. *Yousuf*, 560 U. S. 305, 313 (2010). As the Act itself instructs, "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles *set forth in this [Act]*." 28 U. S. C. § 1602 (emphasis added). Thus, any sort of immu-

nity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.

The text of the Act confers on foreign states two kinds of immunity. First and most significant, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." § 1604. That provision is of no help to Argentina here: A foreign state may waive jurisdictional immunity, § 1605(a)(1), and in this case Argentina did so, see 695 F. 3d, at 203. Consequently, the Act makes Argentina "liable in the same manner and to the same extent as a private individual under like circumstances." § 1606.

The Act's second immunity-conferring provision states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." § 1609. The exceptions to this immunity defense (we will call it "execution immunity") are narrower. "The property in the United States of a foreign state" is subject to attachment, arrest, or execution if (1) it is "used for a commercial activity in the United States," § 1610(a), *and* (2) some other enumerated exception to immunity applies, such as the one allowing for waiver, see § 1610(a)(1)–(7). The Act goes on to confer a more robust execution immunity on designated international-organization property, § 1611(a), property of a foreign central bank, § 1611(b)(1), and "property of a foreign state . . . [that] is, or is intended to be, used in connection with a military activity" and is either "of a military character" or "under the control of a military authority or defense agency," § 1611(b)(2).

That is the last of the Act's immunity-granting sections. There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets. Argentina concedes that no part of the Act "expressly address[es] [postjudgment] discovery." Brief for Petitioner 22. Quite right. The Act speaks of discovery

only once, in a subsection requiring courts to stay discovery requests directed to the United States that would interfere with criminal or national-security matters, § 1605(g)(1). And that section explicitly suspends certain Federal Rules of Civil Procedure when such a stay is entered, see § 1605(g)(4). Elsewhere, it is clear when the Act's provisions specifically applicable to suits against sovereigns displace their general federal-rule counterparts. See, *e. g.*, § 1608(d). Far from containing the "plain statement" necessary to preclude application of federal discovery rules, *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539 (1987), the Act says not a word on the subject.[3]

Argentina would have us draw meaning from this silence. Its argument has several parts. First, it asserts that, before and after the Tate Letter, the State Department and American courts routinely accorded *absolute* execution immunity to foreign-state property. If a thing belonged to a foreign sovereign, then, no matter where it was found, it was immune from execution. And absolute immunity from *execution* necessarily entailed immunity from *discovery in aid of execution*. Second, by codifying execution immunity with only a small set of exceptions, Congress merely "partially lowered the previously unconditional barrier to post-judgment relief." Brief for Petitioner 29. Because the Act gives "no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority," *ibid.*, Argentina contends, discovery of assets that do not fall within an exception to execution immunity (plainly true of a foreign state's extraterritorial assets) is forbidden.

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[3] Argentina and the United States suggest that, under the terms of Rule 69 itself, the Act trumps the federal rules, since Rule 69(a)(1) states that "a federal statute governs to the extent it applies." But, since the Act does not contain implicit discovery-immunity protections, it does not "apply" (in the relevant sense) at all.

The argument founders at each step. To begin with, Argentina cites no case holding that, before the Act, a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts. No surprise there. Our courts generally lack authority in the first place to execute against property in other countries, so how could the question ever have arisen? See Wright & Miller § 3013, at 156 ("[A] writ of execution . . . can be served anywhere within the state in which the district court is held"). More importantly, even if Argentina were right about the scope of the common-law execution-immunity rule, then it would be obvious that the terms of § 1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property "*in the United States*." So even if Argentina were correct that § 1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity, the latter would not shield from discovery a foreign sovereign's extraterritorial assets.

But what of foreign-state property that *would* enjoy execution immunity under the Act, such as Argentina's diplomatic or military property? Argentina maintains that, if a judgment creditor could not ultimately execute a judgment against certain property, then it has no business pursuing discovery of information pertaining to that property. But the reason for these subpoenas is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law. If, bizarrely, NML's subpoenas had sought only "information that could not lead to executable assets in the United States or abroad," then Argentina likely would be correct to say that the subpoenas were unenforceable—*not* because information about nonexecutable assets enjoys a penumbral "discovery immunity" under the Act, but because information that could not possibly lead to executable assets is simply not "relevant" to execution in the first place, Fed. Rule Civ.

Proc. 26(b)(1); N. Y. Civ. Prac. Law Ann. § 5223.[4] But of course that is not what the subpoenas seek. They ask for information about Argentina's worldwide assets generally, so that NML can identify where Argentina may be holding property that *is* subject to execution. To be sure, that request is bound to turn up information about property that Argentina regards as immune. But NML may think the same property *not* immune. In which case, Argentina's self-serving legal assertion will not automatically prevail; the District Court will have to settle the matter.

* * *

Today's decision leaves open what Argentina thinks is a gap in the statute. Could the 1976 Congress really have meant not to protect foreign states from postjudgment discovery "clearinghouses"? The riddle is not ours to solve (if it can be solved at all). It is of course possible that, had Congress anticipated the rather unusual circumstances of this case (foreign sovereign waives immunity; foreign sovereign owes money under valid judgments; foreign sovereign does not pay and apparently has no executable assets in the United States), it would have added to the Act a sentence conferring categorical discovery-in-aid-of-execution immunity on a foreign state's extraterritorial assets. Or, just as possible, it would have done no such thing. Either way, "[t]he question . . . is not what Congress 'would have wanted'

[4] The dissent apparently agrees that the Act has nothing to say about the scope of postjudgment discovery of a foreign sovereign's extraterritorial assets. It also apparently agrees that the rules limit discovery to matters relevant to execution. Our agreement ends there. The dissent goes on to assert that, unless a judgment creditor *proves* up front that all of the information it seeks is relevant to execution under the laws of all foreign jurisdictions, discovery of information concerning extraterritorial assets is limited to that which the Act makes relevant to execution *in the United States*. *Post*, at 148 (opinion of GINSBURG, J.). We can find no basis in the Act or the rules for that position.

but what Congress enacted in the FSIA." *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 618 (1992).[5]

Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause "a substantial invasion of [foreign states'] sovereignty," Brief for United States as *Amicus Curiae* 18, and will "[u]ndermin[e] international comity," *id.*, at 19. Worse, such orders might provoke "reciprocal adverse treatment of the United States in foreign courts," *id.*, at 20, and will "threaten harm to the United States' foreign relations more generally," *id.*, at 21. These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.[6]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the decision of this case.

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[5] NML also argues that, even if Argentina had a claim to immunity from postjudgment discovery, it waived it in its bond indenture agreement, see n. 1, *supra*. The Second Circuit did not address this argument. Nor do we.

[6] Although this appeal concerns only the meaning of the Act, we have no reason to doubt that, as NML concedes, "other sources of law" ordinarily will bear on the propriety of discovery requests of this nature and scope, such as "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." Brief for Respondent 24–25 (quoting *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 543–544, and n. 28 (1987)).

JUSTICE GINSBURG, dissenting.

The Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§ 1330, 1602 *et seq.*, if one of several conditions is met, permits execution of a judgment rendered in the United States against a foreign sovereign only on "property in the United States . . . used for a commercial activity." § 1610(a). Accordingly, no inquiry into a foreign sovereign's property in the United States that is not "used for a commercial activity" could be ordered; such an inquiry, as the Court recognizes, would not be "'relevant' to execution in the first place." *Ante*, at 144 (citing Fed. Rule Civ. Proc. 26(b)(1)). Yet the Court permits unlimited inquiry into Argentina's property outside the United States, whether or not the property is "used for a commercial activity." By what authorization does a court in the United States become a "clearinghouse for information," *ante*, at 138 (internal quotation marks omitted), about any and all property held by Argentina abroad? NML may seek such information, the Court reasons, because "NML *does not yet know* what property Argentina has [outside the United States], let alone whether it is executable under the relevant jurisdiction's law." *Ante*, at 144. But see *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 542 (1987) (observing that other jurisdictions generally allow much more limited discovery than is available in the United States).

A court in the United States has no warrant to indulge the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign's property in order to execute a U. S. judgment against the foreign sovereign. Cf. § 1602 ("Under international law, . . . th[e] *commercial property* [of a state] may be levied upon for the satisfaction of judgments rendered against [the state] in connection with [its] commercial activities." (emphasis added)). Without proof of any kind that other nations broadly expose a foreign sovereign's property to arrest, attachment, or execution,

a more modest assumption is in order. See *EM Ltd.* v. *Republic of Argentina*, 695 F. 3d 201, 207 (CA2 2012) (recognizing that postjudgment discovery "must be calculated to assist in collecting on a judgment" (citing Fed. Rules Civ. Proc. 26(b)(1), 69(a)(2))).

Unless and until the judgment creditor, here, NML, proves that other nations would allow unconstrained access to Argentina's assets, I would be guided by the one law we know for sure—our own. That guide is all the more appropriate, as our law coincides with the international norm. See § 1602. Accordingly, I would limit NML's discovery to property used here or abroad "in connection with . . . commercial activities." §§ 1602, 1610(a). I therefore dissent from the sweeping examination of Argentina's worldwide assets the Court exorbitantly approves today.

Syllabus

SUSAN B. ANTHONY LIST ET AL. *v.* DRIEHAUS ET AL.

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

No. 13–193. Argued April 22, 2014—Decided June 16, 2014

Respondent Driehaus, a former Congressman, filed a complaint with the Ohio Elections Commission alleging that petitioner Susan B. Anthony List (SBA) violated an Ohio law that criminalizes certain false statements made during the course of a political campaign. Specifically, Driehaus alleged that SBA violated the law when it stated that his vote for the Patient Protection and Affordable Care Act (ACA) was a vote in favor of "taxpayer funded abortion." After Driehaus lost his reelection bid, the complaint was dismissed, but SBA continued to pursue a separate suit in Federal District Court challenging the law on First Amendment grounds. Petitioner Coalition Opposed to Additional Spending and Taxes also filed a First Amendment challenge to the Ohio law, alleging that it had planned to disseminate materials presenting a similar message but refrained due to the proceedings against SBA. The District Court consolidated the two lawsuits and dismissed them as nonjusticiable, concluding that neither suit presented a sufficiently concrete injury for purposes of standing or ripeness. The Sixth Circuit affirmed on ripeness grounds.

Held: Petitioners have alleged a sufficiently imminent injury for Article III purposes. Pp. 157–168.

(a) To establish Article III standing, a plaintiff must show, *inter alia*, an "injury in fact," which must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560. When challenging a law prior to its enforcement, a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298. Pp. 157–161.

(b) Petitioners have alleged a credible threat of enforcement of the Ohio law. Pp. 161–167.

(1) Petitioners have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest" by pleading specific statements they intend to make in future election cycles. Pp. 161–162.

Syllabus

(2) Petitioners' intended future conduct is also "arguably . . . proscribed by [the] statute." The Ohio false statement statute sweeps broadly, and a panel of the Ohio Elections Commission already found probable cause to believe that SBA violated the law when it made statements similar to those petitioners plan to make in the future. *Golden* v. *Zwickler*, 394 U. S. 103, is distinguishable; the threat of prosecution under an electoral leafletting ban in that case was wholly conjectural because the plaintiff's "sole concern" related to a former Congressman who was unlikely to run for office again. Here, by contrast, petitioners' speech focuses on the broader issue of support for the ACA, not on the voting record of a single candidate. Nor does SBA's insistence that its previous statements were true render its fears of enforcement misplaced. After all, that insistence did not prevent the Commission from finding probable cause for a violation the first time. Pp. 162–163.

(3) Finally, the threat of future enforcement is substantial. There is a history of past enforcement against petitioners. Past enforcement against the same conduct is good evidence that the threat of enforcement is not "'chimerical.'" *Steffel* v. *Thompson*, 415 U. S. 452, 459. The credibility of that threat is bolstered by the fact that a complaint may be filed with the State Commission by "any person," Ohio Rev. Code Ann. §3517.153(A), not just a prosecutor or agency.

The threatened Commission proceedings are of particular concern because of the burden they impose on electoral speech. Moreover, the target of a complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days before an election. But this Court need not decide whether the threat of Commission proceedings standing alone is sufficient; here, those proceedings are backed by the additional threat of criminal prosecution. Pp. 164–167.

(c) The Sixth Circuit separately considered two other "prudential factors": "fitness" and "hardship." This Court need not resolve the continuing vitality of the prudential ripeness doctrine in this case because those factors are easily satisfied here. See *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118. Pp. 167–168.

525 Fed. Appx. 415, reversed and remanded.

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

Michael A. Carvin argued the cause for petitioners. With him on the briefs were *David R. Langdon*, *Christopher P. Finney*, *Curt C. Hartman*, and *Robert A. Destro*.

Eric J. Feigin argued the cause for the United States as *amicus curiae* in support of partial reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Michael S. Raab*, and *Jaynie Lilley*.

Eric E. Murphy, State Solicitor of Ohio, argued the cause for respondents. With him on the brief were *Michael DeWine*, Attorney General, and *Samuel C. Peterson* and *Peter K. Glenn-Applegate*, Deputy Solicitors.*

JUSTICE THOMAS delivered the opinion of the Court.

Petitioners in this case seek to challenge an Ohio statute that prohibits certain "false statements" during the course

*Briefs of *amici curiae* urging reversal were filed for the Alliance Defending Freedom by *David A. Cortman*, *Kevin H. Theriot*, *Heather Gebelin Hacker*, and *David J. Hacker*; for the American Booksellers Association et al. by *Michael A. Bamberger* and *Richard M. Zuckerman*; for the American Civil Liberties Union et al. by *Steven R. Shapiro*; for the Bioethics Defense Fund by *Nikolas T. Nikas* and *Dorinda C. Bordlee*; for the Cato Institute et al. by *Ilya Shapiro*; for the Center for Constitutional Jurisprudence by *John C. Eastman*, *Anthony T. Caso*, and *Edwin Meese III*; for the Christian Legal Society et al. by *Frederick W. Claybrook, Jr.*, *David D. Johnson*, and *Kimberlee Wood Colby*; for the Center for Competitive Politics by *Allen Dickerson* and *Tyler Martinez*; for Citizens United et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Michael Connelly*; for the First Amendment Lawyers Association by *Jennifer M. Kinsley*; for the Foundation for Individual Rights in Education by *Jeffrey A. Rosen*, *John K. Crisham*, *Michael A. Fragoso*, and *Greg Lukianoff*; for the General Conference of Seventh-day Adventists et al. by *Gene C. Schaerr*, *Todd R. McFarland*, and *Charles M. Kester*; for the Government Integrity Fund by *William M. Todd*; for the Institute for Justice et al. by *William H. Mellor*, *Dana Berlinger*, *Paul M. Sherman*, and *Manuel S. Klausner*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for the Republican National Committee by *Michael T. Morley* and *John Phillippe*; for the Southeastern Legal Foundation by *Shannon Lee Goessling*; for the Student Press Law Center by *Adam H. Charnes* and *Richard D. Dietz*; and for the 1851 Center for Constitutional Law by *Gregory A. Keyser*.

Erik S. Jaffe and *Bradley A. Smith* filed a brief of *amici curiae* for Michael DeWine, Attorney General of Ohio.

of a political campaign. The question in this case is whether their preenforcement challenge to that law is justiciable—and in particular, whether they have alleged a sufficiently imminent injury for the purposes of Article III. We conclude that they have.

I

The Ohio statute at issue prohibits certain "false statement[s]" "during the course of any campaign for nomination or election to public office or office of a political party." Ohio Rev. Code Ann. § 3517.21(B) (Lexis 2013). As relevant here, the statute makes it a crime for any person to "[m]ake a false statement concerning the voting record of a candidate or public official," § 3517.21(B)(9), or to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not," § 3517.21(B)(10).[1]

"[A]ny person" acting on personal knowledge may file a complaint with the Ohio Elections Commission (or Commission) alleging a violation of the false statement statute. § 3517.153(A) (Lexis Supp. 2014). If filed within 60 days of a primary election or 90 days of a general election, the com-

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[1] Section 3517.21(B) provides in relevant part:

"No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

. . . . . .

"(9) Make a false statement concerning the voting record of a candidate or public official;

"(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."

plaint is referred to a panel of at least three Commission members. §§ 3517.156(A), (B)(1) (Lexis 2013). The panel must then hold an expedited hearing, generally within two business days, § 3517.156(B)(1), to determine whether there is probable cause to believe the alleged violation occurred, § 3517.156(C). Upon a finding of probable cause, the full Commission must, within 10 days, hold a hearing on the complaint. § 3517.156(C)(2); see also Ohio Admin. Code § 3517–1–10(E) (2008).

The statute authorizes the full Commission to subpoena witnesses and compel production of documents. Ohio Rev. Code Ann. § 3517.153(B) (Lexis Supp. 2014). At the full hearing, the parties may make opening and closing statements and present evidence. Ohio Admin. Code §§ 3517–1–11(B)(2)(c), (d), (g). If the Commission determines by "clear and convincing evidence" that a party has violated the false statement law, the Commission "shall" refer the matter to the relevant county prosecutor. Ohio Rev. Code Ann. §§ 3517.155(D)(1)–(2). Alternatively, the Commission's regulations state that it may simply issue a reprimand. See Ohio Admin. Code § 3517–1–14(D). Violation of the false statement statute is a first-degree misdemeanor punishable by up to six months of imprisonment, a fine up to $5,000, or both. Ohio Rev. Code Ann. §§ 3599.40 (Lexis 2013), 3517.992(V) (Lexis Supp. 2014). A second conviction under the false statement statute is a fourth-degree felony that carries a mandatory penalty of disfranchisement. § 3599.39.

II

Petitioner Susan B. Anthony List (SBA) is a "pro-life advocacy organization." 525 Fed. Appx. 415, 416 (CA6 2013). During the 2010 election cycle, SBA publicly criticized various Members of Congress who voted for the Patient Protection and Affordable Care Act (ACA). In particular, it issued a press release announcing its plan to "educat[e] voters that their representative voted for a health care bill that includes

taxpayer-funded abortion." App. 49–50. The press release listed then-Congressman Steve Driehaus, a respondent here, who voted for the ACA. SBA also sought to display a billboard in Driehaus' district condemning that vote. The planned billboard would have read: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." *Id.*, at 37. The advertising company that owned the billboard space refused to display that message, however, after Driehaus' counsel threatened legal action.

On October 4, 2010, Driehaus filed a complaint with the Ohio Elections Commission alleging, as relevant here, that SBA had violated §§ 3517.21(B)(9) and (10) by falsely stating that he had voted for "taxpayer-funded abortion."[2] Because Driehaus filed his complaint 29 days before the general election, a Commission panel held an expedited hearing. On October 14, 2010, the panel voted 2 to 1 to find probable cause that a violation had been committed. The full Commission set a hearing date for 10 business days later, and the parties commenced discovery. Driehaus noticed depositions of three SBA employees as well as individuals affiliated with similar advocacy groups. He also issued discovery requests for all evidence that SBA would rely on at the Commission hearing, as well as SBA's communications with allied organizations, political party committees, and Members of Congress and their staffs.

On October 18, 2010—after the panel's probable-cause determination, but before the scheduled Commission hearing—SBA filed suit in Federal District Court, seeking declaratory and injunctive relief on the ground that §§ 3517.21(B)(9) and (10) violate the First and Fourteenth Amendments of the United States Constitution. The Dis-

[2] The dispute about the falsity of SBA's speech concerns two different provisions of the ACA: (1) the subsidy to assist lower income individuals in paying insurance premiums, and (2) the direct appropriation of federal money for certain health programs such as community health centers. See Brief for Petitioners 4–5.

trict Court stayed the action under *Younger* v. *Harris*, 401 U. S. 37 (1971), pending completion of the Commission proceedings. The Sixth Circuit denied SBA's motion for an injunction pending appeal. Driehaus and SBA eventually agreed to postpone the full Commission hearing until after the election.

When Driehaus lost the election in November 2010, he moved to withdraw his complaint against SBA. The Commission granted the motion with SBA's consent. Once the Commission proceedings were terminated, the District Court lifted the stay and SBA amended its complaint. As relevant here, the amended complaint alleged that Ohio Rev. Code Ann. §§3517.21(B)(9) and (10) are unconstitutional both facially and as applied. Specifically, the complaint alleged that SBA's speech about Driehaus had been chilled; that SBA "intends to engage in substantially similar activity in the future"; and that it "face[d] the prospect of its speech and associational rights again being chilled and burdened," because "[a]ny complainant can hale [it] before the [Commission], forcing it to expend time and resources defending itself." App. 121–122.

The District Court consolidated SBA's suit with a separate suit brought by petitioner Coalition Opposed to Additional Spending and Taxes (COAST), an advocacy organization that also alleged that the same Ohio false statement provisions are unconstitutional both facially and as applied.[3] Accord-

[3] Petitioners also challenged a related "disclaimer provision," App. 126–127, 156–157, under Ohio Rev. Code Ann. §3517.20, and COAST raised pre-emption and due process claims. Reply Brief 21, n. 7. Petitioners do not pursue their "disclaimer," pre-emption, or due process claims before us. *Ibid.* We also need not address SBA's separate challenge to the Commission's investigatory procedures; petitioners have conceded that the procedures claim stands or falls with the substantive prohibition on false statements. *Ibid.*; see Tr. of Oral Arg. 19. Finally, the parties agree that petitioners' as-applied claims "are better read as facial objections to Ohio's law." Reply Brief 19. Accordingly, we do not separately address the as-applied claims.

ing to its amended complaint, COAST intended to disseminate a mass e-mail and other materials criticizing Driehaus' vote for the ACA as a vote "to fund abortions with tax dollars," but refrained from doing so because of the Commission proceedings against SBA. *Id.*, at 146, 148, 162. COAST further alleged that it "desires to make the same or similar statements about other federal candidates who voted for" the ACA, but that fear "of finding itself subject to the same fate" as SBA has deterred it from doing so. *Id.*, at 149, 157.[4]

The District Court dismissed both suits as nonjusticiable, concluding that neither suit presented a sufficiently concrete injury for purposes of standing or ripeness. The Sixth Circuit affirmed on ripeness grounds. 525 Fed. Appx. 415. The Court of Appeals analyzed three factors to assess whether the case was ripe for review: (1) the likelihood that the alleged harm would come to pass; (2) whether the factual record was sufficiently developed; and (3) the hardship to the parties if judicial relief were denied.

Regarding the first factor, the Sixth Circuit concluded that SBA's prior injuries—the probable-cause determination and the billboard rejection—"do not help it show an imminent threat of *future* prosecution," particularly where "the Commission never found that SBA . . . violated Ohio's false-statement law." *Id.*, at 420. The court further reasoned that it was speculative whether any person would file a complaint with the Commission in the future, in part because Driehaus took a 2-year assignment with the Peace Corps in Africa after losing the election. Finally, the court noted that SBA has not alleged that "it plans to lie or recklessly disregard the veracity of its speech" in the future, but rather

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[4] SBA named Driehaus, the Commission's members and its staff attorney (in their official capacities), and the Ohio secretary of state (in her official capacity) as defendants. COAST named the Commission, the Commission's members and its staff attorney (in their official capacities), and the Ohio secretary of state (in her official capacity) as defendants. All named defendants are respondents here.

maintains that the statements it intends to make are factually true. *Id.*, at 422.

As for the remaining factors, the court concluded that the factual record was insufficiently developed with respect to the content of SBA's future speech, and that withholding judicial relief would not result in undue hardship because, in the time period leading up to the 2010 election, SBA continued to communicate its message even after Commission proceedings were initiated. The Sixth Circuit therefore determined that SBA's suit was not ripe for review, and that its analysis as to SBA compelled the same conclusion with respect to COAST.

We granted certiorari, 571 U. S. 1118 (2014), and now reverse.

III

A

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." §2. The doctrine of standing gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process."[5] *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408 (2013). To establish Article III standing, a plaintiff must show (1) an

[5] The doctrines of standing and ripeness "originate" from the same Article III limitation. *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 335 (2006). As the parties acknowledge, the Article III standing and ripeness issues in this case "boil down to the same question." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 128, n. 8 (2007); see Brief for Petitioners 28; Brief for Respondents 22. Consistent with our practice in cases like *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 392 (1988), and *Babbitt* v. *Farm Workers*, 442 U. S. 289, 299, n. 11 (1979), we use the term "standing" in this opinion.

"injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[i-hood]" that the injury "will be redressed by a favorable decision." *Lujan*, *supra*, at 560–561 (internal quotation marks omitted).

This case concerns the injury-in-fact requirement, which helps to ensure that the plaintiff has a "personal stake in the outcome of the controversy." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975) (internal quotation marks omitted). An injury sufficient to satisfy Article III must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, *supra*, at 560 (some internal quotation marks omitted). An allegation of future injury may suffice if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Clapper*, 568 U. S., at 409, 414, n. 5 (emphasis deleted; internal quotation marks omitted).

"'The party invoking federal jurisdiction bears the burden of establishing' standing." *Id.*, at 411. "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, *supra*, at 561.

B

One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. See *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"); see also *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 128–129 (2007) ("[W]here threatened action by *government* is concerned, we

do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"). Instead, we have permitted preenforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979). Several of our cases illustrate the circumstances under which plaintiffs may bring a preenforcement challenge consistent with Article III.

In *Steffel*, for example, police officers threatened to arrest petitioner and his companion for distributing handbills protesting the Vietnam War. Petitioner left to avoid arrest; his companion remained and was arrested and charged with criminal trespass. Petitioner sought a declaratory judgment that the trespass statute was unconstitutional as applied to him.

We determined that petitioner had alleged a credible threat of enforcement: He had been warned to stop handbilling and threatened with prosecution if he disobeyed; he stated his desire to continue handbilling (an activity he claimed was constitutionally protected); and his companion's prosecution showed that his "concern with arrest" was not "'chimerical.'" 415 U. S., at 459. Under those circumstances, we said, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Ibid.*

In *Babbitt*, we considered a preenforcement challenge to a statute that made it an unfair labor practice to encourage consumers to boycott an "'agricultural product . . . by the use of dishonest, untruthful and deceptive publicity.'" 442 U. S., at 301. The plaintiffs contended that the law "uncon-

stitutionally penalize[d] inaccuracies inadvertently uttered in the course of consumer appeals." *Ibid.*

Building on *Steffel*, we explained that a plaintiff could bring a preenforcement suit when he "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt*, *supra*, at 298. We found those circumstances present in *Babbitt*. In that case, the law "on its face proscribe[d] dishonest, untruthful, and deceptive publicity." 442 U. S., at 302. The plaintiffs had "actively engaged in consumer publicity campaigns in the past" and alleged "an intention to continue" those campaigns in the future. *Id.*, at 301. And although they did not "plan to propagate untruths," they argued that "'erroneous statement is inevitable in free debate.'" *Ibid.* We concluded that the plaintiffs' fear of prosecution was not "imaginary or wholly speculative," and that their challenge to the consumer publicity provision presented an Article III case or controversy. *Id.*, at 302.

Two other cases bear mention. In *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383 (1988), we held that booksellers could seek preenforcement review of a law making it a crime to "'knowingly display for commercial purpose'" material that is "'harmful to juveniles'" as defined by the statute. *Id.*, at 386. At trial, the booksellers introduced 16 books they believed were covered by the statute and testified that costly compliance measures would be necessary to avoid prosecution for displaying such books. Just as in *Babbitt* and *Steffel*, we determined that the "preenforcement nature" of the suit was not "troubl[ing]" because the plaintiffs had "alleged an actual and well-founded fear that the law will be enforced against them." 484 U. S., at 393.

Finally, in *Holder* v. *Humanitarian Law Project*, 561 U. S. 1 (2010), we considered a preenforcement challenge to a law that criminalized "'knowingly provid[ing] material support

or resources to a foreign terrorist organization.'" *Id.*, at 8. The plaintiffs claimed that they had provided support to groups designated as terrorist organizations prior to the law's enactment and would provide similar support in the future. The Government had charged 150 persons with violating the law and declined to disavow prosecution if the plaintiffs resumed their support of the designated organizations. We held that the claims were justiciable: The plaintiffs faced a "'credible threat'" of enforcement and "'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Id.*, at 15.

IV

Here, SBA and COAST contend that the threat of enforcement of the false statement statute amounts to an Article III injury in fact. We agree: Petitioners have alleged a credible threat of enforcement. See *Babbitt*, 442 U. S., at 298.

A

First, petitioners have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Ibid.* Both petitioners have pleaded specific statements they intend to make in future election cycles. SBA has already stated that representatives who voted for the ACA supported "taxpayer-funded abortion," and it has alleged an "inten[t] to engage in substantially similar activity in the future." App. 50, 122. See also *Humanitarian Law Project*, *supra*, at 15–16 (observing that plaintiffs had previously provided support to groups designated as terrorist organizations and alleged they "would provide similar support [to the same terrorist organizations] again if the statute's allegedly unconstitutional bar were lifted"). COAST has alleged that it previously intended to disseminate materials criticizing a vote for the ACA as a vote "to fund abortions with tax dollars," and that it "desires to make the same or similar statements about other federal candidates who

voted for [the ACA]." App. 146, 149, 162. Because petitioners' intended future conduct concerns political speech, it is certainly "affected with a constitutional interest." *Babbitt*, *supra*, at 298; see also *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971) ("[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office").

B

Next, petitioners' intended future conduct is "arguably . . . proscribed by [the] statute" they wish to challenge. *Babbitt*, *supra*, at 298. The Ohio false statement law sweeps broadly, see *supra*, at 152, and n. 1, and covers the subject matter of petitioners' intended speech. Both SBA and COAST have alleged an intent to "[m]ake" statements "concerning the voting record of a candidate or public official," § 3517.21(B)(9), and to "disseminate" statements "concerning a candidate . . . to promote the election, nomination, or defeat of the candidate," § 3517.21(B)(10). And a Commission panel here already found probable cause to believe that SBA violated the statute when it stated that Driehaus had supported "taxpayer-funded abortion"—the same sort of statement petitioners plan to disseminate in the future. Under these circumstances, we have no difficulty concluding that petitioners' intended speech is "arguably proscribed" by the law.

Respondents incorrectly rely on *Golden* v. *Zwickler*, 394 U. S. 103 (1969). In that case, the plaintiff had previously distributed anonymous leaflets criticizing a particular Congressman who had since left office. *Id.*, at 104–106, and n. 2. The Court dismissed the plaintiff's challenge to the electoral leafletting ban as nonjusticiable because his "*sole concern* was literature relating to the Congressman and his record," and "it was most unlikely that the Congressman would again be a candidate." *Id.*, at 109 (emphasis added). Under those

circumstances, any threat of future prosecution was "wholly conjectural." *Ibid.*

Here, by contrast, petitioners' speech focuses on the broader issue of support for the ACA, not on the voting record of a single candidate. See Reply Brief 4–5 (identifying other elected officials who plan to seek reelection as potential objects of SBA's criticisms). Because petitioners' alleged future speech is not directed exclusively at Driehaus, it does not matter whether he "may run for office again." Brief for Respondents 33 (internal quotation marks omitted). As long as petitioners continue to engage in comparable electoral speech regarding support for the ACA, that speech will remain arguably proscribed by Ohio's false statement statute.

Respondents, echoing the Sixth Circuit, contend that SBA's fears of enforcement are misplaced because SBA has not said it "'plans to lie or recklessly disregard the veracity of its speech.'" *Id.*, at 15 (quoting 525 Fed. Appx., at 422). The Sixth Circuit reasoned that because SBA "can only be liable for making a statement 'knowing' it is false," SBA's insistence that its speech is factually true "makes the possibility of prosecution for uttering such statements exceedingly slim." *Id.*, at 422.

The Sixth Circuit misses the point. SBA's insistence that the allegations in its press release were true did not prevent the Commission panel from finding probable cause to believe that SBA had violated the law the first time around. And there is every reason to think that similar speech in the future will result in similar proceedings, notwithstanding SBA's belief in the truth of its allegations. Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law. See, *e. g.*, *Babbitt*, *supra*, at 301 (case was justiciable even though plaintiffs disavowed any intent to "propagate untruths").

C

Finally, the threat of future enforcement of the false statement statute is substantial. Most obviously, there is a history of past enforcement here: SBA was the subject of a complaint in a recent election cycle. We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not "'chimerical.'" *Steffel*, 415 U. S., at 459; cf. *Clapper*, 568 U. S., at 411 (plaintiffs' theory of standing was "substantially undermine[d]" by their "fail[ure] to offer any evidence that their communications ha[d] been monitored" under the challenged statute). Here, the threat is even more substantial given that the Commission panel actually found probable cause to believe that SBA's speech violated the false statement statute. Indeed future complainants may well "invoke the prior probable-cause finding to prove that SBA *knowingly* lied." Brief for Petitioners 32.

The credibility of that threat is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency. Instead, the false statement statute allows "any person" with knowledge of the purported violation to file a complaint. §3517.153(A). Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents. See Brief for Michael DeWine, Attorney General of Ohio, as *Amicus Curiae* 8 (hereinafter DeWine Brief); see also *id.*, at 6 (noting that "the Commission has no system for weeding out frivolous complaints"). And petitioners, who intend to criticize candidates for political office, are easy targets.

Finally, Commission proceedings are not a rare occurrence. Petitioners inform us that the Commission "'handles about 20 to 80 false statement complaints per year,'" Brief for Petitioners 46, and respondents do not deny that the Commission frequently fields complaints alleging violations of the false

statement statute. Cf. *Humanitarian Law Project*, 561 U. S., at 16 (noting that there had been numerous prior prosecutions under the challenged statute). Moreover, respondents have not disavowed enforcement if petitioners make similar statements in the future. See Tr. of Oral Arg. 29–30; see also *Humanitarian Law Project*, *supra*, at 16 ("The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do"). In fact, the specter of enforcement is so substantial that the owner of the billboard refused to display SBA's message after receiving a letter threatening Commission proceedings. On these facts, the prospect of future enforcement is far from "imaginary or speculative." *Babbitt*, 442 U. S., at 298.

We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify preenforcement review. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U. S. 619, 625–626, n. 1 (1986) ("If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not"). The burdens that Commission proceedings can impose on electoral speech are of particular concern here. As the Ohio attorney general himself notes, the "practical effect" of the Ohio false statement scheme is "to permit a private complainant . . . to gain a campaign advantage without ever having to prove the falsity of a statement." DeWine Brief 7. "[C]omplainants may time their submissions to achieve maximum disruption of their political opponents while calculating that an ultimate decision on the merits will be deferred until after the relevant election." *Id.*, at 14–15. Moreover, the target of a false statement complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election. And where, as here, a Commission panel issues

a preelection probable-cause finding, "such a determination itself may be viewed [by the electorate] as a sanction by the State." *Id.*, at 13.

Although the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case. See *Babbitt*, *supra*, at 302, n. 13 (In addition to the threat of criminal sanctions, "the prospect of issuance of an administrative cease-and-desist order or a court-ordered injunction against such prohibited conduct provides substantial additional support for the conclusion that appellees' challenge . . . is justiciable" (citations omitted)).

That conclusion holds true as to both SBA and COAST. Respondents, relying on *Younger* v. *Harris*, 401 U. S. 37 (1971), appear to suggest that COAST lacks standing because it refrained from actually disseminating its planned speech in order to avoid Commission proceedings of its own. See Brief for Respondents 26–27, 34. In *Younger*, the plaintiff had been indicted for distributing leaflets in violation of the California Criminal Syndicalism Act. When he challenged the constitutionality of the law in federal court, several other plaintiffs intervened, arguing that their own speech was inhibited by Harris' prosecution. The Court concluded that only the plaintiff had standing because the intervenors "d[id] not claim that they ha[d] ever been threatened with prosecution, that a prosecution [wa]s likely, or even that a prosecution [wa]s remotely possible." 401 U. S., at 42.

That is not this case. Unlike the intervenors in *Younger*, COAST has alleged an intent to engage in the same speech that was the subject of a prior enforcement proceeding. Also unlike the intervenors in *Younger*, who had never been threatened with prosecution, COAST has been the subject

of Commission proceedings in the past. See, *e. g.*, *COAST Candidates PAC* v. *Ohio Elections Comm'n*, 543 Fed. Appx. 490 (CA6 2013). COAST is far more akin to the plaintiff in *Steffel*, who was not arrested alongside his handbilling companion but was nevertheless threatened with prosecution for similar speech. 415 U. S., at 459.

In sum, we find that both SBA and COAST have alleged a credible threat of enforcement.

V

In concluding that petitioners' claims were not justiciable, the Sixth Circuit separately considered two other factors: whether the factual record was sufficiently developed, and whether hardship to the parties would result if judicial relief is denied at this stage in the proceedings. 525 Fed. Appx., at 419. Respondents contend that these "prudential ripeness" factors confirm that the claims at issue are nonjusticiable. Brief for Respondents 17. But we have already concluded that petitioners have alleged a sufficient Article III injury. To the extent respondents would have us deem petitioners' claims nonjusticiable "on grounds that are 'prudential,' rather than constitutional," "[t]hat request is in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 125–126 (2014) (quoting *Sprint Communications, Inc.* v. *Jacobs*, 571 U. S. 69, 77 (2013); some internal quotation marks omitted).

In any event, we need not resolve the continuing vitality of the prudential ripeness doctrine in this case because the "fitness" and "hardship" factors are easily satisfied here. First, petitioners' challenge to the Ohio false statement statute presents an issue that is "purely legal, and will not be clarified by further factual development." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 581 (1985). And denying prompt judicial review would impose a substan-

tial hardship on petitioners, forcing them to choose between refraining from core political speech on the one hand or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other.

* * *

Petitioners in this case have demonstrated an injury in fact sufficient for Article III standing. We accordingly reverse the judgment of the United States Court of Appeals for the Sixth Circuit and remand the case for further proceedings consistent with this opinion, including a determination whether the remaining Article III standing requirements are met.

It is so ordered.

Syllabus

ABRAMSKI *v.* UNITED STATES

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

No. 12–1493. Argued January 22, 2014—Decided June 16, 2014

Petitioner Bruce Abramski offered to purchase a handgun for his uncle. The form that federal regulations required Abramski to fill out (Form 4473) asked whether he was the "actual transferee/buyer" of the gun, and clearly warned that a straw purchaser (namely, someone buying a gun on behalf of another) was not the actual buyer. Abramski falsely answered that he was the actual buyer. Abramski was convicted for knowingly making false statements "with respect to any fact material to the lawfulness of the sale" of a gun, 18 U. S. C. § 922(a)(6), and for making a false statement "with respect to the information required . . . to be kept" in the gun dealer's records, § 924(a)(1)(A). The Fourth Circuit affirmed.

Held:

1. Abramski's misrepresentation is material under § 922(a)(6). Pp. 177–191.

(a) Abramski contends that federal gun laws are entirely unconcerned with straw arrangements: So long as the person at the counter is eligible to own a gun, the sale to him is legal under the statute. To be sure, federal law regulates licensed dealer's transactions with "persons" or "transferees" without specifying whether that language refers to the straw buyer or the actual purchaser. But when read in light of the statute's context, structure, and purpose, it is clear this language refers to the true buyer rather than the straw. Federal gun law establishes an elaborate system of in-person identification and background checks to ensure that guns are kept out of the hands of felons and other prohibited purchasers. §§ 922(c), 922(t). It also imposes record-keeping requirements to assist law enforcement authorities in investigating serious crimes through the tracing of guns to their buyers. §§ 922(b)(5), 923(g). These provisions would mean little if a would-be gun buyer could evade them all simply by enlisting the aid of an intermediary to execute the paperwork on his behalf. The statute's language is thus best read in context to refer to the actual rather than nominal buyer. This conclusion is reinforced by this Court's standard practice of focusing on practical realities rather than legal formalities when identifying the parties to a transaction. Pp. 177–189.

Syllabus

(b) Abramski argues more narrowly that his false response was not material because his uncle could have legally bought a gun for himself. But Abramski's false statement prevented the dealer from insisting that the true buyer (Alvarez) appear in person, provide identifying information, show a photo ID, and submit to a background check. §§ 922(b), (c), (t). Nothing in the statute suggests that these legal duties may be wiped away merely because the actual buyer turns out to be legally eligible to own a gun. Because the dealer could not have lawfully sold the gun had it known that Abramski was not the true buyer, the misstatement was material to the lawfulness of the sale. Pp. 189–191.

2. Abramski's misrepresentation about the identity of the actual buyer concerned "information required by [Chapter 44 of Title 18 of the United States Code] to be kept" in the dealer's records. § 924(a)(1)(A). Chapter 44 contains a provision requiring a dealer to "maintain such records . . . as the Attorney General may . . . prescribe." § 923(g)(1)(A). The Attorney General requires every licensed dealer to retain in its records a completed copy of Form 4473, see 27 CFR § 478.124(b), and that form in turn includes the "actual buyer" question that Abramski answered falsely. Therefore, falsely answering a question on Form 4473 violates § 924(a)(1)(A). Pp. 191–193.

706 F. 3d 307, affirmed.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 193.

Richard D. Dietz argued the cause for petitioner. With him on the briefs were *Adam H. Charnes*, *Paul J. Foley*, *Thurston H. Webb*, and *Rhonda Lee Overstreet.*

Joseph R. Palmore argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Thomas E. Booth.**

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*Briefs of *amici curiae* urging reversal were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, and *Julie Marie Blake*, *William R. Valentino*, and *J. Zak Ritchie*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom Horne* of Arizona, *Dustin M. McDaniel* of Arkansas, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Leonardo M. Rapa-*

JUSTICE KAGAN delivered the opinion of the Court.

Before a federally licensed firearms dealer may sell a gun, the would-be purchaser must provide certain personal information, show photo identification, and pass a background check. To ensure the accuracy of those submissions, a federal statute imposes criminal penalties on any person who, in connection with a firearm's acquisition, makes false statements about "any fact material to the lawfulness of the sale." 18 U. S. C. § 922(a)(6). In this case, we consider how that law applies to a so-called straw purchaser—namely, a person who buys a gun on someone else's behalf while falsely claim-

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das of Guam, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Bill Schuette* of Michigan, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Gary King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Greg Abbott* of Texas, *Brian L. Tarbet* of Utah, *Kenneth T. Cuccinelli II* of Virginia, and *Peter K. Michael* of Wyoming; for Robert Snellings et al. by *Donald E. J. Kilmer, Jr.*, and *James Jeffries Goodwin*; and for Congressman Steve Stockman et al. by *Herbert W. Titus, William J. Olson, John S. Miles, Jeremiah L. Morgan*, and *Michael Connelly.*

Briefs of *amici curiae* urging affirmance were filed for the State of Hawaii et al. by *David M. Louie*, Attorney General of Hawaii, *Girard D. Lau*, Solicitor General, *Kimberly T. Guidry*, First Deputy Solicitor General, *Charles C. Lifland*, *Richard W. Buckner*, and *Meaghan VerGow*, and by the Attorneys General and other officials for their respective jurisdictions as follows: *George Jepsen*, Attorney General of Connecticut, *Joseph R. Biden III*, Attorney General of Delaware, *Irvin B. Nathan*, Attorney General of the District of Columbia, *Todd S. Kim*, Solicitor General, and *Loren L. Alikhan*, Deputy Solicitor General, *Lisa Madigan*, Attorney General of Illinois, *Douglas F. Gansler*, Attorney General of Maryland, *Martha Coakley*, Attorney General of Massachusetts, *Joseph A. Foster*, Attorney General of New Hampshire, *Eric T. Schneiderman*, Attorney General of New York, and *Ellen F. Rosenblum*, Attorney General of Oregon; for the Brady Center to Prevent Gun Violence by *Elliott Schulder* and *Jonathan E. Lowry*; and for the City of New York by *Michael A. Cardozo* and *Eric Proshansky.*

Stefan Bijan Tahmassebi and *Matthew Bower* filed a brief for the NRA Civil Rights Defense Fund as *amicus curiae.*

ing that it is for himself. We hold that such a misrepresentation is punishable under the statute, whether or not the true buyer could have purchased the gun without the straw.

I

A

Federal law has for over 40 years regulated sales by licensed firearms dealers, principally to prevent guns from falling into the wrong hands. See Gun Control Act of 1968, 18 U. S. C. § 921 *et seq.* Under § 922(g), certain classes of people—felons, drug addicts, and the mentally ill, to list a few—may not purchase or possess any firearm. And to ensure they do not, § 922(d) forbids a licensed dealer from selling a gun to anyone it knows, or has reasonable cause to believe, is such a prohibited buyer. See *Huddleston* v. *United States*, 415 U. S. 814, 825 (1974) ("[T]he focus of the federal scheme," in controlling access to weapons, "is the federally licensed firearms dealer").

The statute establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. Section 922(c) brings the would-be purchaser onto the dealer's "business premises" by prohibiting, except in limited circumstances, the sale of a firearm "to a person who does not appear in person" at that location. Other provisions then require the dealer to check and make use of certain identifying information received from the buyer. Before completing any sale, the dealer must "verif[y] the identity of the transferee by examining a valid identification document" bearing a photograph. § 922(t)(1)(C). In addition, the dealer must procure the buyer's "name, age, and place of residence." § 922(b)(5). And finally, the dealer must (with limited exceptions not at issue here[1]) submit that information to the National Instant Back-

[1] The principal exception is for any buyer who has a state permit that has been "issued only after an authorized government official has verified" the buyer's eligibility to own a gun under both federal and state law. § 922(t)(3).

ground Check System (NICS) to determine whether the potential purchaser is for any reason disqualified from owning a firearm. See §§ 922(t)(1)(A)–(B).

The statute further insists that the dealer keep certain records, to enable federal authorities both to enforce the law's verification measures and to trace firearms used in crimes. See H. R. Rep. No. 1577, 90th Cong., 2d Sess., 14 (1968). A dealer must maintain the identifying information mentioned above (*i. e.*, name, age, and residence) in its permanent files. See § 922(b)(5). In addition, the dealer must keep "such records of . . . sale[ ] or other disposition of firearms . . . as the Attorney General may by regulations prescribe." § 923(g)(1)(A). And the Attorney General (or his designee) may obtain and inspect any of those records, "in the course of a bona fide criminal investigation," to "determin[e] the disposition of 1 or more firearms." § 923(g)(7).

To implement all those statutory requirements, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) developed Form 4473 for gun sales. See Supp. App. 1–6. The part of that form to be completed by the buyer requests his name, birth date, and address, as well as certain other identifying information (for example, his height, weight, and race). The form further lists all the factors disqualifying a person from gun ownership, and asks the would-be buyer whether any of them apply (*e. g.,* "[h]ave you ever been convicted . . . of a felony?"). *Id.*, at 1. Most important here, Question 11.a. asks (with bolded emphasis appearing on the form itself):

> "Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning**: **You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**" *Ibid.*

The accompanying instructions for that question provide:

> "**Question 11.a. Actual Transferee/Buyer:** For purposes of this form, you are the actual transferee/buyer if

> you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself . . . . You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. **ACTUAL TRANSFEREE/BUYER EXAMPLES:** Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer **'NO'** to question 11.a." *Id.*, at 4.

After responding to this and other questions, the customer must sign a certification declaring his answers "true, correct and complete." *Id.*, at 2. That certification provides that the signator "understand[s] that making any false . . . statement" respecting the transaction—and, particularly, "answering 'yes' to question 11.a. if [he is] not the actual buyer"—is a crime "punishable as a felony under Federal law." *Ibid.* (bold typeface deleted).

Two statutory provisions, each designed to ensure that the dealer can rely on the truthfulness of the buyer's disclosures in carrying out its obligations, criminalize certain false statements about firearms transactions. First and foremost, § 922(a)(6) provides as follows:

> "It shall be unlawful . . . for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from [a licensed dealer] knowingly to make any false or fictitious oral or written statement . . . , intended or likely to deceive such [dealer] with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter."

That provision helps make certain that a dealer will receive truthful information as to any matter relevant to a gun sale's legality. In addition, § 924(a)(1)(A) prohibits "knowingly mak[ing] any false statement or representation with respect

to the information required by this chapter to be kept in the records" of a federally licensed gun dealer. The question in this case is whether, as the ATF declares in Form 4473's certification, those statutory provisions criminalize a false answer to Question 11.a.—that is, a customer's statement that he is the "actual transferee/buyer," purchasing a firearm for himself, when in fact he is a straw purchaser, buying the gun on someone else's behalf.

B

The petitioner here is Bruce Abramski, a former police officer who offered to buy a Glock 19 handgun for his uncle, Angel Alvarez. (Abramski thought he could get the gun for a discount by showing his old police identification, though the Government contends that because he had been fired from his job two years earlier, he was no longer authorized to use that card.) Accepting his nephew's offer, Alvarez sent Abramski a check for $400 with "Glock 19 handgun" written on the memo line. Two days later, Abramski went to Town Police Supply, a federally licensed firearms dealer, to make the purchase. There, he filled out Form 4473, falsely checking "Yes" in reply to Question 11.a.—that is, asserting he was the "actual transferee/buyer" when, according to the form's clear definition, he was not. He also signed the requisite certification, acknowledging his understanding that a false answer to Question 11.a. is a federal crime. After Abramski's name cleared the NICS background check, the dealer sold him the Glock. Abramski then deposited the $400 check in his bank account, transferred the gun to Alvarez, and got back a receipt. Federal agents found that receipt while executing a search warrant at Abramski's home after he became a suspect in a different crime.

A grand jury indicted Abramski for violating §§ 922(a)(6) and 924(a)(1)(A) by falsely affirming in his response to Question 11.a. that he was the Glock's actual buyer. Abramski moved to dismiss both charges. He argued that his misrep-

resentation on Question 11.a. was not "material to the lawfulness of the sale" under § 922(a)(6) because Alvarez was legally eligible to own a gun. And he claimed that the false statement did not violate § 924(a)(1)(A) because a buyer's response to Question 11.a. is not "required . . . to be kept in the records" of a gun dealer. After the District Court denied those motions, see 778 F. Supp. 2d 678 (WD Va. 2011), Abramski entered a conditional guilty plea, reserving his right to challenge the rulings. The District Court then sentenced him to five years of probation on each count, running concurrently.

The Court of Appeals for the Fourth Circuit affirmed the convictions. 706 F. 3d 307 (2013). It noted a division among appellate courts on the question Abramski raised about § 922(a)(6)'s materiality requirement: Of three courts to have addressed the issue, one agreed with Abramski that a misrepresentation on Question 11.a. is immaterial if "the true purchaser [here, Alvarez] can lawfully purchase a firearm directly." *Id.*, at 315 (quoting *United States* v. *Polk*, 118 F. 3d 286, 295 (CA5 1997)).[2] The Fourth Circuit, however, thought the majority position correct: "[T]he identity of the actual purchaser of a firearm is a constant that is always material to the lawfulness of a firearm acquisition under § 922(a)(6)." 706 F. 3d, at 316. The court also held that Abramski's conviction under § 924(a)(1)(A) was valid, finding that the statute required a dealer to maintain the information at issue in its records. *Id.*, at 317.

We granted certiorari, 571 U. S. 951 (2013), principally to resolve the Circuit split about § 922(a)(6). In this Court, Abramski renews his claim that a false answer to Question 11.a. is immaterial if the true buyer is legally eligible to pur-

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[2] Compare *Polk*, 118 F. 3d, at 294–295, with *United States* v. *Morales*, 687 F. 3d 697, 700–701 (CA6 2012) (a misrepresentation about the true purchaser's identity is material even when he can legally own a gun); *United States* v. *Frazier*, 605 F. 3d 1271, 1279–1280 (CA11 2010) (same).

chase a firearm. But Abramski now focuses on a new and more ambitious argument, which he concedes no court has previously accepted. See Brief for Petitioner i.[3] In brief, he alleges that a false response to Question 11.a. is *never* material to a gun sale's legality, whether or not the actual buyer is eligible to own a gun. We begin with that fundamental question, next turn to what has become Abramski's back-up argument under § 922(a)(6), and finally consider the relatively easy question pertaining to § 924(A)(1)(a)'s separate false-statement prohibition. On each score, we affirm Abramski's conviction.

II

Abramski's broad theory (mostly echoed by the dissent) is that federal gun law simply does not care about arrangements involving straw purchasers: So long as the person at the counter is eligible to own a gun, the sale to him is legal under the statute. That is true, Abramski contends, irrespective of any agreement that person has made to purchase the firearm on behalf of someone else—including someone who cannot lawfully buy or own a gun himself. Accordingly, Abramski concludes, his "false statement that he was the [Glock 19's] 'actual buyer,'" as that term was "defined in Question 11.a., was not material" —indeed, was utterly irrelevant—"to the lawfulness of the sale." *Id.*, at 31 (emphasis deleted); see also *post*, at 196 (opinion of SCALIA, J.). In essence, he claims, Town Police Supply could legally have sold the gun to him even if he had truthfully answered Question 11.a. by disclosing that he was a straw—because, again, all the federal firearms law cares about is whether the individ-

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[3] Reflecting that prior consensus, neither of Abramski's principal *amici*—the National Rifle Association and a group of 26 States—joins Abramski in making this broader argument. They confine themselves to supporting the more limited claim about straw purchases made on behalf of eligible gun owners, addressed *infra*, at 189–191.

ual standing at the dealer's counter meets the requirements to buy a gun.[4]

At its core, that argument relies on one true fact: Federal gun law regulates licensed dealers' transactions with "persons" or "transferees," without specifically referencing straw purchasers. Section 922(d), for example, bars a dealer from "sell[ing] or otherwise dispos[ing] of" a firearm to any "person" who falls within a prohibited category—felons, drug addicts, the mentally ill, and so forth. See *supra*, at 172; see also § 922(b)(5) (before selling a gun to a "person," the dealer must take down his name, age, and residence); § 922(t)(1) (before selling a gun to a "person," the dealer must run a background check). Similarly, § 922(t)(1)(C) requires the dealer to verify the identity of the "transferee" by checking a valid photo ID. See *supra*, at 172; see also § 922(c) (spelling out circumstances in which a "transferee" may buy a gun without appearing at the dealer's premises). Abramski contends that Congress's use of such language alone, *sans* any mention of "straw purchasers" or "actual buyers," shows that "[i]t is not illegal to buy a gun for someone else." Brief for Petitioner 15–16; Reply Brief 1; see also *post*, at 194–198.

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[4] The dissent reserves the question whether the false statement would be material if the straw purchaser knew that the true buyer was not eligible to own a firearm. *Post*, at 198, n. 3. But first, that reservation is of quite limited scope: Unlike Abramski's back-up argument, which imposes liability whenever the true purchaser cannot legally buy a gun, the dissent's reservation applies only when the straw has knowledge of (or at least reasonable cause to believe) that fact. And as we will later note, straws often do not have such knowledge. See *infra*, at 182–183. Second, the reservation (fairly enough for a reservation) rests on an uncertain legal theory. According to the dissent, a straw buyer might violate § 922(a)(6) if a dealer's sale to him aids and abets his violation of § 922(d)—a provision barring knowingly transferring a gun to an ineligible person, see *infra* this page, 187–188. But that reasoning presupposes that a firearms dealer acting in the ordinary course of business can ever have the intent needed to aid and abet a crime—a question this Court reserved not six months ago. See *Rosemond* v. *United States*, 572 U. S. 65, 77, n. 8 (2014).

But that language merely raises, rather than answers, the critical question: In a straw purchase, who *is* the "person" or "transferee" whom federal gun law addresses? Is that "person" the middleman buying a firearm on someone else's behalf (often because the ultimate recipient could not buy it himself, or wants to camouflage the transaction)? Or is that "person" instead the individual really paying for the gun and meant to take possession of it upon completion of the purchase? Is it the conduit at the counter, or the gun's intended owner?[5] In answering that inquiry, we must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, "structure, history, and purpose." *Maracich* v. *Spears*, 570 U. S. 48, 76 (2013). All those tools of divining meaning—not to mention common sense, which is a fortunate (though not inevitable) side-benefit of construing statutory terms fairly—demonstrate that § 922, in regulating licensed dealers' gun sales, looks through the straw to the actual buyer.[6]

The overarching reason is that Abramski's reading would undermine—indeed, for all important purposes, would virtu-

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[5] The dissent claims the answer is easy because "if I give my son $10 and tell him to pick up milk and eggs at the store, no English speaker would say that the store 'sells' the milk and eggs to me." *Post*, at 196. But try a question more similar to the one the gun law's text raises: If I send my brother to the Apple Store with money and instructions to purchase an iPhone, and then take immediate and sole possession of that device, am I the "person" (or "transferee") who has bought the phone or is he? Nothing in ordinary English usage compels an answer either way.

[6] Contrary to the dissent's view, our analysis does not rest on mere "purpose-based arguments." *Post*, at 198. We simply recognize that a court should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context. As we have previously put the point, a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988).

ally repeal—the gun law's core provisions.[7] As noted earlier, the statute establishes an elaborate system to verify a would-be gun purchaser's identity and check on his background. See *supra*, at 172–173. It also requires that the information so gathered go into a dealer's permanent records. See *supra*, at 173. The twin goals of this comprehensive scheme are to keep guns out of the hands of criminals and others who should not have them, and to assist law enforcement authorities in investigating serious crimes. See *Huddleston*, 415 U. S., at 824; *supra*, at 172–173. And no part of that scheme would work if the statute turned a blind eye to straw purchases—if, in other words, the law addressed not the substance of a transaction, but only empty formalities.

To see why, consider what happens in a typical straw purchase. A felon or other person who cannot buy or own a gun still wants to obtain one. (Or, alternatively, a person who could legally buy a firearm wants to conceal his purchase, maybe so he can use the gun for criminal purposes without fear that police officers will later trace it to him.) Accordingly, the prospective buyer enlists an intermediary to help him accomplish his illegal aim. Perhaps he conscripts a loyal friend or family member; perhaps more often, he hires a stranger to purchase the gun for a price. The actual purchaser might even accompany the straw to the gun shop, instruct him which firearm to buy, give him the money to pay at the counter, and take possession as they walk out the door. See, *e. g.*, *United States* v. *Bowen*, 207 Fed. Appx. 727, 729 (CA7 2006) (describing a straw purchase along those lines); *United States* v. *Paye*, 129 Fed. Appx. 567, 570 (CA11 2005) (*per curiam*) (same). What the true buyer would *not*

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[7] That reading would also, at a stroke, declare unlawful a large part of what the ATF does to combat gun trafficking by criminals. See Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms, Following the Gun: Enforcing Federal Laws Against Firearms Traffickers, p. xi (June 2000) (noting that in several prior years "[a]lmost half of all [ATF firearm] trafficking investigations involved straw purchasers").

do—what he would leave to the straw, who possesses the gun for all of a minute—is give his identifying information to the dealer and submit himself to a background check. How many of the statute's provisions does that scenario—the lawful result of Abramski's (and the dissent's) reading of "transferee" and "person"—render meaningless?

Start with the parts of § 922 enabling a dealer to verify whether a buyer is legally eligible to own a firearm. That task, as noted earlier, begins with identification—requesting the name, address, and age of the potential purchaser and checking his photo ID. See §§ 922(b)(5), (t)(1)(C); *supra*, at 172. And that identification in turn permits a background check: The dealer runs the purchaser's name through the NICS database to discover whether he is, for example, a felon, drug addict, or mentally ill person. See §§ 922(d), (t)(1); *supra*, at 172–173. All those provisions are designed to accomplish what this Court has previously termed Congress's "principal purpose" in enacting the statute—"to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them.'" *Huddleston*, 415 U. S., at 824 (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968)). But under Abramski's reading, the statutory terms would be utterly ineffectual, because the identification and background check would be of the wrong person. The provisions would evaluate the eligibility of mere conduits, while allowing every criminal (and drug addict and so forth) to escape that assessment and walk away with a weapon.

Similarly, Abramski's view would defeat the point of § 922(c), which tightly restricts the sale of guns "to a person who does not appear in person at the licensee's business premises." See *supra*, at 172. Only a narrow class of prospective buyers may ever purchase a gun from afar—primarily, individuals who have already had their eligibility to own a firearm verified by state law enforcement officials with access to the NICS database. See 27 CFR § 478.96(b) (2014); 18 U. S. C. § 922(t)(3); n. 1, *supra*. And even when an indi-

vidual fits within that category, he still must submit to the dealer a sworn statement that he can lawfully own a gun, as well as provide the name and address of the principal law enforcement officer in his community. See § 922(c)(1). The dealer then has to forward notice of the sale to that officer, in order to allow law enforcement authorities to investigate the legality of the sale and, if necessary, call a stop to it. See §§ 922(c)(2)–(3). The provision thus prevents remote sales except to a small class of buyers subject to extraordinary procedures—again, to ensure effective verification of a potential purchaser's eligibility. Yet on Abramski's view, a person could easily bypass the scheme, purchasing a gun without ever leaving his home by dispatching to a gun store a hired deliveryman. Indeed, if Abramski were right, we see no reason why anyone (and certainly anyone with less-than-pure motives) would put himself through the procedures laid out in § 922(c): Deliverymen, after all, are not so hard to come by.

And likewise, the statute's record-keeping provisions would serve little purpose if the records kept were of nominal rather than real buyers. As noted earlier, dealers must store, and law enforcement officers may obtain, information about a gun buyer's identity. See §§ 922(b)(5), 923(g); *supra*, at 173. That information helps to fight serious crime. When police officers retrieve a gun at a crime scene, they can trace it to the buyer and consider him as a suspect. See *National Shooting Sports Foundation, Inc.* v. *Jones*, 716 F. 3d 200, 204 (CADC 2013) (describing law enforcement's use of firearm tracing). Too, the required records enable dealers to identify certain suspicious purchasing trends, which they then must report to federal authorities. See § 923(g)(3) (imposing a reporting obligation when a person buys multiple handguns within five days). But once again, those provisions can serve their objective only if the records point to the person who took actual control of the gun(s). Otherwise, the police will at most learn the identity of an intermediary, who could

not have been responsible for the gun's use and might know next to nothing about the actual buyer. See, *e. g.*, *United States* v. *Juarez*, 626 F. 3d 246, 249 (CA5 2010) (straw purchaser bought military-style assault rifles, later found among Mexican gang members, for a buyer known "only as 'El Mano' "). Abramski's view would thus render the required records close to useless for aiding law enforcement: Putting true numbskulls to one side, anyone purchasing a gun for criminal purposes would avoid leaving a paper trail by the simple expedient of hiring a straw.

To sum up so far: All the prerequisites for buying a gun described above refer to a "person" or "transferee." Read Abramski's way ("the man at the counter"), those terms deny effect to the regulatory scheme, as criminals could always use straw purchasers to evade the law.[8] Read the other way ("the man getting, and always meant to get, the firearm"), those terms give effect to the statutory provisions, allowing them to accomplish their manifest objects. That alone provides more than sufficient reason to understand "person" and "transferee" as referring not to the fictitious but to the real buyer.

And other language in § 922 confirms that construction, by evincing Congress's concern with the practical realities, rather than the legal niceties, of firearms transactions. For example, § 922(a)(6) itself bars material misrepresentations

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[8] The dissent is mistaken when it says that the ATF's own former view of the statute refutes this proposition. See *post*, at 202–203. As we will later discuss, see *infra*, at 191, the ATF for a time thought that § 922(a)(6) did not cover cases in which the true purchaser could have legally purchased a gun himself. But Abramski's principal argument extends much further, to cases in which straws buy weapons for criminals, drug addicts, and other prohibited purchasers. For the reasons just stated, that interpretation would render the statute all but useless. And although the dissent appeals to a snippet of congressional testimony to suggest that ATF once briefly held that extreme view of the statute, it agrees that by at least 1979 (well over three decades ago), ATF recognized the unlawfulness of straw purchases on behalf of prohibited persons.

"in connection with the *acquisition*," and not just the purchase, of a firearm. That broader word, we have previously held, does not focus on "legal title"—let alone legal title for a few short moments, until another, always intended transfer occurs. *Huddleston*, 415 U. S., at 820. Instead, the term signifies "com[ing] into possession, control, or power of disposal," as the actual buyer in a straw purchase does. *Ibid.* Similarly, we have reasoned that such a substance-over-form approach draws support from the statute's repeated references to "the sale *or other disposition*" of a firearm. § 922(a)(6); see § 922(d) (making it unlawful to "sell *or otherwise dispose* of" a gun to a prohibited person). That term, we have stated, "was aimed at providing maximum coverage." *Id.*, at 826–827. We think such expansive language inconsistent with Abramski's view of the statute, which would stare myopically at the nominal buyer while remaining blind to the person exiting the transaction with control of the gun.

Finally, our reading of § 922 comports with courts' standard practice, evident in many legal spheres and presumably known to Congress, of ignoring artifice when identifying the parties to a transaction. In *United States* v. *One 1936 Model Ford V–8 Deluxe Coach, Commercial Credit Co.*, 307 U. S. 219 (1939), for example, we considered the operation of a statute requiring forfeiture of any interest in property that was used to violate prohibition laws, except if acquired in good faith. There, a straw purchaser had bought a car in his name but with his brother's money, and transferred it to the brother—a known bootlegger—right after driving it off the lot. See *id.*, at 222–223. The Court held the finance company's lien on the car non-forfeitable because the company had no hint that the straw was a straw—that his brother would in fact be the owner. See *id.*, at 224. But had the company known, the Court made clear, a different result would have obtained: The company could not have relied on the formalities of the sale to the " 'straw' purchaser"

when it knew that the "real owner and purchaser" of the car was someone different. *Id.*, at 223–224. We have similarly emphasized the need in other contexts, involving both criminal and civil penalties, to look through a transaction's nominal parties to its true participants. See, *e. g.*, *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 193 (2010) (focusing on "substance rather than form" in assessing when entities are distinct enough to be capable of conspiring to violate the antitrust laws); *Gregory* v. *Helvering*, 293 U. S. 465, 470 (1935) (disregarding an intermediary shell corporation created to avoid taxes because doing otherwise would "exalt artifice above reality"). We do no more than that here in holding, consistent with § 922's text, structure, and purpose, that using a straw does not enable evasion of the firearms law.

Abramski, along with the dissent, objects that such action is no circumvention—that Congress made an intentional choice, born of "political compromise," to limit the gun law's compass to the person at the counter, even if merely acting on another's behalf. Reply Brief 11; *post*, at 201–202. As evidence, Abramski states that the statute does not regulate beyond the initial point of sale. Because the law mostly addresses sales made by licensed dealers, a purchaser can (within wide limits) subsequently decide to resell his gun to another private party. See Reply Brief 11. And similarly, Abramski says, a purchaser can buy a gun for someone else as a gift. See Brief for Petitioner 26–27, n. 3. Abramski lumps in the same category the transfer of a gun from a nominal to a real buyer—as something, like a later resale or gift, meant to fall outside the statute's (purported) standing-in-front-of-the-gun-dealer scope. See Reply Brief 13; see also *post*, at 199–201.

But Abramski and the dissent draw the wrong conclusion from their observations about resales and gifts. Yes, Congress decided to regulate dealers' sales, while leaving the secondary market for guns largely untouched. As we noted

in *Huddleston*, Congress chose to make the dealer the "principal agent of federal enforcement" in "restricting [criminals'] access to firearms." 415 U. S., at 824. And yes, that choice (like pretty much everything Congress does) was surely a result of compromise. But no, straw arrangements are not a part of the secondary market, separate and apart from the dealer's sale. In claiming as much, Abramski merely repeats his mistaken assumption that the "person" who acquires a gun from a dealer in a case like this one is the straw, rather than the individual who has made a prior arrangement to pay for, take possession of, own, and use that part of the dealer's stock. For all the reasons we have already given, that is not a plausible construction of a statute mandating that the dealer identify and run a background check on the person to whom it is (really, not fictitiously) selling a gun. See *supra*, at 179–185. The individual who sends a straw to a gun store to buy a firearm *is* transacting with the dealer, in every way but the most formal; and that distinguishes such a person from one who buys a gun, or receives a gun as a gift, from a private party.[9] The line Congress drew between those who acquire guns from dealers and those who get them as gifts or on the secondary market,

[9] The dissent responds: "That certainly distinguishes" the individual transacting with a dealer through a straw from an individual receiving a gun from a private party; "so would the fact that [the former] has orange hair." *Post*, at 200. But that is an example of wit gone wrong. Whether the purchaser has orange hair, we can all agree, is immaterial to the statutory scheme. By contrast, whether the purchaser has transacted with a licensed dealer is integral to the statute—because, as previously noted, "the federal scheme . . . controls access to weapons" through the federally licensed firearms dealer, who is "the principal agent of federal enforcement." *Huddleston* v. *United States*, 415 U. S. 814, 824, 825 (1974); see *supra*, at 185 and this page. In so designing the statute, Congress chose not to pursue the goal of "controll[ing] access" to guns to the nth degree; buyers can, as the dissent says, avoid the statute's background check and record-keeping requirements by getting a gun second-hand. But that possibility provides no justification for limiting the statute's considered regulation of *dealer* sales.

we suspect, reflects a host of things, including administrative simplicity and a view about where the most problematic firearms transactions—like criminal organizations' bulk gun purchases—typically occur. But whatever the reason, the scarcity of controls in the secondary market provides no reason to gut the robust measures Congress enacted at the point of sale.

Abramski claims further support for his argument from Congress's decision in 1986 to amend § 922(d) to prohibit a private party (and not just, as originally enacted, a licensed dealer) from selling a gun to someone he knows or reasonably should know cannot legally possess one. See Firearms Owners' Protection Act, § 102(5)(A), 100 Stat. 451–452. According to Abramski, the revised § 922(d) should be understood as Congress's exclusive response to the potential dangers arising from straw purchases. See Brief for Petitioner 26–27. The amendment shows, he claims, that "Congress chose to address this perceived problem in a way other than" by imposing liability under § 922(a)(6) on a straw who tells a licensed dealer that he is the firearm's actual buyer. Reply Brief 14, n. 2.

But Congress's amendment of § 922(d) says nothing about § 922(a)(6)'s application to straw purchasers. In enacting that amendment, Congress left § 922(a)(6) just as it was, undercutting any suggestion that Congress somehow intended to contract that provision's reach. The amendment instead performed a different function: Rather than ensuring that a licensed dealer receives truthful information, it extended a minimal form of regulation to the *secondary* market. The revised § 922(d) prevents a private person from knowingly selling a gun to an ineligible owner no matter when or how he acquired the weapon: It thus applies not just to a straw purchaser, but to an individual who bought a gun for himself and later decided to resell it. At the same time, § 922(d) has nothing to say about a raft of cases § 922(a)(6) covers, including all the (many) straw purchases in which the

frontman does not know that the actual buyer is ineligible. See *supra*, at 182–183. Thus, § 922(d) could not serve as an effective substitute for § 922(a)(6). And the mere potential for some transactions to run afoul of both prohibitions gives no cause to read § 922(d) as limiting § 922(a)(6) (or vice versa). See, *e. g.*, *United States* v. *Batchelder*, 442 U. S. 114, 118–126 (1979).[10]

Abramski's principal attack on his § 922(a)(6) conviction therefore fails. Contrary to his contention, the information Question 11.a. requests—"[a]re you the actual transferee/buyer[?]" or, put conversely, "are [you] acquiring the firearm(s) on behalf of another person[?]"—is relevant to the lawfulness of a gun sale. That is because, for all the reasons we have given, the firearms law contemplates that the dealer will check not the fictitious purchaser's but instead the true purchaser's identity and eligibility for gun ownership. By concealing that Alvarez was the actual buyer, Abramski prevented the dealer from transacting with Alvarez face-to-face, see § 922(c), recording his name, age, and residence, see § 922(b)(5), inspecting his photo ID, see § 922(t)(1)(C), submitting his identifying information to the background check system, see § 922(t)(1)(B), and determining whether he was prohibited from receiving a firearm, see § 922(d). In sum, Abramski thwarted application of essentially all of the fire-

[10] Nor do we agree with the dissent's argument (not urged by Abramski himself) that the rule of lenity defeats our construction. See *post*, at 203–205. That rule, as we have repeatedly emphasized, applies only if, "after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich* v. *Spears*, 570 U. S. 48, 76 (2013) (quoting *Barber* v. *Thomas*, 560 U. S. 474, 488 (2010)). We are not in that position here: Although the text creates some ambiguity, the context, structure, history, and purpose resolve it. The dissent would apply the rule of lenity here because the statute's text, taken alone, permits a narrower construction, but we have repeatedly emphasized that is not the appropriate test. See, *e. g.*, *Muscarello* v. *United States*, 524 U. S. 125, 138 (1998); *Smith* v. *United States*, 508 U. S. 223, 239 (1993).

arms law's requirements. We can hardly think of a misrepresentation any more material to a sale's legality.

III

Abramski also challenges his § 922(a)(6) conviction on a narrower ground. For purposes of this argument, he assumes that the Government can make its case when a straw hides the name of an underlying purchaser who is legally ineligible to own a gun. But, Abramski reminds us, that is not true here, because Alvarez could have bought a gun for himself. In such circumstances, Abramski claims that a false response to Question 11.a. is not material. See Brief for Petitioner 28–30. Essentially, Abramski contends, when the hidden purchaser is eligible anyway to own a gun, all's well that ends well, and all should be forgiven.

But we think what we have already said shows the fallacy of that claim: Abramski's false statement was material because had he revealed that he was purchasing the gun on Alvarez's behalf, the sale could not have proceeded under the law—even though Alvarez turned out to be an eligible gun owner. The sale, as an initial matter, would not have complied with § 922(c)'s restrictions on absentee purchases. See *supra*, at 181–182. If the dealer here, Town Police Supply, had realized it was in fact selling a gun to Alvarez, it would have had to stop the transaction for failure to comply with those conditions. Yet more, the sale could not have gone forward because the dealer would have lacked the information needed to verify and record Alvarez's identity and check his background. See §§ 922(b)(5), (t)(1)(B)–(C); *supra*, at 180–182. Those requirements, as we have explained, pertain to the real buyer; and the after-the-fact discovery that Alvarez would have passed the background check cannot somehow wipe them away. Accordingly, had Town Police Supply known Abramski was a straw, it could not have certified, as Form 4473 demands, its belief that the transfer was "not unlawful." Supp. App. 3.

An analogy may help show the weakness of Abramski's argument. Suppose a would-be purchaser, Smith, lawfully could own a gun. But further suppose that, for reasons of his own, Smith uses an alias (let's say Jones) to make the purchase. Would anyone say "no harm, no foul," just because Smith is not in fact a prohibited person under § 922(d)? We think not. Smith would in any event have made a false statement about who will own the gun, impeding the dealer's ability to carry out its legal responsibilities. So too here.

Abramski objects that because Alvarez could own a gun, the statute's core purpose—"keeping guns out of the hands" of criminals and other prohibited persons—"is not even implicated." Brief for Petitioner 29. But that argument (which would apply no less to the alias scenario) misunderstands the way the statute works. As earlier noted, the federal gun law makes the dealer "[t]he principal agent of federal enforcement." *Huddleston*, 415 U. S., at 824, see *supra*, at 185–186. It is that highly regulated, legally knowledgeable entity, possessing access to the expansive NICS database, which has the responsibility to "[e]nsure that, in the course of sales or other dispositions . . . , weapons [are not] obtained by individuals whose possession of them would be contrary to the public interest." 415 U. S., at 825. Nothing could be less consonant with the statutory scheme than placing that inquiry in the hands of an unlicensed straw purchaser, who is unlikely to be familiar with federal firearms law and has no ability to use the database to check whether the true buyer may own a gun. And in any event, keeping firearms out of the hands of criminals is not § 922's only goal: The statute's record-keeping provisions, as we have said, are also designed to aid law enforcement in the investigation of crime. See *supra*, at 173, 182–183. Abramski's proposed limitation on § 922(a)(6) would undercut that purpose because many would-be criminals remain legally eligible to buy firearms, and thus could use straws to purchase an endless stream of guns off-the-books. See, *e. g.*, *Polk*, 118 F. 3d, at

289 (eligible gun buyer used straw purchasers to secretly accumulate an "arsenal of weapons" for a "massive offensive" against the Federal Government).

In addition, Abramski briefly notes that until 1995, the ATF took the view that a straw purchaser's misrepresentation counted as material only if the true buyer could not legally possess a gun. See Brief for Petitioner 7–8; n. 8, *supra*. We may put aside that ATF has for almost two decades now taken the opposite position, after reflecting on both appellate case law and changes in the statute. See Tr. of Oral Arg. 41; Brady Handgun Violence Prevention Act of 1993, § 103, 107 Stat. 1541 (codified at 18 U. S. C. § 922(t)). The critical point is that criminal laws are for courts, not for the Government, to construe. See, *e. g.*, *United States* v. *Apel*, 571 U. S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference"). We think ATF's old position no more relevant than its current one—which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to in construing § 922(a)(6)), a court has an obligation to correct its error. Here, nothing suggests that Congress—the entity whose voice *does* matter—limited its prohibition of a straw purchaser's misrepresentation in the way Abramski proposes.

IV

Finally, Abramski challenges his conviction under § 924(a)(1)(A), which prohibits "knowingly mak[ing] any false statement . . . with respect to the information required by this chapter to be kept in the records" of a federally licensed dealer. That provision is broader than § 922(a)(6) in one respect: It does not require that the false statement at issue be "material" in any way. At the same time, § 924(a)(1)(A) includes an element absent from § 922(a)(6): The false statement must relate to "information required by this chapter to be kept in [a dealer's] records." Abramski notes that the

indictment in this case charged him with only one misrepresentation: his statement in response to Question 11.a. that he was buying the Glock on his own behalf rather than on someone else's. And, he argues, that information (unlike the transferee's "name, age, and place of residence," which he plausibly reads the indictment as not mentioning) was not required "*by this chapter*"—but only by Form 4473 itself—to be kept in the dealer's permanent records. Brief for Petitioner 32.

We disagree. Included in "this chapter"—Chapter 44 of Title 18—is a provision, noted earlier, requiring a dealer to "maintain such records of . . . sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe." § 923(g)(1)(A); *supra*, at 173. Because of that statutory section, the information that the Attorney General's regulations compel a dealer to keep is information "required by this chapter." And those regulations (the validity of which Abramski does not here contest) demand that every licensed dealer "retain . . . as a part of [its] required records, each Form 4473 obtained in the course of" selling or otherwise disposing of a firearm. 27 CFR § 478.124(b). Accordingly, a false answer on that form, such as the one Abramski made, pertains to information a dealer is statutorily required to maintain.[11]

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[11] The dissent argues that our view would impose criminal liability for a false answer even to an "ultra vires question," such as "the buyer's favorite color." *Post*, at 206. We need not, and do not, opine on that hypothetical, because it is miles away from this case. As we have explained, see *supra*, at 179–189, Question 11.a. is not ultra vires, but instead fundamental to the lawfulness of a gun sale. It is, indeed, part and parcel of the dealer's determination of the (true) buyer's "name, age, and place of residence," which § 922(b)(5) requires the dealer to keep. That section alone would justify Abramski's conviction under § 924(a)(1)(A) if the indictment here had clearly alleged that, in addition to answering Question 11.a. falsely, he lied about that buyer's "name, age, and place of residence."

V

No piece of information is more important under federal firearms law than the identity of a gun's purchaser—the person who acquires a gun as a result of a transaction with a licensed dealer. Had Abramski admitted that he was not that purchaser, but merely a straw—that he was asking the dealer to verify the identity of, and run a background check on, the wrong individual—the sale here could not have gone forward. That makes Abramski's misrepresentation on Question 11.a. material under § 922(a)(6). And because that statement pertained to information that a dealer must keep in its permanent records under the firearms law, Abramski's answer to Question 11.a. also violated § 924(a)(1)(A). Accordingly, we affirm the judgment of the Fourth Circuit.

It is so ordered.

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

Bruce Abramski bought a gun for his uncle from a federally licensed gun dealer, using money his uncle gave him for that purpose. Both men were legally eligible to receive and possess firearms, and Abramski transferred the gun to his uncle at a federally licensed gun dealership in compliance with state law. When buying the gun, Abramski had to fill out Form 4473 issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). In response to a question on the form, Abramski affirmed that he was the "actual/transferee buyer" of the gun, even though the form stated that he was not the "actual transferee/buyer" if he was purchasing the gun for a third party at that person's request and with funds provided by that person.

The Government charged Abramski with two federal crimes under the Gun Control Act of 1968, as amended, 18 U. S. C. §§ 921–931: making a false statement "material to the

lawfulness of the sale," in violation of § 922(a)(6), and making a false statement "with respect to information required by [the Act] to be kept" by the dealer, in violation of § 924(a)(1)(A). On both counts the Government interprets this criminal statute to punish conduct that its plain language simply does not reach. I respectfully dissent from the Court's holding to the contrary.

I. Section 922(a)(6)

A

Under § 922(a)(6), it is a crime to make a "false . . . statement" to a licensed gun dealer about a "fact material to the lawfulness of" a firearms sale. Abramski made a false statement when he claimed to be the gun's "actual transferee/buyer" as Form 4473 defined that term. But that false statement was not "material to the lawfulness of the sale" since the truth—that Abramski was buying the gun for his uncle with his uncle's money—would not have made the sale unlawful. See *Kungys* v. *United States*, 485 U. S. 759, 775 (1988) (plurality opinion) (materiality is determined by asking "what would have ensued from official knowledge of the misrepresented fact"); accord *id.*, at 787 (Stevens, J., concurring in judgment). Therefore, Abramski's conviction on this count cannot stand.

Several provisions of the Act limit the circumstances in which a licensed gun dealer may lawfully sell a firearm. Most prominently, the Act provides that no one may "sell or otherwise dispose of" a firearm to a person who he knows or has reasonable cause to believe falls within one of nine prohibited categories (such as felons, fugitives, illegal-drug users, and the mentally ill). § 922(d). But the Government does not contend that either Abramski or his uncle fell into one of those prohibited categories. And no provision of the Act prohibits one person who is eligible to receive and possess firearms (*e. g.*, Abramski) from buying a gun for another person who is eligible to receive and possess firearms (*e. g.*,

Abramski's uncle), even at the other's request and with the other's money.

The Government's contention that Abramski's false statement was material to the lawfulness of the sale depends on a strained interpretation of provisions that mention the "person" to whom a dealer "sell[s]" (or "transfer[s]," or "deliver[s]") a gun. A dealer may not "sell or deliver" a firearm to a "person" without recording "the name, age, and place of residence of such person." § 922(b)(5). He may not, without following special procedures, "sell" a firearm to a "person" who does not appear in person at the dealer's business. § 922(c). He may not "transfer" a firearm to a "person" without verifying that person's identity and running a background check. § 922(t)(1). And he may not "sell or deliver" a firearm to a "person" who he knows or has reasonable cause to believe resides in a different State. § 922(b)(3).

The Government maintains that in this case *Abramski's uncle* was the "person" to whom the dealer "s[old]" the gun, and that the sale consequently violated those provisions. It bases that assertion on the claim that the Gun Control Act implicitly incorporates "principles of agency law." Brief for United States 17. Under those principles, it contends, the individual who walks into a dealer's store, fills out the requisite forms, pays the dealer, and takes possession of the gun is not necessarily the "person" to whom the dealer "sell[s]" the gun. Instead, it says, we must ask whether that individual bought the gun as a third party's common-law agent; if so, then the third party is the "person" to whom the dealer "sell[s]" the gun within the meaning of the relevant statutory provisions. The majority agrees: Although it never explicitly mentions agency law, it declares that if an individual is "buying a firearm on someone else's behalf," the "someone else" is the "person" to whom the dealer "sell[s]" the gun within the meaning of the statute. *Ante*, at 179.

I doubt that three of the four provisions at issue here would establish the materiality of Abramski's falsehood *even*

if Abramski's uncle were deemed the "person" to whom the dealer "s[old]" the gun.[1] But § 922(b)(3) would unquestionably do so, since it prohibits a dealer from selling a gun to a person who resides in another State, as Abramski's uncle did. That is of no moment, however, because Abramski's uncle was not the "person" to whom the gun was "s[old]."

The contrary interpretation provided by the Government and the majority founders on the plain language of the Act. We interpret criminal statutes, like other statutes, in a manner consistent with ordinary English usage. *Flores-Figueroa* v. *United States*, 556 U. S. 646, 650–652 (2009); *Jones* v. *United States*, 529 U. S. 848, 855 (2000); *Bailey* v. *United States*, 516 U. S. 137, 144–145 (1995). In ordinary usage, a vendor sells (or delivers, or transfers) an item of merchandise to the person who physically appears in his store, selects the item, pays for it, and takes possession of it. So if I give my son $10 and tell him to pick up milk and eggs at the store, no English speaker would say that the store "sells" the milk and eggs to me.[2] And even if we were pre-

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[1] Sections 922(b)(5), (c), and (t)(1) require the dealer to follow certain procedures with respect to that "person," such as recording his name, dealing with him in person, and checking his background. I doubt whether a falsehood that causes the dealer to neglect those procedures (here, by applying them to the wrong person) is *material to the lawfulness of the sale* within the meaning of § 922(a)(6) if the sale could have been executed lawfully had the truth been disclosed. Moreover, if that were so—if a falsehood that introduced procedural error into a gun sale were *always* material to lawfulness—then § 924(a)(1)(A) (discussed in Part II of this opinion), which prohibits making false statements with respect to information required to be recorded in a dealer's records, would be superfluous.

[2] The majority makes the puzzling suggestion that the answer would be different if the sale involved consumer electronics instead of groceries. *Ante*, at 179, n. 5. But whether the item sold is a carton of milk, an iPhone, or anything else under the sun, an ordinary English speaker would say that an over-the-counter merchant "sells" the item to the person who pays for and takes possession of it, not the individual to whom that person later transfers the item.

pared to let "principles of agency law" trump ordinary English usage in the interpretation of this criminal statute, those principles would not require a different result. See, *e. g.*, Restatement (Second) of Agency § 366, Illustration 1 (1957) ("On behalf of P, his disclosed principal, A makes a written contract with T wherein A promises to buy from T, *and T agrees to sell to A*, certain machinery for $1000. . . . [If there is fraud in the inducement and A has already paid], A can maintain an action against T for the thousand dollars" (emphasis added)).

Huddleston v. *United States*, 415 U. S. 814 (1974), on which the majority relies, *ante*, at 183–184, does not suggest otherwise. There we addressed the *types* of transactions covered by the statutory term "acquisition" in § 922(a)(6) (a term whose meaning is not at issue here), holding that they were not limited to "sale-like transaction[s]" but included a "pawnshop redemption of a firearm." 415 U. S., at 819. We said nothing about the distinct question of *to whom* a dealer "sell[s]," "transfer[s]," or "deliver[s]" a firearm in a given transaction. Nor does the case stand, as the majority believes, for "a substance-over-form approach," *ante*, at 184. We said the term "acquisition" was "'aimed at providing maximum coverage,'" *ibid.* (quoting 415 U. S., at 826–827), not because substance over form demands that, nor because everything in the Act must be assumed to provide maximum coverage, but because "[t]he word 'acquire' is defined to mean simply 'to come into possession, control, or power of disposal of,'" which gives "no intimation . . . that title or ownership would be necessary." *Id.*, at 820.

Contrary to the majority's assertion that the statute "merely raises, rather than answers, the critical question" whether Abramski or his uncle was the "person" to whom the dealer "s[old]" the gun, *ante*, at 179, the statute speaks to that question directly. Giving the text its plain, ordinary meaning, Abramski, not his uncle, was that "person." That being so, the Government has identified no reason why the

arrangement between Abramski and his uncle, both of whom were eligible to receive and possess firearms, was "material to the lawfulness of" the sale.[3]

B

The majority contends, however, that the Gun Control Act's "principal purpose" of "curb[ing] crime by keeping firearms out of the hands of those not legally entitled to possess them" demands the conclusion that Abramski's uncle was the "person" to whom the dealer "s[old]" the gun. *Ante*, at 181 (internal quotation marks omitted). But "no law pursues its purpose at all costs," and the "textual limitations upon a law's scope" are equally "a part of its 'purpose.'" *Rapanos* v. *United States*, 547 U. S. 715, 752 (2006) (plurality opinion). The majority's purpose-based arguments describe a statute Congress reasonably might have written, but not the statute it wrote.

The heart of the majority's argument is its claim that unless Abramski's uncle is deemed the "person" to whom the gun was "s[old]," the Act's identification, background-check, and record-keeping requirements would be "render[ed] meaningless." *Ante*, at 181. That vastly overstates the consequences. Perhaps the statute would serve the purpose of crime prevention *more effectively* if the requirements at issue looked past the "man at the counter" to the person

[3] The facts of this case provide no occasion to address whether—as ATF maintained for many years before adopting its current position—a misrepresentation in response to Form 4473's "actual buyer/transferee" question would be "material to the lawfulness of the sale" if the customer intended to transfer the gun to a person who he knew or had reasonable cause to believe was prohibited by the Act from receiving or possessing firearms. A falsehood that conceals an intention of that sort may be material because a dealer who sold the gun knowing of that intention might be "unlawfully aiding" the customer's violation of § 924(d) (and the prohibited person's violation of § 924(g)). Cf. ATF, Industry Circular 79–10 (1979), in (Your Guide To) Federal Firearms Regulation 1988–89 (1988), p. 78; *infra*, at 202. I need not decide that question here.

"getting, and always meant to get, the firearm." *Ante*, at 183. But ensuring that the person taking possession of the firearm from the dealer is eligible to receive and possess a firearm, and recording information about that person for later reference, are by no means worthless functions. On the contrary, they indisputably advance the purpose of crime prevention by making it harder for ineligible persons to acquire guns and easier for the Government to locate those guns in the future; they simply do not advance that purpose to the same degree as a more exacting law might have done.

That the Act's focus on the "man at the counter" in this situation does not render its requirements "meaningless" is confirmed by the Government's concession that the Act has a similar focus in many comparable situations where the gun's immediate purchaser is—to use the majority's phrase—a "mere condui[t]" for a contemplated transfer of the gun to a different person who will "take possession of, own, and use" it. *Ante*, at 181, 186. Consider the following scenarios in which even the Government regards the man at the counter as the "person" to whom the dealer "sell[s]" the gun:

- *Guns Intended as Gifts.* In the Government's view, an individual who buys a gun "with the intent of making a gift of the firearm to another person" is the gun's "true purchaser." ATF, Federal Firearms Regulations Reference Guide 165 (2005) (hereinafter 2005 ATF Guide). The Government's position makes no exception for situations where the gift is specifically requested by the recipient (as gifts sometimes are). So long as no money changes hands, and no agency relationship is formed, between gifter and giftee, the Act is concerned only with the man at the counter.
- *Guns Intended for Resale.* Introducing money into the equation does not automatically change the outcome. The Government admits that the man at the counter is the true purchaser even if he immediately sells the gun

to someone else. Tr. of Oral Arg. 34–35. And it appears the Government's position would be the same even if the man at the counter purchased the gun with the *intent* to sell it to a particular third party, so long as the two did not enter into a common-law agency relationship.

- *Guns Intended as Raffle Prizes.* The Government considers the man at the counter the true purchaser even if he is buying the gun "for the purpose of raffling [it] at an event"—in which case he can provide his own information on Form 4473 and "transfer the firearm to the raffle winner without a Form 4473 being completed or a [background] check being conducted" on the winner. 2005 ATF Guide 195.

If the statute's requirements were "render[ed] meaningless" by treating Abramski rather than his uncle as the true purchaser, then they would be every bit as meaningless in the scenarios just described. The Government's concession that the statute is operating appropriately in each of those scenarios should cause the majority to reevaluate its assumptions about the type and degree of regulation that the statute regards as "meaningful." The majority, it is clear, regards Abramski's interpretation as creating a loophole in the law; but even if that were a fair characterization, why is the majority convinced that a statute with so many *admitted* loopholes does not contain this *particular* loophole?

The majority's answer to this argument is that "the individual who sends a straw to a gun store to buy a firearm is transacting with the dealer, in every way but the most formal." *Ante*, at 186 (emphasis deleted). That certainly distinguishes that individual from the intended subsequent donee or purchaser; so would the fact that he has orange hair. But it does not establish why that individual, any more than the others, should be thought to be covered by statutory language (the "person" to whom a dealer "sell[s]" a gun) that

does not naturally apply. The only thing which can justify *that* leap is the false imperative to make the statute as effective as possible, rather than as effective as the language indicates Congress desired.[4]

What the scenarios described above show is that the statute typically *is* concerned only with the man at the counter, even where that man is in a practical sense a "conduit" who will promptly transfer the gun to someone else. Perhaps that is because Congress wanted a rule that would be easy to understand and to administer, which the Government's proposed agency test—and the majority's apparent adoption of that test *sans* any mention of agency law—certainly is not. (When counsel for the Government was pressed about hypothetical situations not gift-wrapped as neatly as this case, he said, frankly but unhelpfully, that they would turn on the "factual question" whether the purchase was "made on behalf of someone else." Tr. of Oral Arg. 49–50.)

Or perhaps Congress drew the line where it did because the Gun Control Act, like many contentious pieces of legislation, was a "compromise" among "highly interested parties attempting to pull the provisions in different directions." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 461 (2002); see *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122,

[4] The majority's claim that its analysis "does not rest on mere 'purpose-based arguments,'" *ante*, at 179, n. 6, rings hollow. The majority says it is relying on the principle that when a statutory provision is "ambiguous" but "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law," we should adopt that meaning. *Ibid.* (internal quotation marks omitted). But even if the text at issue here were ambiguous, it is clear that the "substantive effect" of the narrower interpretation is "compatible with"—indeed, it is downright congenial to—"the rest of" the Gun Control Act. The majority's contrary conclusion rests, not on anything in the text or structure of the Act, but on the majority's guess about how far Congress meant to go in pursuit of its crime-prevention "purpose."

135–136 (1995). Perhaps those whose votes were needed for passage of the statute *wanted* a lawful purchaser to be able to use an agent. A statute shaped by political tradeoffs in a controversial area may appear "imperfect" from some perspectives, but "our ability to imagine ways of redesigning the statute to advance one of Congress' ends does not render it irrational." *Preseault* v. *ICC*, 494 U. S. 1, 19 (1990). We must accept that Congress, balancing the conflicting demands of a divided citizenry, "'wrote the statute it wrote'—meaning, a statute going so far and no further." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 794 (2014).

That Abramski's reading does not render the Act's requirements "meaningless" is further evidenced by the fact that, for decades, even ATF itself did not read the statute to criminalize conduct like Abramski's. After Congress passed the Act in 1968, ATF's initial position was that the Act did not prohibit the sale of a gun to an eligible buyer acting on behalf of a third party (even an ineligible one). See Hearings Before the Subcommittee To Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., pt. 1, p. 118 (1975). A few years later, ATF modified its position and asserted that the Act did not "prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person" *unless* the other person was "prohibited from receiving or possessing a firearm," in which case the dealer could be guilty of "unlawfully aiding the prohibited person's own violation." ATF, Industry Circular 79–10 (1979), in (Your Guide To) Federal Firearms Regulation 1988–89 (1988), p. 78. The agency appears not to have adopted its current position until the early 1990's. See *United States* v. *Polk*, 118 F. 3d 286, 295, n. 7 (CA5 1997).

The majority deems this enforcement history "not relevant" because the Government's reading of a criminal statute is not entitled to deference. *Ante*, at 191. But the fact that the agency charged with enforcing the Act read it, over a

period of roughly 25 years, not to apply to the type of conduct at issue here is powerful evidence that interpreting the Act in that way is natural and reasonable and does not make its requirements "meaningless."

C

Even if the statute were wrongly thought to be ambiguous on this point, the rule of lenity would defeat the Government's construction. It is a "familiar principle" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Skilling* v. *United States*, 561 U. S. 358, 410 (2010). That principle prevents us from giving the words of a criminal statute "a meaning that is different from [their] ordinary, accepted meaning, and that disfavors the defendant." *Burrage* v. *United States*, 571 U. S. 204, 216 (2014). And it means that when a criminal statute has two possible readings, we do not "'choose the harsher alternative'" unless Congress has "'spoken in language that is clear and definite.'" *United States* v. *Bass*, 404 U. S. 336, 347–349 (1971). For the reasons given above, it cannot be said that the statute unambiguously commands the Government's current reading. It is especially contrary to sound practice to give this criminal statute a meaning that the Government itself rejected for years.

The majority does not mention the rule of lenity apart from a footnote, *ante*, at 188, n. 10, responding to this dissent. The footnote concedes that "the text creates some ambiguity" but says that "context, structure, history, and purpose resolve it." *Ibid.* But for the reasons given above, context and structure do not support the majority's interpretation, history refutes it by showing that the Government itself interpreted the statute more leniently for many years, and "purpose" supports it only if one imputes to the statute a crime-fighting purpose broader than the text discloses (a practice that would nullify the rule of lenity in all cases).

See Part I–B, *supra*.[5] If lenity has no role to play in a clear case such as this one, we ought to stop pretending it is a genuine part of our jurisprudence.

Contrary to the majority's miserly approach, the rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, "a reasonable doubt persists" regarding whether Congress has made the defendant's conduct a federal crime, *Moskal* v. *United States*, 498 U. S. 103, 108 (1990)—in other words, whenever those tools do not decisively dispel the statute's ambiguity. *Skilling*, *supra*, at 410; see, *e. g.*, *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 409 (2003); *Cleveland* v. *United States*, 531 U. S. 12, 25 (2000); *Crandon* v. *United States*, 494 U. S. 152, 158 (1990). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct . . . we apply the rule of lenity and resolve the ambiguity in [the defendant]'s favor." *United States* v. *Granderson*, 511 U. S. 39, 54 (1994). It cannot honestly be said that the text, structure, and history of the Gun Control Act establish as "unambiguously correct" that the Act makes Abramski's conduct a federal crime.

By refusing to apply lenity here, the majority turns its back on a liberty-protecting and democracy-promoting rule that is "perhaps not much less old than construction itself." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.); see, *e. g.*, 1 W. Blackstone, Commentaries on the Laws of England 88 (1765) ("Penal statutes must be construed strictly"). As Chief Justice Marshall wrote, the rule is "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Wiltberger*, *supra*, at 95. It forbids a court to criminalize an act simply because the court deems that act

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[5] The majority is thus entirely wrong to charge that I would apply the rule of lenity "because the statute's text, taken alone, permits a narrower construction," *ante*, at 188, n. 10.

"of equal atrocity, or of kindred character, with those which are enumerated." *Id.*, at 96. Today's majority disregards that foundational principle.

II. Section 924(a)(1)(A)

Under § 924(a)(1)(A), it is a crime to make a "false statement . . . with respect to the information *required by this chapter* to be kept in the records of" a federally licensed gun dealer (emphasis added). "[T]his chapter" refers to chapter 44 of title 18 of the United States Code, which contains the Gun Control Act. §§ 921–931.

The question Abramski answered falsely was whether he was buying the gun for someone else. Did the Act itself require the dealer to record this information? It did not; it simply required him to record "the name, age, and place of residence" of the "person" to whom the firearm was "s[old] or deliver[ed]." § 922(b)(5). As explained above, that "person" was Abramski, not his uncle. See Part I, *supra*.

But, the majority says, the Act also directs dealers to "'maintain such records . . . as the Attorney General may by regulations prescribe.'" *Ante*, at 192 (quoting § 923(g)(1)(A)). So did a regulation require this information to be recorded? Again, no. The relevant regulation provides that a dealer shall

> "obtain a Form 4473 from the transferee showing the transferee's name, sex, residence address (including county or similar political subdivision), date and place of birth; height, weight and race of the transferee; the transferee's country of citizenship; the transferee's INS-issued alien number or admission number; the transferee's State of residence; and certification by the transferee that the transferee is not prohibited by the Act from transporting or shipping a firearm in interstate or foreign commerce or receiving a firearm which has been shipped or transported in interstate or foreign com-

> merce or possessing a firearm in or affecting commerce." 27 CFR § 478.124(c)(1) (2014).

The long list of information that this regulation requires to be kept in the dealer's records does not include whether the transferee is buying the gun for an eligible third party.

But wait! the majority says: Another provision of the regulation requires a dealer to "'retain . . . as part of [its] required records, each Form 4473 obtained in the course of'" selling or disposing of a firearm. *Ante,* at 192 (quoting 27 CFR § 478.124(a)). Therefore, according to the majority, any "false answer on that form"—even an answer to a question that is not among those enumerated in the regulation—necessarily "pertains to information a dealer is statutorily required to maintain." *Ante,* at 192.

That carries the text of the statute a bridge too far. On the majority's view, if the bureaucrats responsible for creating Form 4473 decided to ask about the buyer's favorite color, a false response would be a federal crime. That is not what the statute says. The statute punishes misstatements "with respect to *information* required to be kept," § 924(a)(1)(A) (emphasis added), not with respect to "information contained in forms required to be kept." Because neither the Act nor any regulation requires a dealer to keep a record of whether a customer is purchasing a gun for himself or for an eligible third party, that question had no place on Form 4473—any more than would the question whether the customer was purchasing the gun as a gift for a particular individual and, if so, who that individual was. And the statute no more criminalizes a false answer to an ultra vires question on Form 4473 than it criminalizes the purchaser's volunteering of a false e-mail address on that form. Information regarding Abramski's status as a "straw purchaser" was not "information required to be kept," and that is an end of the matter. In my view, that is the best—indeed, the only plausible—interpretation of § 924(a)(1)(A). But at a mini-

mum, the statute is ambiguous, and lenity does the rest. See Part I–C, *supra*.[6]

* * *

The Court makes it a federal crime for one lawful gun owner to buy a gun for another lawful gun owner. Whether or not that is a sensible result, the statutes Congress enacted do not support it—especially when, as is appropriate, we resolve ambiguity in those statutes in favor of the accused. I respectfully dissent.

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[6] The majority professes that it "need not, and do[es] not, opine on" whether it would impose liability for "a false answer even to an 'ultra vires question'" because, given its reasoning on Count One, the question at issue here was "part and parcel of the dealer's determination of the (true) buyer's 'name, age, and place of residence,' which § 922(b)(5) requires the dealer to keep." *Ante*, at 192, n. 11. But if that is really all the majority means to decide, then why bother to invoke the requirement that the dealer keep such records as the regulations prescribe and the regulation requiring the dealer to keep Form 4473? See *ante*, at 191–192. If the majority's ruling is as limited as it claims, it ought to cite § 922(b)(5) and be done.

Syllabus

ALICE CORPORATION PTY. LTD. *v.* CLS BANK INTERNATIONAL ET AL.

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

No. 13–298. Argued March 31, 2014—Decided June 19, 2014

Petitioner Alice Corporation is the assignee of several patents that disclose a scheme for mitigating "settlement risk," *i. e.*, the risk that only one party to an agreed-upon financial exchange will satisfy its obligation. In particular, the patent claims are designed to facilitate the exchange of financial obligations between two parties by using a computer system as a third-party intermediary. The patents in suit claim (1) a method for exchanging financial obligations, (2) a computer system configured to carry out the method for exchanging obligations, and (3) a computer-readable medium containing program code for performing the method of exchanging obligations.

Respondents (together, CLS Bank), who operate a global network that facilitates currency transactions, filed suit against petitioner, arguing that the patent claims at issue are invalid, unenforceable, or not infringed. Petitioner counterclaimed, alleging infringement. After *Bilski* v. *Kappos*, 561 U. S. 593, was decided, the District Court held that all of the claims were ineligible for patent protection under 35 U. S. C. § 101 because they are directed to an abstract idea. The en banc Federal Circuit affirmed.

Held: Because the claims are drawn to a patent-ineligible abstract idea, they are not patent eligible under § 101. Pp. 216–227.

(a) The Court has long held that § 101, which defines the subject matter eligible for patent protection, contains an implicit exception for "'[l]aws of nature, natural phenomena, and abstract ideas.'" *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, 569 U. S. 576, 589. In applying the § 101 exception, this Court must distinguish patents that claim the "'buildin[g] block[s]'" of human ingenuity, which are ineligible for patent protection, from those that integrate the building blocks into something more, see *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, 566 U. S. 66, 89, thereby "transform[ing]" them into a patent-eligible invention, *id.*, at 72. Pp. 216–217.

(b) Using this framework, the Court must first determine whether the claims at issue are directed to a patent-ineligible concept. 566 U. S., at 77. If so, the Court then asks whether the claim's elements, consid-

ered both individually and "as an ordered combination," "transform the nature of the claim" into a patent-eligible application. *Id.*, at 79, 78. Pp. 217–227.

(1) The claims at issue are directed to a patent-ineligible concept: the abstract idea of intermediated settlement. Under "the longstanding rule that '[a]n idea of itself is not patentable,'" *Gottschalk* v. *Benson*, 409 U. S. 63, 67, this Court has found ineligible patent claims involving an algorithm for converting binary-coded decimal numerals into pure binary form, *id.*, at 71–72; a mathematical formula for computing "alarm limits" in a catalytic conversion process, *Parker* v. *Flook*, 437 U. S. 584, 594–595; and, most recently, a method for hedging against the financial risk of price fluctuations, *Bilski*, 561 U. S., at 599. It follows from these cases, and *Bilski* in particular, that the claims at issue are directed to an abstract idea. On their face, they are drawn to the concept of intermediated settlement, *i. e.*, the use of a third party to mitigate settlement risk. Like the risk hedging in *Bilski*, the concept of intermediated settlement is "'a fundamental economic practice long prevalent in our system of commerce,'" *ibid.*, and the use of a third-party intermediary (or "clearing house") is a building block of the modern economy. Thus, intermediated settlement, like hedging, is an "abstract idea" beyond § 101's scope. Pp. 218–221.

(2) Turning to the second step of *Mayo*'s framework: The method claims, which merely require generic computer implementation, fail to transform that abstract idea into a patent-eligible invention. Pp. 221–226.

(i) "[S]imply appending conventional steps, specified at a high level of generality," to a method already "well known in the art" is not "*enough*" to supply the "'inventive concept'" needed to make this transformation. *Mayo*, *supra*, at 82, 79, 77, 72. The introduction of a computer into the claims does not alter the analysis. Neither stating an abstract idea "while adding the words 'apply it,'" *Mayo*, *supra*, at 72, nor limiting the use of an abstract idea "'to a particular technological environment,'" *Bilski*, *supra*, at 610–611, is enough for patent eligibility. Stating an abstract idea while adding the words "apply it with a computer" simply combines those two steps, with the same deficient result. Wholly generic computer implementation is not generally the sort of "additional featur[e]" that provides any "practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself." *Mayo*, *supra*, at 77. Pp. 221–224.

(ii) Here, the representative method claim does no more than simply instruct the practitioner to implement the abstract idea of intermediated settlement on a generic computer. Taking the claim elements

separately, the function performed by the computer at each step—creating and maintaining "shadow" accounts, obtaining data, adjusting account balances, and issuing automated instructions—is "[p]urely 'conventional.'" *Mayo*, 566 U. S., at 79. Considered "as an ordered combination," these computer components "ad[d] nothing . . . that is not already present when the steps are considered separately." *Ibid.* Viewed as a whole, these method claims simply recite the concept of intermediated settlement as performed by a generic computer. They do not, for example, purport to improve the functioning of the computer itself or effect an improvement in any other technology or technical field. An instruction to apply the abstract idea of intermediated settlement using some unspecified, generic computer is not "*enough*" to transform the abstract idea into a patent-eligible invention. *Id.*, at 77. Pp. 224–226.

(3) Because petitioner's system and media claims add nothing of substance to the underlying abstract idea, they too are patent ineligible under § 101. Petitioner conceded below that its media claims rise or fall with its method claims. And the system claims are no different in substance from the method claims. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long "warn[ed] . . . against" interpreting § 101 "in ways that make patent eligibility 'depend simply on the draftsman's art.'" *Mayo*, *supra*, at 72. Holding that the system claims are patent eligible would have exactly that result. Pp. 226–227.

717 F. 3d 1269, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 227.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Jeffrey P. Kushan*, *Constantine L. Trela, Jr.*, *Tacy F. Flint*, *Adam L. Perlman*, and *Robert E. Sokohl*.

Mark A. Perry argued the cause for respondents. With him on the brief were *Helgi C. Walker* and *Brian M. Buroker*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance. With him on

the brief were *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Ginger D. Anders*, *Mark R. Freeman*, and *Scott C. Weidenfeller.**

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*Briefs of *amici curiae* urging reversal were filed for Advanced Biological Laboratories, SA, by *Robert R. Sachs* and *Daniel R. Brownstone*; for Trading Technologies International, Inc., et al. by *Charles J. Cooper*, *Vincent J. Colatriano*, *Steven F. Borsand*, and *Jay Q. Knobloch*; and for Margo Livesay by *Ms. Livesay*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Sandra S. Park*, *Steven R. Shapiro*, and *Lenora M. Lapidus*; for BSA|The Software Alliance by *Andrew J. Pincus* and *Paul W. Hughes*; for the Clearing House Association L. L. C. et al. by *William H. Burgess*; for the Computer & Communications Industry Association by *Matthew Levy*; for the Electronic Frontier Foundation by *Julie P. Samuels*, *Michael Barclay*, *Daniel K. Nazer*, and *Pamela Samuelson*; for Google Inc. et al. by *Daryl L. Joseffer*, *Karen F. Grohman*, and *Adam M. Conrad*; for Juhasz Law Firm, P. C., by *Paul R. Juhasz*; for Law, Business, and Economics Scholars by *Jason M. Schultz* and *Brian J. Love*, both *pro se*; for Microsoft Corp. et al. by *Jeffrey A. Lamken*, *John M. Whealan*, *Horacio E. Gutiérrez*, *Julie L. Sigall*, and *David W. Jones*; for Public Knowledge et al. by *Charles Duan* and *Jack Lerner*; for Red Hat, Inc., by *Robert H. Tiller*; for RichRelevance, Inc., et al. by *William M. Jay* and *Douglas J. Kline*; for Software Freedom Law Center et al. by *Eben Moglen*; for Peter S. Menell et al. by *Mr. Menell*, *pro se*; and for Tony Dutra by *Mr. Dutra*, *pro se*.

Briefs of *amici curiae* were filed for the American Antitrust Institute by *Albert A. Foer*, *Richard M. Brunell*, *Randy M. Stutz*, and *Shubha Ghosh*; for the American Intellectual Property Law Association by *Jerry R. Selinger* and *Gero McClellan*; for the Association of the Bar of the City of New York by *Charles E. Miller* and *John Gladstone Mills III*; for Checkpoint Software, Inc., et al. by *Mark A. Lemley* and *Stefani E. Shanberg*; for the Conejo Valley Bar Association by *Steven C. Sereboff*, *Mark A. Goldstein*, *Michael D. Harris*, and *M. Kala Sarvaiya*; for IEEE-USA by *Chris J. Katopis*; for the International Association for the Protection of Intellectual Property by *Philip C. Swain* and *R. Mark Halligan*; for International Business Machines Corp. by *Paul D. Clement*, *Marian Underweiser*, and *Kenneth R. Corsello*; for the Intellectual Property Law Association of Chicago by *Margaret M. Duncan*, *Rita J. Yoon*, and *Charles W. Shifley*; for the Intellectual Property Owners Association by *D. Bartley Eppenauer*, *Andrew C. Cooper*, *Philip S. Johnson*, and *Kevin H. Rhodes*;

JUSTICE THOMAS delivered the opinion of the Court.

The patents at issue in this case disclose a computer-implemented scheme for mitigating "settlement risk" (*i. e.*, the risk that only one party to a financial transaction will pay what it owes) by using a third-party intermediary. The question presented is whether these claims are patent eligible under 35 U. S. C. § 101, or are instead drawn to a patent-ineligible abstract idea. We hold that the claims at issue are drawn to the abstract idea of intermediated settlement, and that merely requiring generic computer implementation fails to transform that abstract idea into a patent-eligible invention. We therefore affirm the judgment of the United States Court of Appeals for the Federal Circuit.

I

A

Petitioner Alice Corporation is the assignee of several patents that disclose schemes to manage certain forms of financial risk.[1] According to the specification largely shared by the patents, the invention "enabl[es] the management of risk relating to specified, yet unknown, future events." App. 248. The specification further explains that the "invention relates to methods and apparatus, including electrical com-

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for the New York Intellectual Property Law Association by *Anthony F. Lo Cicero*, *Charles R. Macedo*, *Joseph M. Casino*, *Michael J. Kasdan*, and *Bruce D. Abramson*; for Proove Biosciences, Inc., by *Catherine Meshkin* and *Patrick R. Delaney*; for Retailers by *Peter J. Brann* and *Stacy O. Stitham*; for SHFL Entertainment, Inc., by *Adrian M. Pruetz*, *Erica J. Van Loon*, *Rex Hwang*, and *Charles C. Koole*; for Sigram Schindler Beteiligungsgesellschaft mbH by *Chidambaram S. Iyer*; for Ronald M. Benrey by *Robert R. Sachs* and *Daniel R. Brownstone*; for Dale R. Cook by *Mr. Cook*, *pro se*; for Robin Feldman et al. by *Mr. Feldman*, *pro se*; for Brian R. Galvin by *Roy Rainey*; for Lee Hollaar et al. by *Peter K. Trzyna*, *pro se*; for James B. Lampert et al. by *Mr. Lampert*, *pro se*; and for Paul R. Michel by *Charles Hieken* and *John A. Dragseth*.

[1] The patents at issue are United States Patent Nos. 5,970,479 (the '479 patent), 6,912,510, 7,149,720, and 7,725,375.

puters and data processing systems applied to financial matters and risk management." *Id.*, at 243.

The claims at issue relate to a computerized scheme for mitigating "settlement risk"—*i. e.*, the risk that only one party to an agreed-upon financial exchange will satisfy its obligation. In particular, the claims are designed to facilitate the exchange of financial obligations between two parties by using a computer system as a third-party intermediary. *Id.*, at 383–384.[2] The intermediary creates "shadow" credit and debit records (*i. e.*, account ledgers) that mirror the balances in the parties' real-world accounts at "exchange institutions" (*e. g.*, banks). The intermediary updates the shadow records in real time as transactions are entered, allowing "only those transactions for which the parties' updated shadow records indicate sufficient resources to satisfy their mutual obligations." 717 F. 3d 1269, 1285 (CA Fed.

[2] The parties agree that claim 33 of the '479 patent is representative of the method claims. Claim 33 recites:

"A method of exchanging obligations as between parties, each party holding a credit record and a debit record with an exchange institution, the credit records and debit records for exchange of predetermined obligations, the method comprising the steps of:

"(a) creating a shadow credit record and a shadow debit record for each stakeholder party to be held independently by a supervisory institution from the exchange institutions;

"(b) obtaining from each exchange institution a start-of-day balance for each shadow credit record and shadow debit record;

"(c) for every transaction resulting in an exchange obligation, the supervisory institution adjusting each respective party's shadow credit record or shadow debit record, allowing only these transactions that do not result in the value of the shadow debit record being less than the value of the shadow credit record at any time, each said adjustment taking place in chronological order, and

"(d) at the end-of-day, the supervisory institution instructing on[e] of the exchange institutions to exchange credits or debits to the credit record and debit record of the respective parties in accordance with the adjustments of the said permitted transactions, the credits and debits being irrevocable, time invariant obligations placed on the exchange institutions." App. 383–384.

2013) (Lourie, J., concurring). At the end of the day, the intermediary instructs the relevant financial institutions to carry out the "permitted" transactions in accordance with the updated shadow records, *ibid.*, thus mitigating the risk that only one party will perform the agreed-upon exchange.

In sum, the patents in suit claim (1) the foregoing method for exchanging obligations (the method claims), (2) a computer system configured to carry out the method for exchanging obligations (the system claims), and (3) a computer-readable medium containing program code for performing the method of exchanging obligations (the media claims). All of the claims are implemented using a computer; the system and media claims expressly recite a computer, and the parties have stipulated that the method claims require a computer as well.

B

Respondents CLS Bank International and CLS Services Ltd. (together, CLS Bank) operate a global network that facilitates currency transactions. In 2007, CLS Bank filed suit against petitioner, seeking a declaratory judgment that the claims at issue are invalid, unenforceable, or not infringed. Petitioner counterclaimed, alleging infringement. Following this Court's decision in *Bilski* v. *Kappos*, 561 U. S. 593 (2010), the parties filed cross-motions for summary judgment on whether the asserted claims are eligible for patent protection under 35 U. S. C. § 101. The District Court held that all of the claims are patent ineligible because they are directed to the abstract idea of "employing a neutral intermediary to facilitate simultaneous exchange of obligations in order to minimize risk." 768 F. Supp. 2d 221, 252 (DC 2011).

A divided panel of the United States Court of Appeals for the Federal Circuit reversed, holding that it was not "manifestly evident" that petitioner's claims are directed to an abstract idea. 685 F. 3d 1341, 1352, 1356 (2012). The Federal Circuit granted rehearing en banc, vacated the panel opinion, and affirmed the judgment of the District Court in a one-

paragraph *per curiam* opinion. 717 F. 3d, at 1273. Seven of the ten participating judges agreed that petitioner's method and media claims are patent ineligible. See *id.*, at 1274 (Lourie, J., concurring); *id.*, at 1312–1313 (Rader, C. J., concurring in part and dissenting in part). With respect to petitioner's system claims, the en banc Federal Circuit affirmed the District Court's judgment by an equally divided vote. *Id.*, at 1273.

Writing for a five-member plurality, Judge Lourie concluded that all of the claims at issue are patent ineligible. In the plurality's view, under this Court's decision in *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, 566 U. S. 66 (2012), a court must first "identif[y] the abstract idea represented in the claim," and then determine "whether the balance of the claim adds 'significantly more.'" 717 F. 3d, at 1286. The plurality concluded that petitioner's claims "draw on the abstract idea of reducing settlement risk by effecting trades through a third-party intermediary," and that the use of a computer to maintain, adjust, and reconcile shadow accounts added nothing of substance to that abstract idea. *Ibid.*

Chief Judge Rader concurred in part and dissented in part. In a part of the opinion joined only by Judge Moore, Chief Judge Rader agreed with the plurality that petitioner's method and media claims are drawn to an abstract idea. *Id.*, at 1312–1313. In a part of the opinion joined by Judges Linn, Moore, and O'Malley, Chief Judge Rader would have held that the system claims are patent eligible because they involve computer "hardware" that is "specifically programmed to solve a complex problem." *Id.*, at 1307. Judge Moore wrote a separate opinion dissenting in part, arguing that the system claims are patent eligible. *Id.*, at 1313–1314. Judge Newman filed an opinion concurring in part and dissenting in part, arguing that all of petitioner's claims are patent eligible. *Id.*, at 1327. Judges Linn and O'Malley filed a separate dissenting opinion reaching that same conclusion. *Ibid.*

We granted certiorari, 571 U. S. 1090 (2013), and now affirm.

II

Section 101 of the Patent Act defines the subject matter eligible for patent protection. It provides:

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

"We have long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable." *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, 569 U. S. 576, 589 (2013) (internal quotation marks and brackets omitted). We have interpreted § 101 and its predecessors in light of this exception for more than 150 years. *Bilski*, *supra*, at 601–602; see also *O'Reilly* v. *Morse*, 15 How. 62, 112–120 (1854); *Le Roy* v. *Tatham*, 14 How. 156, 174–175 (1853).

We have described the concern that drives this exclusionary principle as one of pre-emption. See, *e. g.*, *Bilski*, *supra*, at 611–612 (upholding the patent "would pre-empt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea"). Laws of nature, natural phenomena, and abstract ideas are "'"the basic tools of scientific and technological work."'" *Myriad*, *supra*, at 589. "[M]onopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it," thereby thwarting the primary object of the patent laws. *Mayo*, *supra*, at 71; see U. S. Const., Art. I, § 8, cl. 8 (Congress "shall have Power . . . To promote the Progress of Science and useful Arts"). We have "repeatedly emphasized this . . . concern that patent law not inhibit further discovery by improperly tying up the future use of" these building blocks of human ingenuity. *Mayo*, *supra*, at 85 (citing *Morse*, *supra*, at 113).

At the same time, we tread carefully in construing this exclusionary principle lest it swallow all of patent law. *Mayo*, 566 U. S., at 71. At some level, "all inventions . . . embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas." *Ibid.* Thus, an invention is not rendered ineligible for patent simply because it involves an abstract concept. See *Diamond* v. *Diehr*, 450 U. S. 175, 187 (1981). "[A]pplication[s]" of such concepts "'to a new and useful end,'" we have said, remain eligible for patent protection. *Gottschalk* v. *Benson*, 409 U. S. 63, 67 (1972).

Accordingly, in applying the § 101 exception, we must distinguish between patents that claim the "'buildin[g] block[s]'" of human ingenuity and those that integrate the building blocks into something more, *Mayo*, 566 U. S., at 89, thereby "transform[ing]" them into a patent-eligible invention, *id.*, at 72. The former "would risk disproportionately tying up the use of the underlying" ideas, *id.*, at 73, and are therefore ineligible for patent protection. The latter pose no comparable risk of pre-emption, and therefore remain eligible for the monopoly granted under our patent laws.

III

In *Mayo*, we set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts. *Id.*, at 77. If so, we then ask, "[w]hat else is there in the claims before us?" *Id.*, at 78. To answer that question, we consider the elements of each claim both individually and "as an ordered combination" to determine whether the additional elements "transform the nature of the claim" into a patent-eligible application. *Id.*, at 79, 78. We have described step two of this analysis as a search for an "'inventive concept'"—*i. e.*, an element or combination of elements

that is "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself." *Id.*, at 72–73.[3]

A

We must first determine whether the claims at issue are directed to a patent-ineligible concept. We conclude that they are: These claims are drawn to the abstract idea of intermediated settlement.

The "abstract ideas" category embodies "the longstanding rule that '[a]n idea of itself is not patentable.'" *Benson*, *supra*, at 67 (quoting *Rubber-Tip Pencil Co.* v. *Howard*, 20 Wall. 498, 507 (1874)); see also *Le Roy*, *supra*, at 175 ("A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right"). In *Benson*, for example, this Court rejected as ineligible patent claims involving an algorithm for converting binary-coded decimal numerals into pure binary form, holding that the claimed patent was "in practical effect . . . a patent on the algorithm itself." 409 U. S., at 71–72. And in *Parker* v. *Flook*, 437 U. S. 584, 594–595 (1978), we held that a mathematical formula for computing "alarm limits" in a catalytic conversion process was also a patent-ineligible abstract idea.

We most recently addressed the category of abstract ideas in *Bilski*, 561 U. S. 593. The claims at issue in *Bilski* described a method for hedging against the financial risk of price fluctuations. Claim 1 recited a series of steps for hedging risk, including: (1) initiating a series of financial transactions between providers and consumers of a commodity; (2)

[3] Because the approach we made explicit in *Mayo* considers all claim elements, both individually and in combination, it is consistent with the general rule that patent claims "must be considered as a whole." *Diamond* v. *Diehr*, 450 U. S. 175, 188 (1981); see *Parker* v. *Flook*, 437 U. S. 584, 594 (1978) ("Our approach . . . is . . . not at all inconsistent with the view that a patent claim must be considered as a whole").

identifying market participants that have a counterrisk for the same commodity; and (3) initiating a series of transactions between those market participants and the commodity provider to balance the risk position of the first series of consumer transactions. *Id.*, at 599. Claim 4 "pu[t] the concept articulated in claim 1 into a simple mathematical formula." *Ibid.* The remaining claims were drawn to examples of hedging in commodities and energy markets.

"[A]ll Members of the Court agree[d]" that the patent at issue in *Bilski* claimed an "abstract idea." *Id.*, at 609; see also *id.*, at 619 (Stevens, J., concurring in judgment). Specifically, the claims described "the basic concept of hedging, or protecting against risk." *Id.*, at 611. The Court explained that "'[h]edging is a fundamental economic practice long prevalent in our system of commerce and taught in any introductory finance class.'" *Ibid.* "The concept of hedging" as recited by the claims in suit was therefore a patent-ineligible "abstract idea, just like the algorithms at issue in *Benson* and *Flook*." *Ibid.*

It follows from our prior cases, and *Bilski* in particular, that the claims at issue here are directed to an abstract idea. Petitioner's claims involve a method of exchanging financial obligations between two parties using a third-party intermediary to mitigate settlement risk. The intermediary creates and updates "shadow" records to reflect the value of each party's actual accounts held at "exchange institutions," thereby permitting only those transactions for which the parties have sufficient resources. At the end of each day, the intermediary issues irrevocable instructions to the exchange institutions to carry out the permitted transactions.

On their face, the claims before us are drawn to the concept of intermediated settlement, *i. e.*, the use of a third party to mitigate settlement risk. Like the risk hedging in *Bilski*, the concept of intermediated settlement is "'a fundamental economic practice long prevalent in our system of commerce.'" *Ibid.*; see, *e. g.*, Emery, Speculation on the

Stock and Produce Exchanges of the United States, in 7 Studies in History, Economics and Public Law 283, 346–356 (1896) (discussing the use of a "clearing-house" as an intermediary to reduce settlement risk). The use of a third-party intermediary (or "clearinghouse") is also a building block of the modern economy. See, *e. g.*, Yadav, The Problematic Case of Clearinghouses in Complex Markets, 101 Geo. L. J. 387, 406–412 (2013); J. Hull, Risk Management and Financial Institutions 103–104 (3d ed. 2012). Thus, intermediated settlement, like hedging, is an "abstract idea" beyond the scope of § 101.

Petitioner acknowledges that its claims describe intermediated settlement, see Brief for Petitioner 4, but rejects the conclusion that its claims recite an "abstract idea." Drawing on the presence of mathematical formulas in some of our abstract-ideas precedents, petitioner contends that the abstract-ideas category is confined to "preexisting, fundamental truth[s]" that "'exis[t] in principle apart from any human action.'" *Id.*, at 23, 26 (quoting *Mayo*, 566 U. S., at 77).

Bilski belies petitioner's assertion. The concept of risk hedging we identified as an abstract idea in that case cannot be described as a "preexisting, fundamental truth." The patent in *Bilski* simply involved a "series of steps instructing how to hedge risk." 561 U. S., at 599. Although hedging is a longstanding commercial practice, *ibid.*, it is a method of organizing human activity, not a "truth" about the natural world "'that has always existed,'" Brief for Petitioner 22 (quoting *Flook*, *supra*, at 593, n. 15). One of the claims in *Bilski* reduced hedging to a mathematical formula, but the Court did not assign any special significance to that fact, much less the sort of talismanic significance petitioner claims. Instead, the Court grounded its conclusion that all of the claims at issue were abstract ideas in the understanding that risk hedging was a "'fundamental economic practice.'" 561 U. S., at 611.

In any event, we need not labor to delimit the precise contours of the "abstract ideas" category in this case. It is enough to recognize that there is no meaningful distinction between the concept of risk hedging in *Bilski* and the concept of intermediated settlement at issue here. Both are squarely within the realm of "abstract ideas" as we have used that term.

B

Because the claims at issue are directed to the abstract idea of intermediated settlement, we turn to the second step in *Mayo*'s framework. We conclude that the method claims, which merely require generic computer implementation, fail to transform that abstract idea into a patent-eligible invention.

1

At *Mayo* step two, we must examine the elements of the claim to determine whether it contains an "'inventive concept'" sufficient to "transform" the claimed abstract idea into a patent-eligible application. 566 U. S., at 72, 80. A claim that recites an abstract idea must include "additional features" to ensure "that the [claim] is more than a drafting effort designed to monopolize the [abstract idea]." *Id.*, at 77. *Mayo* made clear that transformation into a patent-eligible application requires "more than simply stat[ing] the [abstract idea] while adding the words 'apply it.'" *Id.*, at 72.

Mayo itself is instructive. The patents at issue in *Mayo* claimed a method for measuring metabolites in the bloodstream in order to calibrate the appropriate dosage of thiopurine drugs in the treatment of autoimmune diseases. *Id.*, at 73–75. The respondent in that case contended that the claimed method was a patent-eligible application of natural laws that describe the relationship between the concentration of certain metabolites and the likelihood that the drug dosage will be harmful or ineffective. But methods for determining metabolite levels were already "well known in the

art," and the process at issue amounted to "nothing significantly more than an instruction to doctors to apply the applicable laws when treating their patients." *Id.*, at 79. "[S]imply appending conventional steps, specified at a high level of generality," was not "*enough*" to supply an "'inventive concept.'" *Id.*, at 82, 77, 72.

The introduction of a computer into the claims does not alter the analysis at *Mayo* step two. In *Benson*, for example, we considered a patent that claimed an algorithm implemented on "a general-purpose digital computer." 409 U. S., at 64. Because the algorithm was an abstract idea, see *supra*, at 218, the claim had to supply a "'new and useful'" application of the idea in order to be patent eligible. 409 U. S., at 67. But the computer implementation did not supply the necessary inventive concept; the process could be "carried out in existing computers long in use." *Ibid.* We accordingly "held that simply implementing a mathematical principle on a physical machine, namely a computer, [i]s not a patentable application of that principle." *Mayo*, *supra*, at 84 (citing *Benson*, *supra*, at 64).

Flook is to the same effect. There, we examined a computerized method for using a mathematical formula to adjust alarm limits for certain operating conditions (*e. g.*, temperature and pressure) that could signal inefficiency or danger in a catalytic conversion process. 437 U. S., at 585–586. Once again, the formula itself was an abstract idea, see *supra*, at 218, and the computer implementation was purely conventional. 437 U. S., at 594 (noting that the "use of computers for 'automatic monitoring-alarming'" was "well known"). In holding that the process was patent ineligible, we rejected the argument that "implement[ing] a principle in some specific fashion" will "automatically fal[l] within the patentable subject matter of § 101." *Id.*, at 593. Thus, "*Flook* stands for the proposition that the prohibition against patenting abstract ideas cannot be circumvented by attempting to limit the use of [the idea] to a particular technological environment."

Bilski, 561 U. S., at 610–611 (internal quotation marks omitted).

In *Diehr*, 450 U. S. 175, by contrast, we held that a computer-implemented process for curing rubber was patent eligible, but not because it involved a computer. The claim employed a "well-known" mathematical equation, but it used that equation in a process designed to solve a technological problem in "conventional industry practice." *Id.*, at 177, 178. The invention in *Diehr* used a "thermocouple" to record constant temperature measurements inside the rubber mold—something "the industry ha[d] not been able to obtain." *Id.*, at 178, and n. 3. The temperature measurements were then fed into a computer, which repeatedly recalculated the remaining cure time by using the mathematical equation. *Id.*, at 178–179. These additional steps, we recently explained, "transformed the process into an inventive application of the formula." *Mayo*, *supra*, at 81. In other words, the claims in *Diehr* were patent eligible because they improved an existing technological process, not because they were implemented on a computer.

These cases demonstrate that the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea "while adding the words 'apply it'" is not enough for patent eligibility. *Mayo*, *supra*, at 72. Nor is limiting the use of an abstract idea "'to a particular technological environment.'" *Bilski*, *supra*, at 610–611. Stating an abstract idea while adding the words "apply it with a computer" simply combines those two steps, with the same deficient result. Thus, if a patent's recitation of a computer amounts to a mere instruction to "implemen[t]" an abstract idea "on . . . a computer," *Mayo*, *supra*, at 84, that addition cannot impart patent eligibility. This conclusion accords with the pre-emption concern that undergirds our §101 jurisprudence. Given the ubiquity of computers, see 717 F. 3d, at 1286 (Lourie, J., concurring), wholly generic computer im-

plementation is not generally the sort of "additional featur[e]" that provides any "practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself." *Mayo*, *supra*, at 77.

The fact that a computer "necessarily exist[s] in the physical, rather than purely conceptual, realm," Brief for Petitioner 39, is beside the point. There is no dispute that a computer is a tangible system (in § 101 terms, a "machine"), or that many computer-implemented claims are formally addressed to patent-eligible subject matter. But if that were the end of the § 101 inquiry, an applicant could claim any principle of the physical or social sciences by reciting a computer system configured to implement the relevant concept. Such a result would make the determination of patent eligibility "depend simply on the draftsman's art," *Flook*, *supra*, at 593, thereby eviscerating the rule that "'[l]aws of nature, natural phenomena, and abstract ideas are not patentable,'" *Myriad*, 569 U. S., at 589.

2

The representative method claim in this case recites the following steps: (1) "creating" shadow records for each counterparty to a transaction; (2) "obtaining" start-of-day balances based on the parties' real-world accounts at exchange institutions; (3) "adjusting" the shadow records as transactions are entered, allowing only those transactions for which the parties have sufficient resources; and (4) issuing irrevocable end-of-day instructions to the exchange institutions to carry out the permitted transactions. See n. 2, *supra*. Petitioner principally contends that the claims are patent eligible because these steps "require a substantial and meaningful role for the computer." Brief for Petitioner 48. As stipulated, the claimed method requires the use of a computer to create electronic records, track multiple transactions, and issue simultaneous instructions; in other words, "[t]he computer is itself the intermediary." *Ibid.* (emphasis deleted).

In light of the foregoing, see *supra*, at 222, the relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea of intermediated settlement on a generic computer. They do not.

Taking the claim elements separately, the function performed by the computer at each step of the process is "[p]urely conventional." *Mayo*, 566 U. S., at 79 (internal quotation marks omitted). Using a computer to create and maintain "shadow" accounts amounts to electronic recordkeeping—one of the most basic functions of a computer. See, *e. g.*, *Benson*, 409 U. S., at 65 (noting that a computer "operates . . . upon both new and previously stored data"). The same is true with respect to the use of a computer to obtain data, adjust account balances, and issue automated instructions; all of these computer functions are "well-understood, routine, conventional activit[ies]" previously known to the industry. *Mayo*, 566 U. S., at 73. In short, each step does no more than require a generic computer to perform generic computer functions.

Considered "as an ordered combination," the computer components of petitioner's method "ad[d] nothing . . . that is not already present when the steps are considered separately." *Id.*, at 79. Viewed as a whole, petitioner's method claims simply recite the concept of intermediated settlement as performed by a generic computer. See 717 F. 3d, at 1286 (Lourie, J., concurring) (noting that the representative method claim "lacks *any* express language to define the computer's participation"). The method claims do not, for example, purport to improve the functioning of the computer itself. See *ibid.* ("There is no specific or limiting recitation of . . . improved computer technology . . . "); Brief for United States as *Amicus Curiae* 28–30. Nor do they effect an improvement in any other technology or technical field. See, *e. g.*, *Diehr*, *supra*, at 177–178. Instead, the claims at issue amount to "nothing significantly more" than

an instruction to apply the abstract idea of intermediated settlement using some unspecified, generic computer. *Mayo*, 566 U. S., at 79. Under our precedents, that is not "*enough*" to transform an abstract idea into a patent-eligible invention. *Id.*, at 77.

C

Petitioner's claims to a computer system and a computer-readable medium fail for substantially the same reasons. Petitioner conceded below that its media claims rise or fall with its method claims. En Banc Response Brief for Defendant-Appellant in No. 11–1301 (CA Fed.), p. 50, n. 3. As to its system claims, petitioner emphasizes that those claims recite "specific hardware" configured to perform "specific computerized functions." Brief for Petitioner 53. But what petitioner characterizes as specific hardware—a "data processing system" with a "communications controller" and "data storage unit," for example, see App. 954, 958, 1257—is purely functional and generic. Nearly every computer will include a "communications controller" and "data storage unit" capable of performing the basic calculation, storage, and transmission functions required by the method claims. See 717 F. 3d, at 1290 (Lourie, J., concurring). As a result, none of the hardware recited by the system claims "offers a meaningful limitation beyond generally linking 'the use of the [method] to a particular technological environment,' that is, implementation via computers." *Id.*, at 1291 (quoting *Bilski*, 561 U. S., at 610–611).

Put another way, the system claims are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long "warn[ed] . . . against" interpreting § 101 "in ways that make patent eligibility 'depend simply on the draftsman's art.'" *Mayo*, *supra*, at 72 (quoting *Flook*, 437 U. S., at 593); see *id.*, at 590 ("The concept of patentable subject

matter under § 101 is not 'like a nose of wax which may be turned and twisted in any direction . . . '"). Holding that the system claims are patent eligible would have exactly that result.

Because petitioner's system and media claims add nothing of substance to the underlying abstract idea, we hold that they too are patent ineligible under § 101.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit is affirmed.

It is so ordered.

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

I adhere to the view that any "claim that merely describes a method of doing business does not qualify as a 'process' under § 101." *Bilski* v. *Kappos*, 561 U. S. 593, 614 (2010) (Stevens, J., concurring in judgment); see also *In re Bilski*, 545 F. 3d 943, 972 (CA Fed. 2008) (Dyk, J., concurring) ("There is no suggestion in any of th[e] early [English] consideration of process patents that processes for organizing human activity were or ever had been patentable"). As in *Bilski*, however, I further believe that the method claims at issue are drawn to an abstract idea. Cf. 561 U. S., at 619 (opinion of Stevens, J.). I therefore join the opinion of the Court.

Syllabus

LANE *v.* FRANKS ET AL.

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

No. 13–483. Argued April 28, 2014—Decided June 19, 2014

As Director of Community Intensive Training for Youth (CITY), a program for underprivileged youth operated by Central Alabama Community College (CACC), petitioner Edward Lane conducted an audit of the program's expenses and discovered that Suzanne Schmitz, an Alabama State Representative on CITY's payroll, had not been reporting for work. Lane eventually terminated Schmitz' employment. Shortly thereafter, federal authorities indicted Schmitz on charges of mail fraud and theft concerning a program receiving federal funds. Lane testified, under subpoena, regarding the events that led to his terminating Schmitz. Schmitz was convicted and sentenced to 30 months in prison. Meanwhile, CITY was experiencing significant budget shortfalls. Respondent Franks, then CACC's president, terminated Lane along with 28 other employees in a claimed effort to address the financial difficulties. A few days later, however, Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee. Lane sued Franks in his individual and official capacities under 42 U. S. C. § 1983, alleging that Franks had violated the First Amendment by firing him in retaliation for testifying against Schmitz.

The District Court granted Franks' motion for summary judgment, holding that the individual-capacity claims were barred by qualified immunity and the official-capacity claims were barred by the Eleventh Amendment. The Eleventh Circuit affirmed, holding that Lane's testimony was not entitled to First Amendment protection. It reasoned that Lane spoke as an employee and not as a citizen because he acted pursuant to his official duties when he investigated and terminated Schmitz' employment.

Held:

1. Lane's sworn testimony outside the scope of his ordinary job duties is entitled to First Amendment protection. Pp. 235–242.

(a) *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568, requires balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Under the first step of the *Pickering* analysis, if the speech is made pursuant to

the employee's ordinary job duties, then the employee is not speaking as a citizen for First Amendment purposes, and the inquiry ends. *Garcetti* v. *Ceballos*, 547 U. S. 410, 421. But if the "employee spoke as a citizen on a matter of public concern," the inquiry turns to "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.*, at 418. Pp. 235–237.

(b) Lane's testimony is speech as a citizen on a matter of public concern. Pp. 238–241.

(1) Sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer. The Eleventh Circuit read *Garcetti* far too broadly in holding that Lane did not speak as a citizen when he testified simply because he learned of the subject matter of that testimony in the course of his employment. *Garcetti* said nothing about speech that relates to public employment or concerns information learned in the course of that employment. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Indeed, speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment. Pp. 238–241.

(2) Whether speech is a matter of public concern turns on the "content, form, and context" of the speech. *Connick* v. *Myers*, 461 U. S. 138, 147–148. Here, corruption in a public program and misuse of state funds obviously involve matters of significant public concern. See *Garcetti*, 547 U. S., at 425. And the form and context of the speech—sworn testimony in a judicial proceeding—fortify that conclusion. See *United States* v. *Alvarez*, 567 U. S. 709, 721. P. 241.

(c) Turning to *Pickering*'s second step, the employer's side of the scale is entirely empty. Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor—for instance, evidence that Lane's testimony was false or erroneous or that Lane unnecessarily disclosed sensitive, confidential, or privileged information while testifying. P. 242.

2. Franks is entitled to qualified immunity for the claims against him in his individual capacity. The question here is whether Franks reasonably could have believed that, when he fired Lane, a government employer could fire an employee because of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities.

Syllabus

See *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 743. At the relevant time, Eleventh Circuit precedent did not preclude Franks from holding that belief, and no decision of this Court was sufficiently clear to cast doubt on controlling Circuit precedent. Any discrepancies in Eleventh Circuit precedent only serve to highlight the dispositive point that the question was not beyond debate at the time Franks acted. Pp. 243–246.

3. The Eleventh Circuit declined to consider the District Court's dismissal of the claims against respondent Burrow in her official capacity as CACC's acting president, and the parties have not asked this Court to consider them here. The judgment of the Eleventh Circuit as to those claims is reversed, and the case is remanded for further proceedings. Pp. 246–247.

523 Fed. Appx. 709, affirmed in part, reversed in part, and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, in which SCALIA and ALITO, JJ., joined, *post*, p. 247.

Tejinder Singh argued the cause for petitioner. With him on the briefs were *Thomas C. Goldstein* and *Kevin K. Russell*.

Deputy Solicitor General Gershengorn argued the cause for the United States as *amicus curiae* supporting affirmance in part and reversal in part. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Rachel P. Kovner*, *Douglas N. Letter*, *Matthew M. Collette*, and *Robert D. Kamenshine*.

Luther Strange, Attorney General of Alabama, argued the cause for respondent Burrow. With him on the briefs were *Andrew L. Brasher*, Solicitor General, and *Megan A. Kirkpatrick*, Assistant Solicitor General. *Mark T. Waggoner* argued the cause for respondent Franks. With him on the brief were *Jennifer Morgan* and *Collin O'Connor Udell*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Lisa S. Blatt*, *Steven R. Shapiro*, and *Randall C. Marshall*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, *James B. Coppess*, and *Matthew J. Ginsburg*; for the First Amendment Coalition by *Floyd Abrams*, *Sogol D. Somekh*, and *Peter Scheer*; for the Government

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee's speech depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). In *Pickering*, the Court struck the balance in favor of the public employee, extending First Amendment protection to a teacher who was fired after writing a letter to the editor of a local newspaper criticizing the school board that employed him. Today, we consider whether the First Amendment similarly protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. We hold that it does.

I

In 2006, Central Alabama Community College (CACC) hired petitioner Edward Lane to be the Director of Community Intensive Training for Youth (CITY), a statewide pro-

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Accountability Project by *Andrew J. Pincus, Charles A. Rothfeld, Michael B. Kimberly, Paul W. Hughes,* and *Eugene R. Fidell*; for Law Professors by *Paul M. Secunda* and *Sheldon H. Nahmod*; for the National Association of Police Organizations by *J. Michael McGuinness*; and for the National Education Association et al. by *Alice O'Brien, Jason Walta, Jeremiah A. Collins, Judith A. Scott,* and *William Lurye.*

Matthew J. Delude and *Charles W. Thompson, Jr.,* filed a brief for the International Municipal Lawyers Association, Inc., et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Alliance Defending Freedom by *David A. Cortman, Kevin H. Theriot,* and *David J. Hacker*; and for the National Whistleblower Center by *Stephen M. Kohn, Michael D. Kohn,* and *David K. Colapinto.*

gram for underprivileged youth. CACC hired Lane on a probationary basis. In his capacity as director, Lane was responsible for overseeing CITY's day-to-day operations, hiring and firing employees, and making decisions with respect to the program's finances.

At the time of Lane's appointment, CITY faced significant financial difficulties. That prompted Lane to conduct a comprehensive audit of the program's expenses. The audit revealed that Suzanne Schmitz, an Alabama State Representative on CITY's payroll, had not been reporting to her CITY office. After unfruitful discussions with Schmitz, Lane shared his finding with CACC's president and its attorney. They warned him that firing Schmitz could have negative repercussions for him and CACC.

Lane nonetheless contacted Schmitz again and instructed her to show up to the Huntsville office to serve as a counselor. Schmitz refused; she responded that she wished to "'continue to serve the CITY program in the same manner as [she had] in the past.'" *Lane* v. *Central Ala. Community College*, 523 Fed. Appx. 709, 710 (CA11 2013) (*per curiam*). Lane fired her shortly thereafter. Schmitz told another CITY employee, Charles Foley, that she intended to "'get [Lane] back'" for firing her. 2012 WL 5289412, *1 (ND Ala., Oct. 18, 2012). She also said that if Lane ever requested money from the state legislature for the program, she would tell him, "'[y]ou're fired.'" *Ibid.*

Schmitz' termination drew the attention of many, including agents of the Federal Bureau of Investigation, which initiated an investigation into Schmitz' employment with CITY. In November 2006, Lane testified before a federal grand jury about his reasons for firing Schmitz. In January 2008, the grand jury indicted Schmitz on four counts of mail fraud and four counts of theft concerning a program receiving federal funds. See *United States* v. *Schmitz*, 634 F. 3d 1247, 1256–1257 (CA11 2011). The indictment alleged that Schmitz had collected $177,251.82 in federal funds even though she per-

formed "'virtually no services,'" "'generated virtually no work product,'" and "'rarely even appeared for work at the CITY Program offices.'" *Id.*, at 1260. It further alleged that Schmitz had submitted false statements concerning the hours she worked and the nature of the services she performed. *Id.*, at 1257.

Schmitz' trial, which garnered extensive press coverage,[1] commenced in August 2008. Lane testified, under subpoena, regarding the events that led to his terminating Schmitz. The jury failed to reach a verdict. Roughly six months later, federal prosecutors retried Schmitz, and Lane testified once again. This time, the jury convicted Schmitz on three counts of mail fraud and four counts of theft concerning a program receiving federal funds. The District Court sentenced her to 30 months in prison and ordered her to pay $177,251.82 in restitution and forfeiture.

Meanwhile, CITY continued to experience considerable budget shortfalls. In November 2008, Lane began reporting to respondent Steve Franks, who had become president of CACC in January 2008. Lane recommended that Franks consider layoffs to address the financial difficulties. In January 2009, Franks decided to terminate 29 probationary CITY employees, including Lane. Shortly thereafter, however, Franks rescinded all but 2 of the 29 terminations— those of Lane and one other employee— because of an "ambiguity in [those other employees'] probationary service." Brief for Respondent Franks 11. Franks claims that he "did not rescind Lane's termination . . . because he believed that Lane was in a fundamentally different category than the other employees: he was the director of the entire CITY pro-

[1] See, *e. g.*, Lawmaker Faces Fraud Charge in June, Montgomery Advertiser, May 6, 2008, p. 1B; Johnson, State Lawmaker's Fraud Trial Starts Today, Montgomery Advertiser, Aug. 18, 2008, p. 1B; Faulk, Schmitz Testifies in Her Defense: Says State Job Was Legitimate, Birmingham News, Feb. 20, 2009, p. 1A; Faulk, Schmitz Convicted, Loses Her State Seat, Birmingham News, Feb. 25, 2009, p. 1A.

gram, and not simply an employee." *Ibid.* In September 2009, CACC eliminated the CITY program and terminated the program's remaining employees. Franks later retired, and respondent Susan Burrow, the current acting president of CACC, replaced him while this case was pending before the Eleventh Circuit.

In January 2011, Lane sued Franks in his individual and official capacities under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz.[2] Lane sought damages from Franks in his individual capacity and sought equitable relief, including reinstatement, from Franks in his official capacity.[3]

The District Court granted Franks' motion for summary judgment. Although the court concluded that the record raised "genuine issues of material fact . . . concerning [Franks'] true motivation for terminating [Lane's] employment," 2012 WL 5289412, *6, it held that Franks was entitled to qualified immunity as to the damages claims because "a reasonable government official in [Franks'] position would not have had reason to believe that the Constitution protected [Lane's] testimony," *id.*, at *12. The District Court relied on *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006), which held that "'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.'" 2012 WL 5289412, *10 (quoting *Garcetti*, 547 U. S., at 421). The court found no violation of clearly established law because Lane had "learned of the information that he testified about while working as Director at [CITY]," such that his "speech [could]

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[2] Lane also brought claims against CACC, as well as claims under a state whistleblower statute, Ala. Code § 36–26A–3 (2013), and 42 U. S. C. § 1985. Those claims are not at issue here.

[3] Because Burrow replaced Franks as president of CACC during the pendency of this lawsuit, the claims originally filed against Franks in his official capacity are now against Burrow.

still be considered as part of his official job duties and not made as a citizen on a matter of public concern." 2012 WL 5289412, *10.

The Eleventh Circuit affirmed. 523 Fed. Appx., at 710. Like the District Court, it relied extensively on *Garcetti*. It reasoned that, "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to [the] employee's professional responsibilities' and is 'a product that the "employer himself has commissioned or created."'" 523 Fed. Appx., at 711 (quoting *Abdur-Rahman* v. *Walker*, 567 F. 3d 1278, 1283 (CA11 2009)). The court concluded that Lane spoke as an employee and not as a citizen because he was acting pursuant to his official duties when he investigated Schmitz' employment, spoke with Schmitz and CACC officials regarding the issue, and terminated Schmitz. 523 Fed. Appx., at 712. "That Lane testified about his official activities pursuant to a subpoena and in the litigation context," the court continued, "does not bring Lane's speech within the protection of the First Amendment." *Ibid.* The Eleventh Circuit also concluded that, "even if . . . a constitutional violation of Lane's First Amendment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity" because the right at issue had not been clearly established. *Id.*, at 711, n. 2.

We granted certiorari, 571 U. S. 1161 (2014), to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities. Compare 523 Fed. Appx., at 712 (case below), with, *e. g.*, *Reilly* v. *Atlantic City*, 532 F. 3d 216, 231 (CA3 2008).

II

Speech by citizens on matters of public concern lies at the heart of the First Amendment, which "was fashioned to as-

sure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, 354 U. S. 476, 484 (1957). This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. See, *e. g.*, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605 (1967); *Pickering*, 391 U. S., at 568; *Connick* v. *Myers*, 461 U. S. 138, 142 (1983). There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994) (plurality opinion). "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego* v. *Roe*, 543 U. S. 77, 82 (2004) (*per curiam*).

Our precedents have also acknowledged the government's countervailing interest in controlling the operation of its workplaces. See, *e. g.*, *Pickering*, 391 U. S., at 568. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U. S., at 418.

Pickering provides the framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees. It requires "balanc[ing] . . . the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at

568. In *Pickering*, the Court held that a teacher's letter to the editor of a local newspaper concerning a school budget constituted speech on a matter of public concern. *Id.*, at 571. And in balancing the employee's interest in such speech against the government's efficiency interest, the Court held that the publication of the letter did not "imped[e] the teacher's proper performance of his daily duties in the classroom" or "interfer[e] with the regular operation of the schools generally." *Id.*, at 572–573. The Court therefore held that the teacher's speech could not serve as the basis for his dismissal. *Id.*, at 574.

In *Garcetti*, we described a two-step inquiry into whether a public employee's speech is entitled to protection:

> "The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." 547 U. S., at 418 (citations omitted).

In describing the first step in this inquiry, *Garcetti* distinguished between employee speech and citizen speech. Whereas speech as a citizen may trigger protection, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*, at 421. Applying that rule to the facts before it, the Court found that an internal memorandum prepared by a prosecutor in the course of his ordinary job responsibilities constituted unprotected employee speech. *Id.*, at 424.

III

Against this backdrop, we turn to the question presented: whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.[4] We hold that it does.

A

The first inquiry is whether the speech in question—Lane's testimony at Schmitz' trials—is speech as a citizen on a matter of public concern. It clearly is.

1

Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.

In rejecting Lane's argument that his testimony was speech as a citizen, the Eleventh Circuit gave short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath. See 523 Fed. Appx., at 712 (finding immaterial the fact that Lane spoke "pursuant to a subpoena and in the litigation context"). Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. See, *e. g.,* 18 U. S. C. § 1623

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[4] It is undisputed that Lane's ordinary job responsibilities did not include testifying in court proceedings. See *Lane* v. *Central Ala. Community College*, 523 Fed. Appx. 709, 712 (CA11 2013). For that reason, Lane asked the Court to decide only whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern. Pet. for Cert. i. We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today.

(criminalizing false statements under oath in judicial proceedings); *United States* v. *Mandujano*, 425 U. S. 564, 576 (1976) (plurality opinion) ("Perjured testimony is an obvious and flagrant affront to the basic concept of judicial proceedings"). When the person testifying is a public employee, he may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.

In holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly. It reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment with CITY, *Garcetti* requires that his testimony be treated as the speech of an employee rather than that of a citizen. See 523 Fed. Appx., at 712. It does not.

The sworn testimony in this case is far removed from the speech at issue in *Garcetti*—an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution. The *Garcetti* Court held that such speech was made pursuant to the employee's "official responsibilities" because "[w]hen [the employee] went to work and performed the tasks he was paid to perform, [he] acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance." 547 U. S., at 422, 424.

But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of [the prosecutor's] employment," because "[t]he First Amendment protects

some expressions related to the speaker's job." *Id.*, at 421. In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.

It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment. In *Pickering*, for example, the Court observed that "[t]eachers are . . . the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U. S., at 572; see also *Garcetti*, 547 U. S., at 421 (recognizing that "[t]he same is true of many other categories of public employees"). Most recently, in *San Diego* v. *Roe*, 543 U. S., at 80, the Court again observed that public employees "are uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large."

The importance of public employee speech is especially evident in the context of this case: a public corruption scandal. The United States, for example, represents that because "[t]he more than 1000 prosecutions for federal corruption offenses that are brought in a typical year . . . often depend on evidence about activities that government officials undertook while in office," those prosecutions often "require testimony from other government employees." Brief for United States as *Amicus Curiae* 20. It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech

by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

Applying these principles, it is clear that Lane's sworn testimony is speech as a citizen.

2

Lane's testimony is also speech on a matter of public concern. Speech involves matters of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.' " *Snyder* v. *Phelps*, 562 U. S. 443, 453 (2011) (citation omitted). The inquiry turns on the "content, form, and context" of the speech. *Connick*, 461 U. S., at 147–148.

The content of Lane's testimony—corruption in a public program and misuse of state funds—obviously involves a matter of significant public concern. See, *e. g.*, *Garcetti*, 547 U. S., at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance"). And the form and context of the speech—sworn testimony in a judicial proceeding—fortify that conclusion. "Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others." *United States* v. *Alvarez*, 567 U. S. 709, 721 (2012) (plurality opinion).

* * *

We hold, then, that Lane's truthful sworn testimony at Schmitz' criminal trials is speech as a citizen on a matter of public concern.

B

This does not settle the matter, however. A public employee's sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern. Under *Pickering*, if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had "an adequate justification for treating the employee differently from any other member of the public" based on the government's needs as an employer. *Garcetti*, 547 U. S., at 418.

As discussed previously, we have recognized that government employers often have legitimate "interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public," including "'promot[ing] efficiency and integrity in the discharge of official duties,'" and "'maintain[ing] proper discipline in public service.'" *Connick*, 461 U. S., at 150–151. We have also cautioned, however, that "a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." *Id.*, at 152.

Here, the employer's side of the *Pickering* scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor. There is no evidence, for example, that Lane's testimony at Schmitz' trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.[5] In these circumstances, we conclude that Lane's speech is entitled to protection under the First Amendment. The Eleventh Circuit erred in holding otherwise and dismissing Lane's claim of retaliation on that basis.

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[5] Of course, quite apart from *Pickering* balancing, wrongdoing that an employee admits to while testifying may be a valid basis for termination or other discipline.

IV

Respondent Franks argues that even if Lane's testimony is protected under the First Amendment, the claims against him in his individual capacity should be dismissed on the basis of qualified immunity. We agree.

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 743 (2011). Under this doctrine, courts may not award damages against a government official in his personal capacity unless "the official violated a statutory or constitutional right," and "the right was 'clearly established' at the time of the challenged conduct." *Id.*, at 735.

The relevant question for qualified immunity purposes is this: Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities? Eleventh Circuit precedent did not preclude Franks from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent.

In dismissing Lane's claim, the Eleventh Circuit relied on its 1998 decision in *Morris* v. *Crow*, 142 F. 3d 1379 (*per curiam*). There, a deputy sheriff sued the sheriff and two other officials, alleging that he had been fired in retaliation for statements he made in an accident report and later giving deposition testimony about his investigation of a fatal car crash between another officer and a citizen. *Id.*, at 1381. In his accident report, the plaintiff noted that the officer was driving more than 130 mph in a 50 mph zone, without using his emergency blue warning light. See *ibid.* The plaintiff later testified to these facts at a deposition in a wrongful death suit against the sheriff's office. *Ibid.* His superiors later fired him. *Ibid.*

The Eleventh Circuit, in a pre-*Garcetti* decision, concluded that the plaintiff's deposition testimony was unprotected. It held that a public employee's speech is protected only when it is "'made primarily in the employee's role as citizen,'" rather than "'primarily in the role of employee.'" *Morris*, 142 F. 3d, at 1382. And it found the plaintiff's deposition testimony to be speech as an employee because it "reiterated the conclusions regarding his observations of the accident" that he "generated in the normal course of [his] duties." *Ibid.* Critically, the court acknowledged—and was unmoved by—the fact that although the plaintiff had investigated the accident and prepared the report pursuant to his official duties, there was no "evidence that [he] gave deposition testimony for any reason other than in compliance with a subpoena to testify truthfully in the civil suit regarding the . . . accident." *Ibid.* The court further reasoned that the speech could not "be characterized as an attempt to make public comment on sheriff's office policies and procedures, the internal workings of the department, the quality of its employees or upon any issue at all." *Ibid.*

Lane argues that two other Eleventh Circuit precedents put Franks on notice that his conduct violated the First Amendment: *Martinez* v. *Opa-Locka*, 971 F. 2d 708 (1992) (*per curiam*), and *Tindal* v. *Montgomery Cty. Comm'n*, 32 F. 3d 1535 (1994). *Martinez* involved a public employee's subpoenaed testimony before the Opa-Locka City Commission regarding her employer's procurement practices. 971 F. 2d, at 710. The Eleventh Circuit held that her speech was protected, reasoning that it addressed a matter of public concern and that her interest in speaking freely was not outweighed by her employer's interest in providing government services. *Id.*, at 712. It held, further, that the relevant constitutional rules were so clearly established at the time that qualified immunity did not apply. *Id.*, at 713. *Tindal*, decided two years after *Martinez*, involved a public employee's subpoenaed testimony in her co-worker's sexual harass-

ment lawsuit. 32 F. 3d, at 1537–1538. The court again ruled in favor of the employee. It held that the employee's speech touched upon a public concern and that her employer had not offered any evidence that the speech hindered operations. *Id.*, at 1539–1540.

Morris, *Martinez*, and *Tindal* represent the landscape of Eleventh Circuit precedent the parties rely on for qualified immunity purposes. If *Martinez* and *Tindal* were controlling in the Eleventh Circuit in 2009, we would agree with Lane that Franks could not reasonably have believed that it was lawful to fire Lane in retaliation for his testimony. But both cases must be read together with *Morris*, which reasoned—in declining to afford First Amendment protection—that the plaintiff's decision to testify was motivated solely by his desire to comply with a subpoena. The same could be said of Lane's decision to testify. Franks was thus entitled to rely on *Morris* when he fired Lane.[6]

Lane argues that *Morris* is inapplicable because it distinguished *Martinez*, suggesting that *Martinez* survived *Morris*. See *Morris*, 142 F. 3d, at 1382–1383. But this debate over whether *Martinez* or *Morris* applies to Lane's claim only highlights the dispositive point: At the time of Lane's termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection. At best, Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity.

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[6] There is another reason *Morris* undermines *Martinez* and *Tindal*. In *Martinez* and *Tindal*, the Eleventh Circuit asked only whether the speech at issue addressed a matter of public concern. *Morris*, which appeared to anticipate *Garcetti*, asked both whether the speech at issue was speech of an employee (and not a citizen) and whether it touched upon a matter of public concern. In this respect, one could read *Morris* as cabining *Martinez* and *Tindal*.

Finally, Lane argues that decisions of the Third and Seventh Circuits put Franks on notice that his firing of Lane was unconstitutional. See *Reilly*, 532 F. 3d, at 231 (CA3) (truthful testimony in court is citizen speech protected by the First Amendment); *Morales* v. *Jones*, 494 F. 3d 590, 598 (CA7 2007) (similar). But, as the court below acknowledged, those precedents were in direct conflict with Eleventh Circuit precedent. See 523 Fed. Appx., at 712, n. 3.

There is no doubt that the Eleventh Circuit incorrectly concluded that Lane's testimony was not entitled to First Amendment protection. But because the question was not "beyond debate" at the time Franks acted, *al-Kidd*, 563 U. S., at 741, Franks is entitled to qualified immunity.

V

Lane's speech is entitled to First Amendment protection, but because respondent Franks is entitled to qualified immunity, we affirm the judgment of the Eleventh Circuit as to the claims against Franks in his individual capacity. Our decision does not resolve, however, the claims against Burrow—initially brought against Franks when he served as president of CACC—in her official capacity. Although the District Court dismissed those claims for prospective relief as barred by the Eleventh Amendment, the Eleventh Circuit declined to consider that question on appeal, see 523 Fed. Appx., at 711 ("Because Lane has failed to establish a *prima facie* case of retaliation, we do not decide about Franks' defense of sovereign immunity"), and the parties have not asked us to consider it now. We therefore reverse the judgment of the Eleventh Circuit as to those claims and remand for further proceedings.

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit is affirmed

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE ALITO join, concurring.

This case presents the discrete question whether a public employee speaks "as a citizen on a matter of public concern," *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006), when the employee gives "[t]ruthful testimony under oath . . . outside the scope of his ordinary job duties," *ante*, at 238. Answering that question requires little more than a straightforward application of *Garcetti*. There, we held that when a public employee speaks "pursuant to" his official duties, he is not speaking "as a citizen," and First Amendment protection is unavailable. 547 U. S., at 421–422. The petitioner in this case did not speak "pursuant to" his ordinary job duties because his responsibilities did not include testifying in court proceedings, see *ante*, at 238, n. 4, and no party has suggested that he was subpoenaed as a representative of his employer, see Fed. Rule Civ. Proc. 30(b)(6) (requiring subpoenaed organizations to designate witnesses to testify on their behalf). Because petitioner did not testify to "fulfil[l] a [work] responsibility," *Garcetti*, *supra*, at 421, he spoke "as a citizen," not as an employee.

We accordingly have no occasion to address the quite different question whether a public employee speaks "as a citizen" when he testifies in the course of his ordinary job responsibilities. See *ante*, at 238, n. 4. For some public employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties. Others may be called to testify in the context of particular litigation as the designated representatives of their employers. See Fed. Rule Civ. Proc. 30(b)(6). The Court properly leaves the constitutional questions raised by these scenarios for another day.

Syllabus

UNITED STATES *v.* CLARKE ET AL.

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

No. 13–301. Argued April 23, 2014—Decided June 19, 2014

The Internal Revenue Service (IRS) issued summonses to the respondents for information and records relevant to the tax obligations of Dynamo Holdings L. P. See 26 U. S. C. § 7602(a). When the respondents failed to comply, the IRS brought an enforcement action in District Court. The respondents challenged the IRS's motives in issuing the summonses, seeking to question the responsible agents. The District Court denied the request and ordered the summonses enforced, characterizing the respondents' arguments as conjecture and incorrect as a matter of law. The Eleventh Circuit reversed, holding that the District Court's refusal to allow the respondents to examine the agents constituted an abuse of discretion, and that Circuit precedent entitled them to conduct such questioning regardless of whether they had presented any factual support for their claims.

Held: A taxpayer has a right to conduct an examination of IRS officials regarding their reasons for issuing a summons when he points to specific facts or circumstances plausibly raising an inference of bad faith. Pp. 253–257.

(a) A person receiving a summons is entitled to contest it in an adversarial enforcement proceeding. *Donaldson* v. *United States*, 400 U. S. 517, 524. But these proceedings are "summary in nature," *United States* v. *Stuart*, 489 U. S. 353, 369, and the only relevant question is whether the summons was issued in good faith, *United States* v. *Powell*, 379 U. S. 48, 56. The balance struck in this Court's prior cases supports a requirement that a summons objector offer not just naked allegations, but some credible evidence to support his claim of improper motive. Circumstantial evidence can suffice to meet that burden, and a fleshed out case is not demanded: The taxpayer need only present a plausible basis for his charge. Pp. 253–255.

(b) Here, however, the Eleventh Circuit applied a categorical rule demanding the examination of IRS agents without assessing the plausibility of the respondents' submissions. On remand, the Court of Appeals must consider those submissions in light of the standard set forth here, giving appropriate deference to the District Court's ruling on whether the respondents have shown enough to entitle them to examine the agents. However, that ruling is entitled to deference only if it was

based on the correct legal standard. See *Fox* v. *Vice*, 563 U. S. 826, 839. And the District Court's latitude does not extend to legal issues about what counts as an illicit motive. Cf. *Koon* v. *United States*, 518 U. S. 81, 100. Pp. 255–257.

517 Fed. Appx. 689, vacated and remanded.

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

Sarah E. Harrington argued the cause for the United States. With her on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Keneally*, *Deputy Solicitor General Stewart*, *Robert W. Metzler*, and *Deborah K. Snyder*.

Edward A. Marod argued the cause for respondents. With him on the brief were *Jack J. Aiello*, *Martin R. Press*, *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Joshua M. Salzman*, and *Christina Manfredi McKinley*.

JUSTICE KAGAN delivered the opinion of the Court.

The Internal Revenue Service (IRS or Service) has broad statutory authority to summon a taxpayer to produce documents or give testimony relevant to determining tax liability. If the taxpayer fails to comply, the IRS may petition a federal district court to enforce the summons. In an enforcement proceeding, the IRS must show that it issued the summons in good faith.

This case requires us to consider when a taxpayer, as part of such a proceeding, has a right to question IRS officials about their reasons for issuing a summons. We hold, contrary to the Court of Appeals below, that a bare allegation of improper purpose does not entitle a taxpayer to examine IRS officials. Rather, the taxpayer has a right to conduct that examination when he points to specific facts or circumstances plausibly raising an inference of bad faith.

I

Congress has "authorized and required" the IRS "to make the inquiries, determinations, and assessments of all taxes"

the Internal Revenue Code imposes. 26 U. S. C. § 6201(a). And in support of that authority, Congress has granted the Service broad latitude to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . , or collecting any such liability." § 7602(a). Such a summons directs a taxpayer (or associated person[1]) to appear before an IRS official and to provide sworn testimony or produce "books, papers, records, or other data . . . relevant or material to [a tax] inquiry." § 7602(a)(1).

If a taxpayer does not comply with a summons, the IRS may bring an enforcement action in district court. See §§ 7402(b), 7604(a). In that proceeding, we have held, the IRS "need only demonstrate good faith in issuing the summons." *United States* v. *Stuart*, 489 U. S. 353, 359 (1989). More specifically, that means establishing what have become known as the *Powell* factors: "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS's] possession, and that the administrative steps required by the [Internal Revenue] Code have been followed." *United States* v. *Powell*, 379 U. S. 48, 57–58 (1964). To make that showing, the IRS usually files an affidavit from the responsible investigating agent. See *Stuart*, 489 U. S., at 360. The taxpayer, however, has an opportunity to challenge that affidavit, and to urge the court to quash the summons "on any appropriate ground"—including, as relevant here, improper purpose. See *Reisman* v. *Caplin*, 375 U. S. 440, 449 (1964).

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[1] The IRS has authority to summon not only "the person liable for tax," but also "any officer or employee of such person," any person having custody of relevant "books of account," and "any other person the [IRS] may deem proper." 26 U. S. C. § 7602(a)(2). For convenience, this opinion refers only to the "taxpayer."

The summons dispute in this case arose from an IRS examination of the tax returns of Dynamo Holdings Limited Partnership (Dynamo) for the 2005–2007 tax years. The IRS harbored suspicions about large interest expenses that those returns had reported. As its investigation proceeded, the Service persuaded Dynamo to agree to two year-long extensions of the usual 3-year limitations period for assessing tax liability; in 2010, with that period again drawing to a close, Dynamo refused to grant the IRS a third extension. Shortly thereafter, in September and October 2010, the IRS issued summonses to the respondents here, four individuals associated with Dynamo whom the Service believed had information and records relevant to Dynamo's tax obligations. None of the respondents complied with those summonses. In December 2010 (still within the augmented limitations period), the IRS issued a Final Partnership Administrative Adjustment proposing changes to Dynamo's returns that would result in greater tax liability. Dynamo responded in February 2011 by filing suit in the United States Tax Court to challenge the adjustments. That litigation remains pending. A few months later, in April 2011, the IRS instituted proceedings in District Court to compel the respondents to comply with the summonses they had gotten.

Those enforcement proceedings developed into a dispute about the IRS's reasons for issuing the summonses. The IRS submitted an investigating agent's affidavit attesting to the *Powell* factors; among other things, that declaration maintained that the testimony and records sought were necessary to "properly investigate the correctness of [Dynamo's] federal tax reporting" and that the summonses were "not issued to harass or for any other improper purpose." App. 26, 34. In reply, the respondents pointed to circumstantial evidence that, in their view, suggested "ulterior motive[s]" of two different kinds. App. to Pet. for Cert. 72a. First, the respondents asserted that the IRS issued the summonses to "punish[ ] [Dynamo] for refusing to agree to a further ex-

tension of the applicable statute of limitations." App. 52. More particularly, they stated in sworn declarations that immediately after Dynamo declined to grant a third extension of time, the IRS, "despite having not asked for additional information for some time, . . . suddenly issued" the summonses. *Id.*, at 95. Second, the respondents averred that the IRS decided to *enforce* the summonses, subsequent to Dynamo's filing suit in Tax Court, to "evad[e] the Tax Court['s] limitations on discovery" and thus gain an unfair advantage in that litigation. *Id.*, at 53. In support of that charge, the respondents submitted an affidavit from the attorney of another Dynamo associate, who had chosen to comply with a summons issued at the same time. The attorney reported that only the IRS attorneys handling the Tax Court case, and not the original investigating agents, were present at the interview of his client. In light of those submissions, the respondents asked for an opportunity to question the agents about their motives.

The District Court denied that request and ordered the respondents to comply with the summonses. According to the court, the respondents "ha[d] made no meaningful allegations of improper purpose" warranting examination of IRS agents. App. to Pet. for Cert. 18a. The court characterized the respondents' statute-of-limitations theory as "mere conjecture." *Id.*, at 14a. And it ruled that the respondents' evasion-of-discovery-limits claim was "incorrect as a matter of law" because "[t]he validity of a summons is tested as of the date of issuance," not enforcement—and the Tax Court proceedings had not yet begun when the IRS issued the summonses. *Id.*, at 15a.

The Court of Appeals for the Eleventh Circuit reversed, holding that the District Court's refusal to allow the respondents to examine IRS agents constituted an abuse of discretion. In support of that ruling, the Court of Appeals cited binding Circuit precedent holding that a simple "allegation of improper purpose," even if lacking any "factual sup-

port," entitles a taxpayer to "question IRS officials concerning the Service's reasons for issuing the summons." 517 Fed. Appx. 689, 691 (2013) (quoting *United States* v. *Southeast First Nat. Bank of Miami Springs*, 655 F. 2d 661, 667 (CA5 1981)); see *Nero Trading, LLC* v. *United States Dept. of Treasury*, 570 F. 3d 1244, 1249 (CA11 2009) (reaffirming *Southeast*).

Every other Court of Appeals has rejected the Eleventh Circuit's view that a bare allegation of improper motive entitles a person objecting to an IRS summons to examine the responsible officials.[2] We granted certiorari to resolve that conflict, 571 U. S. 1118 (2014), and we now vacate the Eleventh Circuit's opinion.

II

A person receiving an IRS summons is, as we have often held, entitled to contest it in an enforcement proceeding. See *United States* v. *Bisceglia*, 420 U. S. 141, 146 (1975); *Powell*, 379 U. S., at 57–58; *Reisman*, 375 U. S., at 449. The power "vested in tax collectors may be abused, as all power" may be abused. *Bisceglia*, 420 U. S., at 146. In recognition of that possibility, Congress made enforcement of an IRS summons contingent on a court's approval. See 26 U. S. C. § 7604(b). And we have time and again stated that the requisite judicial proceeding is not *ex parte* but adversarial. See *Donaldson* v. *United States*, 400 U. S. 517, 527 (1971); *Powell*, 379 U. S., at 58; *Reisman*, 375 U. S., at 446. The

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[2] See, *e. g.*, *Sugarloaf Funding, LLC* v. *United States Dept. of Treasury*, 584 F. 3d 340, 350–351 (CA1 2009) (requiring "a sufficient threshold showing that there was an improper purpose"); *Fortney* v. *United States*, 59 F. 3d 117, 121 (CA9 1995) (requiring "some minimal amount of evidence" beyond "mere memoranda of law or allegations" (internal quotation marks and alterations omitted)); *United States* v. *Kis*, 658 F. 2d 526, 540 (CA7 1981) (requiring "develop[ment] [of] facts from which a court might infer a possibility of some wrongful conduct"); *United States* v. *Garden State Nat. Bank*, 607 F. 2d 61, 71 (CA3 1979) (requiring "factual[ ] support[ ] by the taxpayer's affidavits").

summoned party must receive notice, and may present argument and evidence on all matters bearing on a summons's validity. See *Powell*, 379 U. S., at 58.

Yet we have also emphasized that summons enforcement proceedings are to be "summary in nature." *Stuart*, 489 U. S., at 369. The purpose of a summons is "not to accuse," much less to adjudicate, but only "to inquire." *Bisceglia*, 420 U. S., at 146. And such an investigatory tool, we have recognized, is a crucial backstop in a tax system based on self-reporting. See *ibid.* (restricting summons authority would enable "dishonest persons [to] escap[e] taxation[,] thus shifting heavier burdens to honest taxpayers"). Accordingly, we long ago held that courts may ask only whether the IRS issued a summons in good faith, and must eschew any broader role of "oversee[ing] the [IRS's] determinations to investigate." *Powell*, 379 U. S., at 56. So too, we stated that absent contrary evidence, the IRS can satisfy that standard by submitting a simple affidavit from the investigating agent. See *Stuart*, 489 U. S., at 359–360. Thus, we have rejected rules that would "thwart and defeat the [Service's] appropriate investigatory powers." *Donaldson*, 400 U. S., at 533.

The balance we have struck in prior cases comports with the following rule, applicable here: As part of the adversarial process concerning a summons's validity, the taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge. But circumstantial evidence can suffice to meet that burden; after all, direct evidence of another person's bad faith, at this threshold stage, will rarely if ever be available. And although bare assertion or conjecture is not enough, neither is a fleshed out case demanded: The taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive. That standard will ensure

inquiry where the facts and circumstances make inquiry appropriate, without turning every summons dispute into a fishing expedition for official wrongdoing. And the rule is little different from the one that *both* the respondents and the Government have recommended to us.[3]

But that is not the standard the Eleventh Circuit applied. Although the respondents gamely try to put another face on the opinion below, see Brief for Respondents 24–25, and n. 17, we have no doubt that the Court of Appeals viewed even bare allegations of improper purpose as entitling a summons objector to question IRS agents. The court in fact had some evidence before it pertaining to the respondents' charges: The respondents, for example, had submitted one declaration relating the timing of the summonses to Dynamo's refusal to extend the limitations period, see App. 95, and another aiming to show that the IRS was using the summonses to obtain discovery it could not get in Tax Court, see *id.*, at 97–100. But the Eleventh Circuit never assessed whether those (or any other) materials plausibly supported an inference of improper motive; indeed, the court never mentioned the proffered evidence at all. Instead, and in line with Circuit precedent, the court applied a categorical rule, demanding the examination of IRS agents even when a taxpayer made only conclusory allegations. See *supra*, at 252. That was error. On remand, the Court of Appeals must consider the respondents' submissions in light of the standard we have stated.

That consideration must as well give appropriate deference to the District Court's ruling. An appellate court, as the Eleventh Circuit noted, reviews for abuse of discretion a trial court's decision to order—or not—the questioning of

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[3] See Tr. of Oral Arg. 29 (respondents) (The taxpayer is entitled to question the agent "when he presents specific facts from which an improper purpose . . . may plausibly be inferred"); *id.*, at 5 (United States) ("[A] summons opponent has to put in enough evidence to at least raise an inference" of improper motive, and "[c]ircumstantial evidence is enough").

IRS agents. See 517 Fed. Appx., at 691, n. 2; *Tiffany Fine Arts, Inc.* v. *United States*, 469 U. S. 310, 324, n. 7 (1985). That standard of review reflects the district court's superior familiarity with, and understanding of, the dispute; and it comports with the way appellate courts review related matters of case management, discovery, and trial practice. See, *e. g.*, *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 172–173 (1989); *Crawford-El* v. *Britton*, 523 U. S. 574, 599–601 (1998). Accordingly, the Court of Appeals must take into account on remand the District Court's broad discretion to determine whether a taxpayer has shown enough to require the examination of IRS investigators.

But two caveats to that instruction are in order here. First, the District Court's decision is entitled to deference only if based on the correct legal standard. See *Fox* v. *Vice*, 563 U. S. 826, 839 (2011) ("A trial court has wide discretion when, but only when, it calls the game by the right rules"). We leave to the Court of Appeals the task of deciding whether the District Court asked and answered the relevant question—once again, whether the respondents pointed to specific facts or circumstances plausibly raising an inference of improper motive.

And second, the District Court's latitude does not extend to legal issues about what counts as an illicit motive. As indicated earlier, one such issue is embedded in the respondents' claim that the Government moved to enforce these summonses to gain an unfair advantage in Tax Court litigation. See *supra*, at 252–253. The Government responds, and the District Court agreed, that any such purpose is irrelevant because "the validity of a summons is judged at the time" the IRS originally *issued* the summons, and here that preceded the Tax Court suit. Tr. of Oral Arg. 7; see Reply Brief 19–20; App. to Pet. for Cert. 15a. Similarly, with respect to the respondents' alternative theory, the Government briefly suggested at argument that issuing a summons because "a taxpayer declined to extend a statute of limitations

would [not] be an improper purpose," even assuming that happened here. Tr. of Oral Arg. 6. We state no view on those issues; they are not within the question presented for our review. We note only that they are pure questions of law, so if they arise again on remand, the Court of Appeals has no cause to defer to the District Court. Cf. *Koon* v. *United States*, 518 U. S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law").

For these reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

HALLIBURTON CO. ET AL. *v.* ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

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

No. 13–317. Argued March 5, 2014—Decided June 23, 2014

Investors can recover damages in a private securities fraud action only if they prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock. In *Basic Inc.* v. *Levinson*, 485 U. S. 224, this Court held that investors could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misrepresentations. The Court also held, however, that a defendant could rebut this presumption by showing that the alleged misrepresentation did not actually affect the stock price—that is, that it had no "price impact."

Respondent Erica P. John Fund, Inc. (EPJ Fund), filed a putative class action against Halliburton and one of its executives (collectively Halliburton), alleging that they made misrepresentations designed to inflate Halliburton's stock price, in violation of section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5. The District Court initially denied EPJ Fund's class certification motion, and the Fifth Circuit affirmed. But this Court vacated that judgment, concluding that securities fraud plaintiffs need not prove loss causation—a causal connection between the defendants' alleged misrepresentations and the plaintiffs' economic losses—at the class certification stage in order to invoke *Basic*'s presumption of reliance. On remand, Halliburton argued that class certification was nonetheless inappropriate because the evidence it had earlier introduced to disprove loss causation also showed that its alleged misrepresentations had not affected its stock price. By demonstrating the absence of any "price impact," Halliburton contended, it had rebutted the *Basic* presumption. And without the benefit of that presumption, investors would have to prove reliance on an individual basis, meaning that individual issues would predominate over common ones and class certification would be inappropriate under Federal Rule of Civil Procedure 23(b)(3). The District Court rejected Halliburton's argument and certified the class. The Fifth Circuit affirmed, concluding that Halliburton could use its

price impact evidence to rebut the *Basic* presumption only at trial, not at the class certification stage.

Held:

1. Halliburton has not shown a "special justification," *Dickerson* v. *United States*, 530 U. S. 428, 443, for overruling *Basic*'s presumption of reliance. Pp. 266–277.

(a) To recover damages under section 10(b) and Rule 10b–5, a plaintiff must prove, as relevant here, "'reliance upon the misrepresentation or omission.'" *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. 455, 460–461. The Court recognized in *Basic*, however, that requiring direct proof of reliance from every individual plaintiff "would place an unnecessarily unrealistic evidentiary burden on the . . . plaintiff who has traded on an impersonal market," 485 U. S., at 245, and "effectively would" prevent plaintiffs "from proceeding with a class action" in Rule 10b–5 suits, *id.*, at 242. To address these concerns, the Court held that plaintiffs could satisfy the reliance element of a Rule 10b–5 action by invoking a rebuttable presumption of reliance. The Court based that presumption on what is known as the "fraud-on-the-market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.*, at 246. The Court also noted that the typical "investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Id.*, at 247. As a result, whenever an investor buys or sells stock at the market price, his "reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b–5 action." *Ibid.* *Basic* also emphasized that the presumption of reliance was rebuttable rather than conclusive. Pp. 267–269.

(b) None of Halliburton's arguments for overruling *Basic* so discredit the decision as to constitute a "special justification." Pp. 269–274.

(1) Halliburton first argues that the *Basic* presumption is inconsistent with Congress's intent in passing the 1934 Exchange Act—the same argument made by the dissenting Justices in *Basic*. The *Basic* majority did not find that argument persuasive then, and Halliburton has given no new reason to endorse it now. Pp. 269–270.

(2) Halliburton also contends that *Basic* rested on two premises that have been undermined by developments in economic theory. First, it argues that the *Basic* Court espoused "a robust view of market efficiency" that is no longer tenable in light of empirical evidence ostensibly showing that material, public information often is not quickly incorporated into stock prices. The Court in *Basic* acknowledged, however, the debate among economists about the efficiency of capital markets and

refused to endorse "any particular theory of how quickly and completely publicly available information is reflected in market price." 485 U. S., at 248, n. 28. The Court instead based the presumption of reliance on the fairly modest premise that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Id.*, at 247, n. 24. Moreover, in making the presumption rebuttable, *Basic* recognized that market efficiency is a matter of degree and accordingly made it a matter of proof. Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities.

Halliburton also contests the premise that investors "invest 'in reliance on the integrity of [the market] price,'" *id.*, at 247, identifying a number of classes of investors for whom "price integrity" is supposedly "marginal or irrelevant." But *Basic* never denied the existence of such investors, who in any event rely at least on the facts that market prices will incorporate public information within a reasonable period and that market prices, however inaccurate, are not distorted by fraud. Pp. 270–274.

(c) The principle of *stare decisis* has "'special force'" "in respect to statutory interpretation" because "'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139. So too with *Basic*'s presumption of reliance. The presumption is not inconsistent with this Court's more recent decisions construing the Rule 10b–5 cause of action. In *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, and *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, the Court declined to effectively eliminate the reliance element by extending liability to entirely new categories of defendants who themselves had not made any material, public misrepresentation. The *Basic* presumption, by contrast, merely provides an alternative means of satisfying the reliance element. Nor is the *Basic* presumption inconsistent with the Court's recent decisions governing class action certification, which require plaintiffs to *prove*—not simply plead—that their proposed class satisfies each requirement of Federal Rule of Civil Procedure 23, including, if applicable, the predominance requirement of Rule 23(b)(3). See, *e. g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350. The *Basic* presumption does not relieve plaintiffs of that burden but rather sets forth what plaintiffs must prove to demonstrate predominance. Finally, Halliburton emphasizes the possible harmful consequences of the securities class actions facilitated by the *Basic* presumption, but such concerns are more appropriately addressed to Congress, which has in fact responded, to some extent, to many of them. Pp. 274–277.

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2. For the same reasons the Court declines to overrule *Basic*'s presumption of reliance, it also declines to modify the prerequisites for invoking the presumption by requiring plaintiffs to prove "price impact" directly at the class certification stage. The *Basic* presumption incorporates two constituent presumptions: First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation. Requiring plaintiffs to prove price impact directly would take away the first constituent presumption. Halliburton's argument for doing so is the same as its argument for overruling the *Basic* presumption altogether, and it meets the same fate. Pp. 277–279.

3. The Court agrees with Halliburton, however, that defendants must be afforded an opportunity to rebut the presumption of reliance before class certification with evidence of a *lack* of price impact. Defendants may already introduce such evidence at the merits stage to rebut the *Basic* presumption, as well as at the class certification stage to counter a plaintiff's showing of market efficiency. Forbidding defendants to rely on the same evidence prior to class certification for the particular purpose of rebutting the presumption altogether makes no sense, and can readily lead to results that are inconsistent with *Basic*'s own logic. *Basic* allows plaintiffs to establish price impact indirectly, by showing that a stock traded in an efficient market and that a defendant's misrepresentations were public and material. But an indirect proxy should not preclude consideration of a defendant's direct, more salient evidence showing that an alleged misrepresentation did not actually affect the stock's price and, consequently, that the *Basic* presumption does not apply. *Amgen* does not require a different result. There, the Court held that materiality, though a prerequisite for invoking the *Basic* presumption, should be left to the merits stage because it does not bear on the predominance requirement of Rule 23(b)(3). In contrast, the fact that a misrepresentation has price impact is "*Basic*'s fundamental premise." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 813. It thus has everything to do with the issue of predominance at the class certification stage. That is why, if reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be proved before class certification. Given that such indirect evidence of price impact will be before the court at the class certification stage in any event, there is no reason to artificially limit the inquiry at that stage by excluding direct evidence of price impact. Pp. 279–284.

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718 F. 3d 423, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion, in which BREYER and SOTOMAYOR, JJ., joined, *post*, p. 284. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA and ALITO, JJ., joined, *post*, p. 284.

Aaron M. Streett argued the cause for petitioners. With him on the briefs were *David D. Sterling*, *Evan A. Young*, and *William Bradford Reynolds*.

David Boies argued the cause for respondent. With him on the brief were *Carl E. Goldfarb*, *Lewis Kahn*, *Neil Rothstein*, *E. Lawrence Vincent, Jr.*, and *Kim Miller*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Nicole A. Saharsky*, *Anne K. Small*, *Michael A. Conley*, *Jacob H. Stillman*, and *Jeffrey A. Berger*.*

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*Briefs of *amici curiae* urging reversal were filed for American Institute of Certified Public Accountants by *Paul D. Clement*; for Amgen Inc. by *Seth P. Waxman*, *Louis R. Cohen*, *Daniel S. Volchok*, *Kelly P. Dunbar*, and *Noah A. Levine*; for the Chamber of Commerce of the United States of America et al. by *Steven G. Bradbury*, *Lily Fu Claffee*, *Rachel L. Brand*, *Sheldon Gilbert*, *Linda Kelly*, *Quentin Riegel*, *James M. "Mit" Spears*, and *Melissa B. Kimmel*; for the Committee on Capital Markets Regulation by *Lewis J. Liman*, *Mitchell A. Lowenthal*, and *Hal S. Scott*; for DRI–The Voice of the Defense Bar by *J. Michael Weston*, *Timothy R. McCormick*, *Richard B. Phillips, Jr.*, and *Michael W. Stockham*; for Former SEC Commissioners et al. by *John F. Savarese*, *George T. Conway III*, and *Joseph A. Grundfest*; for Law Professors by *John P. Elwood* and *Jennifer B. Poppe*; for the Securities Industry and Financial Markets Association by *Charles E. Davidow*, *Kevin M. Carroll*, and *Walter Rieman*; for Vivendi S. A. by *James W. Quinn*, *Miranda Schiller*, *Gregory Silbert*, *Miguel A. Estrada*, and *Mark A. Perry*; and for the Washington Legal Foundation by *Lyle Roberts* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Oregon et al. by *Ellen F. Rosenblum*, Attorney General of Oregon, and *Anna Joyce*, Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Dustin McDaniel* of Arkansas, *George Jepsen* of Connecticut, *Leonardo M. Rapadas* of Guam, *David M. Louie*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Investors can recover damages in a private securities fraud action only if they prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock. In *Basic Inc.* v. *Levinson*, 485 U. S. 224 (1988), we held that investors could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misstatements. In such a case, we concluded, anyone who buys or sells the stock at the market price may be considered to have relied on those misstatements.

We also held, however, that a defendant could rebut this presumption in a number of ways, including by showing that the alleged misrepresentation did not actually affect the

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of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *Janet T. Mills* of Maine, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Eric T. Schneiderman* of New York, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Robert E. Cooper, Jr.*, of Tennessee, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for AARP by *Jay E. Sushelsky* and *Michael Schuster*; for Civil Procedure Scholars by *Jonathan S. Massey* and *Daniel Berger*; for the Council of Institutional Investors et al. by *Ryan P. Bates*, *Grant F. Langley*, and *Ann Marie Johnson*; for Current and Former Members of Congress et al. by *David E. Mills* and *Barry A. Weprin*; for Financial Economists by *Ernest A. Young* and *Leonard Barrack*; for Former SEC Chairman William H. Donaldson et al. by *James A. Feldman*, *Meyer Eisenberg*, and *Edward Labaton*; for Institutional Investors by *Brian Stuart Koukoutchos*, *David Kessler*, *Darren J. Check*, *Jay W. Eisenhofer*, and *Max W. Berger*; for Legal Scholars by *Charles Fried*, *Thomas C. Goldstein*, *Kevin K. Russell*, and *James E. Cecchi*; for Securities Law Scholars by *Jill E. Fisch*, *pro se*; and for Testifying Economists by *Erik S. Jaffe* and *Marc I. Gross*.

Brendan P. Cullen, *Robert J. Giuffra, Jr.*, *Matthew A. Schwartz*, *Brent J. McIntosh*, and *Jeffrey B. Wall* filed a brief for Former Members of Congress et al. as *amici curiae*.

stock's price—that is, that the misrepresentation had no "price impact." The questions presented are whether we should overrule or modify *Basic*'s presumption of reliance and, if not, whether defendants should nonetheless be afforded an opportunity in securities class action cases to rebut the presumption at the class certification stage, by showing a lack of price impact.

I

Respondent Erica P. John Fund, Inc. (EPJ Fund), is the lead plaintiff in a putative class action against Halliburton and one of its executives (collectively Halliburton) alleging violations of section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b), and Securities and Exchange Commission Rule 10b–5, 17 CFR § 240.10b–5 (2013). According to EPJ Fund, between June 3, 1999, and December 7, 2001, Halliburton made a series of misrepresentations regarding its potential liability in asbestos litigation, its expected revenue from certain construction contracts, and the anticipated benefits of its merger with another company—all in an attempt to inflate the price of its stock. Halliburton subsequently made a number of corrective disclosures, which, EPJ Fund contends, caused the company's stock price to drop and investors to lose money.

EPJ Fund moved to certify a class comprising all investors who purchased Halliburton common stock during the class period. The District Court found that the proposed class satisfied all the threshold requirements of Federal Rule of Civil Procedure 23(a): It was sufficiently numerous, there were common questions of law or fact, the representative parties' claims were typical of the class claims, and the representatives could fairly and adequately protect the interests of the class. App. to Pet. for Cert. 54a. And except for one difficulty, the court would have also concluded that the class satisfied the requirement of Rule 23(b)(3) that "the questions of law or fact common to class members predominate over any questions affecting only individual members." See *id.*,

at 55a, 98a. The difficulty was that Circuit precedent required securities fraud plaintiffs to prove "loss causation"—a causal connection between the defendants' alleged misrepresentations and the plaintiffs' economic losses—in order to invoke *Basic*'s presumption of reliance and obtain class certification. App. to Pet. for Cert. 55a, and n. 2. Because EPJ Fund had not demonstrated such a connection for any of Halliburton's alleged misrepresentations, the District Court refused to certify the proposed class. *Id.*, at 55a, 98a. The United States Court of Appeals for the Fifth Circuit affirmed the denial of class certification on the same ground. *Archdiocese of Milwaukee Supporting Fund, Inc.* v. *Halliburton Co.*, 597 F. 3d 330 (2010).

We granted certiorari and vacated the judgment, finding nothing in "*Basic* or its logic" to justify the Fifth Circuit's requirement that securities fraud plaintiffs prove loss causation at the class certification stage in order to invoke *Basic*'s presumption of reliance. *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 812 (2011) (*Halliburton I*). "Loss causation," we explained, "addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Ibid.* We remanded the case for the lower courts to consider "any further arguments against class certification" that Halliburton had preserved. *Id.*, at 815.

On remand, Halliburton argued that class certification was inappropriate because the evidence it had earlier introduced to disprove loss causation also showed that none of its alleged misrepresentations had actually affected its stock price. By demonstrating the absence of any "price impact," Halliburton contended, it had rebutted *Basic*'s presumption that the members of the proposed class had relied on its alleged misrepresentations simply by buying or selling its stock at the market price. And without the benefit of the *Basic* presumption, investors would have to prove reliance on an individual basis, meaning that in-

dividual issues would predominate over common ones. The District Court declined to consider Halliburton's argument, holding that the *Basic* presumption applied and certifying the class under Rule 23(b)(3). App. to Pet. for Cert. 30a.

The Fifth Circuit affirmed. 718 F. 3d 423 (2013). The court found that Halliburton had preserved its price impact argument, but to no avail. *Id.*, at 435–436. While acknowledging that "Halliburton's price impact evidence could be used at the trial on the merits to refute the presumption of reliance," *id.*, at 433, the court held that Halliburton could not use such evidence for that purpose at the class certification stage, *id.*, at 435. "[P]rice impact evidence," the court explained, "does not bear on the question of common question predominance [under Rule 23(b)(3)], and is thus appropriately considered only on the merits after the class has been certified." *Ibid.*

We once again granted certiorari, 571 U. S. 1020 (2013), this time to resolve a conflict among the Circuits over whether securities fraud defendants may attempt to rebut the *Basic* presumption at the class certification stage with evidence of a lack of price impact. We also accepted Halliburton's invitation to reconsider the presumption of reliance for securities fraud claims that we adopted in *Basic*.

II

Halliburton urges us to overrule *Basic*'s presumption of reliance and to instead require every securities fraud plaintiff to prove that he actually relied on the defendant's misrepresentation in deciding to buy or sell a company's stock. Before overturning a long-settled precedent, however, we require "special justification," not just an argument that the precedent was wrongly decided. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (internal quotation marks omitted). Halliburton has failed to make that showing.

A

Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b–5 prohibit making any material misstatement or omission in connection with the purchase or sale of any security. Although section 10(b) does not create an express private cause of action, we have long recognized an implied private cause of action to enforce the provision and its implementing regulation. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975). To recover damages for violations of section 10(b) and Rule 10b–5, a plaintiff must prove "'(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. 455, 460–461 (2013) (quoting *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. 27, 37–38 (2011)).

The reliance element "'ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury.'" 568 U. S., at 461 (quoting *Halliburton I*, 563 U. S., at 810). "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e. g.*, purchasing common stock—based on that specific misrepresentation." *Id.*, at 810.

In *Basic*, however, we recognized that requiring such direct proof of reliance "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." 485 U. S., at 245. That is because, even assuming an investor could prove that he was aware of the misrepresentation, he would still have to "show a speculative state of facts, *i. e.*, how he would have acted . . . if the misrepresentation had not been made." *Ibid.*

We also noted that "[r]equiring proof of individualized reliance" from every securities fraud plaintiff "effectively would . . . prevent[ ] [plaintiffs] from proceeding with a class action" in Rule 10b–5 suits. *Id.*, at 242. If every plaintiff had to prove direct reliance on the defendant's misrepresentation, "individual issues then would . . . overwhelm[ ] the common ones," making certification under Rule 23(b)(3) inappropriate. *Ibid.*

To address these concerns, *Basic* held that securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b–5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation. The Court based that presumption on what is known as the "fraud-on-the-market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.*, at 246. The Court also noted that, rather than scrutinize every piece of public information about a company for himself, the typical "investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price"—the belief that it reflects all public, material information. *Id.*, at 247. As a result, whenever the investor buys or sells stock at the market price, his "reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b–5 action." *Ibid.*

Based on this theory, a plaintiff must make the following showings to demonstrate that the presumption of reliance applies in a given case: (1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed. See *id.*, at 248, n. 27; *Halliburton I*, *supra*, at 811.

At the same time, *Basic* emphasized that the presumption of reliance was rebuttable rather than conclusive. Specifi-

cally, "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." 485 U. S., at 248. So for example, if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price, or that a plaintiff would have bought or sold the stock even had he been aware that the stock's price was tainted by fraud, then the presumption of reliance would not apply. *Id.*, at 248–249. In either of those cases, a plaintiff would have to prove that he directly relied on the defendant's misrepresentation in buying or selling the stock.

B

Halliburton contends that securities fraud plaintiffs should *always* have to prove direct reliance and that the *Basic* Court erred in allowing them to invoke a presumption of reliance instead. According to Halliburton, the *Basic* presumption contravenes congressional intent and has been undermined by subsequent developments in economic theory. Neither argument, however, so discredits *Basic* as to constitute "special justification" for overruling the decision.

1

Halliburton first argues that the *Basic* presumption is inconsistent with Congress's intent in passing the 1934 Exchange Act. Because "[t]he Section 10(b) action is a 'judicial construct that Congress did not enact,'" this Court, Halliburton insists, "must identify—and borrow from—the express provision that is 'most analogous to the private 10b–5 right of action.'" Brief for Petitioners 12 (quoting *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164 (2008); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 294 (1993)). According to Halliburton, the closest analogue to section 10(b) is section 18(a) of the Act, which creates an express private

cause of action allowing investors to recover damages based on misrepresentations made in certain regulatory filings. 15 U. S. C. § 78r(a). That provision requires an investor to prove that he bought or sold stock "in reliance upon" the defendant's misrepresentation. *Ibid.* In ignoring this direct reliance requirement, the argument goes, the *Basic* Court relieved Rule 10b–5 plaintiffs of a burden that Congress would have imposed had it created the cause of action.

EPJ Fund contests both premises of Halliburton's argument, arguing that Congress has affirmed *Basic*'s construction of section 10(b) and that, in any event, the closest analogue to section 10(b) is not section 18(a) but section 9, 15 U. S. C. § 78i—a provision that does not require actual reliance.

We need not settle this dispute. In *Basic*, the dissenting Justices made the same argument based on section 18(a) that Halliburton presses here. See 485 U. S., at 257–258 (White, J., concurring in part and dissenting in part). The *Basic* majority did not find that argument persuasive then, and Halliburton has given us no new reason to endorse it now.

2

Halliburton's primary argument for overruling *Basic* is that the decision rested on two premises that can no longer withstand scrutiny. The first premise concerns what is known as the "efficient capital markets hypothesis." *Basic* stated that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.*, at 246. From that statement, Halliburton concludes that the *Basic* Court espoused "a robust view of market efficiency" that is no longer tenable, for "'overwhelming empirical evidence' now 'suggests that capital markets are not fundamentally efficient.'" Brief for Petitioners 14–16 (quoting Lev & de Villiers, Stock Price Crashes and 10b–5 Damages: A Legal, Economic, and Policy Analysis, 47 Stan. L. Rev. 7, 20 (1994)).

To support this contention, Halliburton cites studies purporting to show that "public information is often not incorporated immediately (much less rationally) into market prices." Brief for Petitioners 17; see *id.*, at 16–20. See also Brief for Law Professors as *Amici Curiae* 15–18.

Halliburton does not, of course, maintain that capital markets are *always* inefficient. Rather, in its view, *Basic*'s fundamental error was to ignore the fact that "'efficiency is not a binary, yes or no question.'" Brief for Petitioners 20 (quoting Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 167). The markets for some securities are more efficient than the markets for others, and even a single market can process different kinds of information more or less efficiently, depending on how widely the information is disseminated and how easily it is understood. Brief for Petitioners 20–21. Yet *Basic*, Halliburton asserts, glossed over these nuances, assuming a false dichotomy that renders the presumption of reliance both underinclusive and overinclusive: A misrepresentation can distort a stock's market price even in a generally inefficient market, and a misrepresentation can leave a stock's market price unaffected even in a generally efficient one. Brief for Petitioners 21.

Halliburton's criticisms fail to take *Basic* on its own terms. Halliburton focuses on the debate among economists about the degree to which the market price of a company's stock reflects public information about the company—and thus the degree to which an investor can earn an abnormal, above-market return by trading on such information. See Brief for Financial Economists as *Amici Curiae* 4–10 (describing the debate). That debate is not new. Indeed, the *Basic* Court acknowledged it and declined to enter the fray, declaring that "[w]e need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory." 485 U. S., at 246–247, n. 24. To recog-

nize the presumption of reliance, the Court explained, was not "conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.*, at 248, n. 28. The Court instead based the presumption on the fairly modest premise that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Id.*, at 247, n. 24. *Basic*'s presumption of reliance thus does not rest on a "binary" view of market efficiency. Indeed, in making the presumption rebuttable, *Basic* recognized that market efficiency is a matter of degree and accordingly made it a matter of proof.

The academic debates discussed by Halliburton have not refuted the modest premise underlying the presumption of reliance. Even the foremost critics of the efficient capital markets hypothesis acknowledge that public information generally affects stock prices. See, *e. g.*, Shiller, We'll Share the Honors, and Agree to Disagree, N. Y. Times, Oct. 27, 2013, p. BU6 ("Of course, prices reflect available information"). Halliburton also conceded as much in its reply brief and at oral argument. See Reply Brief 13 ("market prices generally respond to new, material information"); Tr. of Oral Arg. 7. Debates about the precise *degree* to which stock prices accurately reflect public information are thus largely beside the point. "That the . . . price [of a stock] may be inaccurate does not detract from the fact that false statements affect it, and cause loss," which is "all that *Basic* requires." *Schleicher* v. *Wendt*, 618 F. 3d 679, 685 (CA7 2010) (Easterbrook, C. J.). Even though the efficient capital markets hypothesis may have "garnered substantial criticism since *Basic*," *post*, at 289 (THOMAS, J., concurring in judgment), Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities. Contrast *State Oil Co.* v.

Khan, 522 U. S. 3 (1997), unanimously overruling *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968).

Halliburton also contests a second premise underlying the *Basic* presumption: the notion that investors "invest 'in reliance on the integrity of [the market] price.' " Reply Brief 14 (quoting 485 U. S., at 247; alteration in original). Halliburton identifies a number of classes of investors for whom "price integrity" is supposedly "marginal or irrelevant." Reply Brief 14. The primary example is the value investor, who believes that certain stocks are undervalued or overvalued and attempts to "beat the market" by buying the undervalued stocks and selling the overvalued ones. Brief for Petitioners 15–16 (internal quotation marks omitted). See also Brief for Vivendi S. A. as *Amicus Curiae* 3–10 (describing the investment strategies of day traders, volatility arbitragers, and value investors). If many investors "are indifferent to prices," Halliburton contends, then courts should not presume that investors rely on the integrity of those prices and any misrepresentations incorporated into them. Reply Brief 14.

But *Basic* never denied the existence of such investors. As we recently explained, *Basic* concluded only that "it is reasonable to presume that *most* investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen*, 568 U. S., at 462 (emphasis added).

In any event, there is no reason to suppose that even Halliburton's main counterexample—the value investor—is as indifferent to the integrity of market prices as Halliburton suggests. Such an investor implicitly relies on the fact that a stock's market price will eventually reflect material information—how else could the market correction on which his profit depends occur? To be sure, the value investor "does not believe that the market price accurately reflects public

information *at the time he transacts*." *Post*, at 294. But to indirectly rely on a misstatement in the sense relevant for the *Basic* presumption, he need only trade stock based on the belief that the market price will incorporate public information within a reasonable period. The value investor also presumably tries to estimate *how* undervalued or overvalued a particular stock is, and such estimates can be skewed by a market price tainted by fraud.

C

The principle of *stare decisis* has "'special force'" "in respect to statutory interpretation" because "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989)). So too with *Basic*'s presumption of reliance. Although the presumption is a judicially created doctrine designed to implement a judicially created cause of action, we have described the presumption as "a substantive doctrine of federal securities-fraud law." *Amgen*, *supra*, at 462. That is because it provides a way of satisfying the reliance element of the Rule 10b–5 cause of action. See, *e. g.*, *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341–342 (2005). As with any other element of that cause of action, Congress may overturn or modify any aspect of our interpretations of the reliance requirement, including the *Basic* presumption itself. Given that possibility, we see no reason to exempt the *Basic* presumption from ordinary principles of *stare decisis*.

To buttress its case for overruling *Basic*, Halliburton contends that, in addition to being wrongly decided, the decision is inconsistent with our more recent decisions construing the Rule 10b–5 cause of action. As Halliburton notes, we have held that "we must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'"

Janus Capital Group, Inc. v. *First Derivative Traders*, 564 U. S. 135, 142 (2011) (quoting *Stoneridge*, 552 U. S., at 167); see, *e. g.*, *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994) (refusing to recognize aiding-and-abetting liability under the Rule 10b–5 cause of action); *Stoneridge*, *supra* (refusing to extend Rule 10b–5 liability to certain secondary actors who did not themselves make material misstatements). Yet the *Basic* presumption, Halliburton asserts, does just the opposite, *expanding* the Rule 10b–5 cause of action. Brief for Petitioners 27–29.

Not so. In *Central Bank* and *Stoneridge*, we declined to extend Rule 10b–5 liability to entirely new categories of defendants who themselves had not made any material, public misrepresentation. Such an extension, we explained, would have eviscerated the requirement that a plaintiff prove that he relied on a misrepresentation made *by the defendant*. See *Central Bank*, *supra*, at 180; *Stoneridge*, *supra*, at 157, 159. The *Basic* presumption does not eliminate that requirement but rather provides an alternative means of satisfying it. While the presumption makes it easier for plaintiffs to prove reliance, it does not alter the elements of the Rule 10b–5 cause of action and thus maintains the action's original legal scope.

Halliburton also argues that the *Basic* presumption cannot be reconciled with our recent decisions governing class action certification under Federal Rule of Civil Procedure 23. Those decisions have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3). See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350 (2011); *Comcast Corp.* v. *Behrend*, 569 U. S. 27, 33–34 (2013). According to Halliburton, *Basic* relieves Rule 10b–5 plaintiffs of that burden, allowing courts to presume that common issues of reliance predominate over individual ones.

That is not the effect of the *Basic* presumption. In securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3). The *Basic* presumption does not relieve plaintiffs of the burden of proving—before class certification—that this requirement is met. *Basic* instead establishes that a plaintiff satisfies that burden by proving the prerequisites for invoking the presumption—namely, publicity, materiality, market efficiency, and market timing. The burden of proving those prerequisites still rests with plaintiffs and (with the exception of materiality) must be satisfied before class certification. *Basic* does not, in other words, allow plaintiffs simply to plead that common questions of reliance predominate over individual ones, but rather sets forth what they must prove to demonstrate such predominance.

Basic does afford defendants an opportunity to rebut the presumption of reliance with respect to an individual plaintiff by showing that he did not rely on the integrity of the market price in trading stock. While this has the effect of "leav[ing] individualized questions of reliance in the case," *post*, at 295, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.

Finally, Halliburton and its *amici* contend that, by facilitating securities class actions, the *Basic* presumption produces a number of serious and harmful consequences. Such class actions, they say, allow plaintiffs to extort large settlements from defendants for meritless claims; punish innocent shareholders, who end up having to pay settlements and judgments; impose excessive costs on businesses; and consume a disproportionately large share of judicial resources. Brief for Petitioners 39–45.

These concerns are more appropriately addressed to Congress, which has in fact responded, to some extent, to many of the issues raised by Halliburton and its *amici*. Congress has, for example, enacted the Private Securities Litigation Reform Act of 1995, 109 Stat. 737, which sought to combat perceived abuses in securities litigation with heightened pleading requirements, limits on damages and attorney's fees, a "safe harbor" for certain kinds of statements, restrictions on the selection of lead plaintiffs in securities class actions, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss. See *Amgen*, 568 U. S., at 476. And to prevent plaintiffs from circumventing these restrictions by bringing securities class actions under state law in state court, Congress also enacted the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227, which precludes many state law class actions alleging securities fraud. See *Amgen*, *supra*, at 476. Such legislation demonstrates Congress's willingness to consider policy concerns of the sort that Halliburton says should lead us to overrule *Basic*.

III

Halliburton proposes two alternatives to overruling *Basic* that would alleviate what it regards as the decision's most serious flaws. The first alternative would require plaintiffs to prove that a defendant's misrepresentation actually affected the stock price—so-called "price impact"—in order to invoke the *Basic* presumption. It should not be enough, Halliburton contends, for plaintiffs to demonstrate the general efficiency of the market in which the stock traded. Halliburton's second proposed alternative would allow defendants to rebut the presumption of reliance with evidence of a *lack* of price impact, not only at the merits stage—which all agree defendants may already do—but also before class certification.

A

As noted, to invoke the *Basic* presumption, a plaintiff must prove that: (1) the alleged misrepresentations were publicly

known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed. See *Basic*, 485 U. S., at 248, n. 27; *Amgen*, *supra*, at 471. Each of these requirements follows from the fraud-on-the-market theory underlying the presumption. If the misrepresentation was not publicly known, then it could not have distorted the stock's market price. So too if the misrepresentation was immaterial—that is, if it would not have " 'been viewed by the reasonable investor as having significantly altered the "total mix" of information made available,' " *Basic*, *supra*, at 231–232 (quoting *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449 (1976))—or if the market in which the stock traded was inefficient. And if the plaintiff did not buy or sell the stock after the misrepresentation was made but before the truth was revealed, then he could not be said to have acted in reliance on a fraud-tainted price.

The first three prerequisites are directed at price impact—"whether the alleged misrepresentations affected the market price in the first place." *Halliburton I*, 563 U. S., at 814. In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse. The "fundamental premise" underlying the presumption is "that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." 563 U. S., at 813. If it was not, then there is "no grounding for any contention that [the] investor[ ] indirectly relied on th[at] misrepresentation[ ] through [his] reliance on the integrity of the market price." *Amgen*, *supra*, at 473.

Halliburton argues that since the *Basic* presumption hinges on price impact, plaintiffs should be required to prove it directly in order to invoke the presumption. Proving the presumption's prerequisites, which are at best an imperfect proxy for price impact, should not suffice.

Far from a modest refinement of the *Basic* presumption, this proposal would radically alter the required showing for

the reliance element of the Rule 10b–5 cause of action. What is called the *Basic* presumption actually incorporates two constituent presumptions: First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation.

By requiring plaintiffs to prove price impact directly, Halliburton's proposal would take away the first constituent presumption. Halliburton's argument for doing so is the same as its primary argument for overruling the *Basic* presumption altogether: Because market efficiency is not a yes-or-no proposition, a public, material misrepresentation might not affect a stock's price even in a generally efficient market. But as explained, *Basic* never suggested otherwise; that is why it affords defendants an opportunity to rebut the presumption by showing, among other things, that the particular misrepresentation at issue did not affect the stock's market price. For the same reasons we declined to completely jettison the *Basic* presumption, we decline to effectively jettison half of it by revising the prerequisites for invoking it.

B

Even if plaintiffs need not directly prove price impact to invoke the *Basic* presumption, Halliburton contends that defendants should at least be allowed to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price. We agree.

1

There is no dispute that defendants may introduce such evidence at the merits stage to rebut the *Basic* presumption. *Basic* itself "made clear that the presumption was just that, and could be rebutted by appropriate evidence," including

evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock. *Halliburton I*, *supra*, at 811; see *Basic*, *supra*, at 248.

Nor is there any dispute that defendants may introduce price impact evidence at the class certification stage, so long as it is for the purpose of countering a plaintiff's showing of market efficiency, rather than directly rebutting the presumption. As EPJ Fund acknowledges, "[o]f course . . . defendants can introduce evidence at class certification of lack of price impact as some evidence that the market is not efficient." Brief for Respondent 53. See also Brief for United States as *Amicus Curiae* 26.

After all, plaintiffs themselves can and do introduce evidence of the *existence* of price impact in connection with "event studies"—regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events. See Brief for Law Professors as *Amici Curiae* 25–28. In this case, for example, EPJ Fund submitted an event study of various episodes that might have been expected to affect the price of Halliburton's stock, in order to demonstrate that the market for that stock takes account of material, public information about the company. See App. 217–230 (describing the results of the study). The episodes examined by EPJ Fund's event study included one of the alleged misrepresentations that form the basis of the Fund's suit. See *id.*, at 230, 343–344. See also *In re Xcelera.com Securities Litigation*, 430 F. 3d 503, 513 (CA1 2005) (event study included effect of misrepresentation challenged in the case).

Defendants—like plaintiffs—may accordingly submit price impact evidence prior to class certification. What defendants may not do, EPJ Fund insists and the Court of Appeals held, is rely on that same evidence prior to class certification for the particular purpose of rebutting the presumption altogether.

This restriction makes no sense, and can readily lead to bizarre results. Suppose a defendant at the certification

stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs' claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed.

Such a result is inconsistent with *Basic*'s own logic. Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute an indirect way of showing price impact. As explained, it is appropriate to allow plaintiffs to rely on this indirect proxy for price impact, rather than requiring them to prove price impact directly, given *Basic*'s rationales for recognizing a presumption of reliance in the first place. See *supra*, at 268, 277–278.

But an indirect proxy should not preclude direct evidence when such evidence is available. As we explained in *Basic*, "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance" because "the basis for finding that the fraud had been transmitted through market price would be gone." 485 U. S., at 248. And without the presumption of reliance, a Rule 10b–5 suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so com-

mon issues would not "predominate" over individual ones, as required by Rule 23(b)(3). *Id.*, at 242. Price impact is thus an essential precondition for any Rule 10b–5 class action. While *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply.

2

The Court of Appeals relied on our decision in *Amgen* in holding that Halliburton could not introduce evidence of lack of price impact at the class certification stage. The question in *Amgen* was whether plaintiffs could be required to prove (or defendants be permitted to disprove) materiality before class certification. Even though materiality is a prerequisite for invoking the *Basic* presumption, we held that it should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3). We reasoned that materiality is an objective issue susceptible to common, classwide proof. 568 U. S., at 467. We also noted that a failure to prove materiality would necessarily defeat every plaintiff's claim on the merits; it would not simply preclude invocation of the presumption and thereby cause individual questions of reliance to predominate over common ones. *Id.*, at 467–468. See also *id.*, at 474. In this latter respect, we explained, materiality differs from the publicity and market efficiency prerequisites, neither of which is necessary to prove a Rule 10b–5 claim on the merits. *Id.*, at 473–474.

EPJ Fund argues that much of the foregoing could be said of price impact as well. Fair enough. But price impact differs from materiality in a crucial respect. Given that the other *Basic* prerequisites must still be proved at the class certification stage, the common issue of materiality can be left to the merits stage without risking the certification of classes in which individual issues will end up overwhelming common ones. And because materiality is a discrete issue

that can be resolved in isolation from the other prerequisites, it can be wholly confined to the merits stage.

Price impact is different. The fact that a misrepresentation "was reflected in the market price at the time of [the] transaction"—that it had price impact—is "*Basic*'s fundamental premise." *Halliburton I*, 563 U. S., at 813. It thus has everything to do with the issue of predominance at the class certification stage. That is why, if reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be proved before class certification. Without proof of those prerequisites, the fraud-on-the-market theory underlying the presumption completely collapses, rendering class certification inappropriate.

But as explained, publicity and market efficiency are nothing more than prerequisites for an indirect showing of price impact. There is no dispute that at least such indirect proof of price impact "is needed to ensure that the questions of law or fact common to the class will 'predominate.'" *Amgen*, 568 U. S., at 467 (emphasis deleted); see *id.*, at 473–474. That is so even though such proof is also highly relevant at the merits stage.

Our choice in this case, then, is not between allowing price impact evidence at the class certification stage or relegating it to the merits. Evidence of price impact will be before the court at the certification stage in any event. The choice, rather, is between limiting the price impact inquiry before class certification to indirect evidence, or allowing consideration of direct evidence as well. As explained, we see no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact. Defendants may seek to defeat the *Basic* presumption at that stage through direct as well as indirect price impact evidence.

* * *

More than 25 years ago, we held that plaintiffs could satisfy the reliance element of the Rule 10b–5 cause of action by invoking a presumption that a public, material misrepre-

sentation will distort the price of stock traded in an efficient market, and that anyone who purchases the stock at the market price may be considered to have done so in reliance on the misrepresentation. We adhere to that decision and decline to modify the prerequisites for invoking the presumption of reliance. But to maintain the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23, defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.

Because the courts below denied Halliburton that opportunity, we vacate the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

Advancing price impact consideration from the merits stage to the certification stage may broaden the scope of discovery available at certification. See Tr. of Oral Arg. 36–37. But the Court recognizes that it is incumbent upon the defendant to show the absence of price impact. See *ante*, at 278–279. The Court's judgment, therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims. On that understanding, I join the Court's opinion.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE ALITO join, concurring in the judgment.

The implied Rule 10b–5 private cause of action is "a relic of the heady days in which this Court assumed common-law powers to create causes of action," *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (SCALIA, J., concurring); see, *e. g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964). We have since ended that practice because the au-

thority to fashion private remedies to enforce federal law belongs to Congress alone. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164 (2008). Absent statutory authorization for a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter." *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001).

Basic Inc. v. *Levinson*, 485 U. S. 224 (1988), demonstrates the wisdom of this rule. *Basic* presented the question how investors must prove the reliance element of the implied Rule 10b–5 cause of action—the requirement that the plaintiff buy or sell stock in reliance on the defendant's misstatement—when they transact on modern, impersonal securities exchanges. Were the Rule 10b–5 action statutory, the Court could have resolved this question by interpreting the statutory language. Without a statute to interpret for guidance, however, the Court began instead with a particular policy "problem": For investors in impersonal markets, the traditional reliance requirement was hard to prove and impossible to prove as common among plaintiffs bringing 10b–5 class-action suits. *Id.*, at 242, 245. With the task thus framed as "resol[ving]" that "'problem'" rather than interpreting statutory text, *id.*, at 242, the Court turned to nascent economic theory and naked intuitions about investment behavior in its efforts to fashion a new, easier way to meet the reliance requirement. The result was an evidentiary presumption, based on a "fraud on the market" theory, that paved the way for class actions under Rule 10b–5.

Today we are asked to determine whether *Basic* was correctly decided. The Court suggests that it was, and that *stare decisis* demands that we preserve it. I disagree. Logic, economic realities, and our subsequent jurisprudence have undermined the foundations of the *Basic* presumption, and *stare decisis* cannot prop up the facade that remains. *Basic* should be overruled.

I

Understanding where *Basic* went wrong requires an explanation of the "reliance" requirement as traditionally understood.

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element" of the implied 10b–5 private cause of action.[1] *Stoneridge*, *supra*, at 159. To prove reliance, the plaintiff must show "'transaction causation,'" *i. e.*, that the specific misstatement induced "the investor's decision to engage in the transaction." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 812 (2011). Such proof "ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury'"—namely, that the plaintiff has not just lost money as a result of the misstatement, but that he was actually *defrauded* by it. *Id.*, at 810; see also *Dirks* v. *SEC*, 463 U. S. 646, 666–667, n. 27 (1983) ("[T]o constitute a violation of Rule 10b–5, there must be fraud. . . . [T]here always are winners and losers; but those who have 'lost' have not necessarily been defrauded"). Without that connection, Rule 10b–5 is reduced to a "'scheme of investor's insurance,'" because a plaintiff could recover whenever the defendant's misstatement distorted the stock price—regardless of whether the misstatement had actually tricked the plaintiff into buying (or selling) the stock in the first place. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 345 (2005) (quoting *Basic*, *supra*, at 252 (White, J., concurring in part and dissenting in part)).

The "traditional" reliance element requires a plaintiff to "sho[w] that he was aware of a company's statement and en-

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[1] As the private Rule 10b–5 action has evolved, the Court has drawn on the common-law action of deceit to identify six elements a private plaintiff must prove: "'(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. 455, 460–461 (2013).

gaged in a relevant transaction . . . based on that specific misrepresentation." *Erica P. John Fund*, *supra*, at 810. But investors who purchase stock from third parties on impersonal exchanges (*e. g.*, the New York Stock Exchange) often will not be aware of any particular statement made by the issuer of the security, and therefore cannot establish that they transacted based on a specific misrepresentation. Nor is the traditional reliance requirement amenable to class treatment; the inherently individualized nature of the reliance inquiry renders it impossible for a 10b–5 plaintiff to prove that common questions predominate over individual ones, making class certification improper. See *Basic*, *supra*, at 242; Fed. Rule Civ. Proc. 23(b)(3).

Citing these difficulties of proof and class certification, 485 U. S., at 242, 245, the *Basic* Court dispensed with the traditional reliance requirement in favor of a new one based on the fraud-on-the-market theory.[2] The new version of reliance had two related parts.

First, *Basic* suggested that plaintiffs could meet the reliance requirement " 'indirectly,' " *id.*, at 245. The Court reasoned that " 'ideally, [the market] transmits information to the investor in the processed form of a market price.' " *Id.*, at 244. An investor could thus be said to have "relied" on a specific misstatement if (1) the market had incorporated that statement into the market price of the security, and (2) the investor then bought or sold that security "in reliance on the integrity of the [market] price," *id.*, at 247, *i. e.*, based on his

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[2] In the years preceding *Basic*, lower courts and commentators experimented with various ways to facilitate 10b–5 class actions by relaxing or eliminating the reliance element of the implied 10b–5 action. See, *e. g.*, *Blackie* v. *Barrack*, 524 F. 2d 891 (CA9 1975); Note, The Fraud-on-the-Market Theory, 95 Harv. L. Rev. 1143 (1982); Note, The Reliance Requirement in Private Actions Under SEC Rule 10b–5, 88 Harv. L. Rev. 584, 592–606 (1975). The "fraud-on-the-market theory" is an umbrella term for those varied efforts. Black, Fraud on the Market: A Criticism of Dispensing With Reliance Requirements in Certain Open Market Transactions, 62 N. C. L. Rev. 435, 439–457 (1984).

belief that the market price "'reflect[ed]'" the stock's underlying "'value,'" *id.*, at 244.

Second, *Basic* created a presumption that this "indirect" form of "reliance" had been proved. Based primarily on certain assumptions about economic theory and investor behavior, *Basic* afforded plaintiffs who traded in efficient markets an evidentiary presumption that both steps of the novel reliance requirement had been satisfied—that (1) the market *had* incorporated the specific misstatement into the market price of the security, and (2) the plaintiff *did* transact in reliance on the integrity of that price.[3] *Id.*, at 247. A defendant was ostensibly entitled to rebut the presumption by putting forth evidence that either of those steps was absent. *Id.*, at 248.

II

Basic's reimagined reliance requirement was a mistake, and the passage of time has compounded its failings. First, the Court based both parts of the presumption of reliance on a questionable understanding of disputed economic theory and flawed intuitions about investor behavior. Second, *Basic*'s rebuttable presumption is at odds with our subsequent Rule 23 cases, which require plaintiffs seeking class certification to "'affirmatively demonstrate'" certification requirements like the predominance of common questions. *Comcast Corp.* v. *Behrend*, 569 U. S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350 (2011)). Finally, *Basic*'s presumption that investors rely on the integrity of the market price is virtually irrebuttable in practice, which means that the "essential" reliance element effectively exists in name only.

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[3] An investor could invoke this presumption by demonstrating certain predicates: (1) a public statement; (2) an efficient market; (3) that the shares were traded after the statement was made but before the truth was revealed; and (4) that the statement was material. *Basic*, 485 U. S., at 248, n. 27.

A

Basic based the presumption of reliance on two factual assumptions. The first assumption was that, in a "well-developed market," public statements are generally "reflected" in the market price of securities. 485 U. S., at 247. The second was that investors in such markets transact "in reliance on the integrity of that price." *Ibid.* In other words, the Court created a presumption that a plaintiff had met the two-part, fraud-on-the-market version of the reliance requirement because, in the Court's view, "common sense and probability" suggested that each of those parts *would* be met. *Id.*, at 246.

In reality, both of the Court's key assumptions are highly contestable and do not provide the necessary support for *Basic*'s presumption of reliance. The first assumption—that public statements are "reflected" in the market price—was grounded in an economic theory that has garnered substantial criticism since *Basic*. The second assumption—that investors categorically rely on the integrity of the market price—is simply wrong.

1

The Court's first assumption was that "most publicly available information"—including public misstatements—"is reflected in [the] market price" of a security. *Id.*, at 247. The Court grounded that assumption in "empirical studies" testing a then-nascent economic theory known as the efficient capital markets hypothesis. *Id.*, at 246–247. Specifically, the Court relied upon the "semi-strong" version of that theory, which posits that the average investor cannot earn above-market returns (*i. e.*, "beat the market") in an efficient market by trading on the basis of publicly available information. See, *e. g.*, Stout, The Mechanisms of Market Inefficiency: An Introduction to the New Finance, 28 J. Corp. L. 635, 640, and n. 24 (2003) (citing Fama, Efficient Capital Markets: A Review of Theory and Empirical Work, 25 J. Finance

383, 388 (1970)).[4] The upshot of the hypothesis is that "the market price of shares traded on well-developed markets [will] reflec[t] all publicly available information, and, hence, any material misrepresentations." *Basic*, *supra*, at 246. At the time of *Basic*, this version of the efficient capital markets hypothesis was "widely accepted." See Dunbar & Heller 463–464.

This view of market efficiency has since lost its luster. See, *e. g.*, Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 175 ("Doubts about the strength and pervasiveness of market efficiency are much greater today than they were in the mid-1980s"). As it turns out, even "well-developed" markets (like the New York Stock Exchange) do not uniformly incorporate information into market prices with high speed. "[F]riction in accessing public information" and the presence of "processing costs" means that "not all public information will be impounded in a security's price with the same alacrity, or perhaps with any quickness at all." Cox, Understanding Causation in Private Securities Lawsuits: Building on *Amgen*, 66 Vand. L. Rev. 1719, 1732 (2013) (hereinafter Cox). For example, information that is easily digestible (merger announcements or stock splits) or especially prominent (Wall Street Journal articles) may be incorporated quickly, while information that is broadly applicable or technical (Securities and Exchange Commission filings) may be incorporated slowly or even ignored. See Stout, *supra*, at 653–656; see, *e. g.*, *In re Merck & Co. Securities Litigation*, 432 F. 3d 261, 263–265 (CA3 2005) (a Wall Street Journal article caused a steep decline in the

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[4] The "weak form" of the hypothesis provides that an investor cannot earn an above-market return by trading on historical price data. See Dunbar & Heller, Fraud on the Market Meets Behavioral Finance, 31 Del. J. Corporate L. 455, 463–464 (2006) (hereinafter Dunbar & Heller). The "strong form" provides that investors cannot achieve above-market returns even by trading on nonpublic information. See *ibid.* The weak form is generally accepted; the strong form is not. See *ibid.*

company's stock price even though the same information was contained in an earlier SEC disclosure).

Further, and more importantly, "overwhelming empirical evidence" now suggests that even when markets do incorporate public information, they often fail to do so accurately. Lev & de Villiers, Stock Price Crashes and 10b–5 Damages: A Legal, Economic and Policy Analysis, 47 Stan. L. Rev. 7, 20–21 (1994); see also *id.*, at 21 ("That many share price movements seem unrelated to specific information strongly suggests that capital markets are not fundamentally efficient, and that wide deviations from fundamentals . . . can occur" (footnote omitted)). "Scores" of "efficiency-defying anomalies"—such as market swings in the absence of new information and prolonged deviations from underlying asset values—make market efficiency "more contestable than ever." Langevoort, Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation, 97 Nw. U. L. Rev. 135, 141 (2002); Dunbar & Heller 476–483. Such anomalies make it difficult to tell whether, at any given moment, a stock's price accurately reflects its value as indicated by all publicly available information. In sum, economists now understand that the price impact *Basic* assumed would happen reflexively is actually far from certain even in "well-developed" markets. Thus, *Basic*'s claim that "common sense and probability" support a presumption of reliance rests on shaky footing.

2

The *Basic* Court also grounded the presumption of reliance in a second assumption: that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." 485 U. S., at 247. In other words, the Court assumed that investors transact based on the belief that the market price accurately reflects the underlying "'value'" of the security. See *id.*, at 244 ("'[P]urchasers generally rely on the price of the stock as a reflection of

its value' "). The *Basic* Court appears to have adopted this assumption about investment behavior based only on what it believed to be "common sense." *Id.*, at 246. The Court found it "'hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?' " *Id.*, at 246–247.

The Court's rather superficial analysis does not withstand scrutiny. It cannot be seriously disputed that a great many investors do *not* buy or sell stock based on a belief that the stock's price accurately reflects its value. Many investors in fact trade for the opposite reason—that is, because they think the market has undervalued or overvalued the stock, and they believe they can profit from that mispricing. *Id.*, at 256 (opinion of White, J.); see, *e. g.*, Macey, The Fraud on the Market Theory: Some Preliminary Issues, 74 Cornell L. Rev. 923, 925 (1989) (The "opposite" of *Basic*'s assumption appears to be true; some investors "attempt to locate undervalued stocks in an effort to 'beat the market' . . . in essence betting that the market . . . is in fact inefficient"). Indeed, securities transactions often take place because the transacting parties disagree on the security's value. See, *e. g.*, Stout, Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation, 81 Va. L. Rev. 611, 619 (1995) ("[A]vailable evidence suggests that . . . investor disagreement inspires the lion's share of equities transactions").

Other investors trade for reasons entirely unrelated to price—for instance, to address changing liquidity needs, tax concerns, or portfolio balancing requirements. See *id.*, at 657–658; see also Cox 1739 (investors may purchase "due to portfolio rebalancing arising from its obeisance to an indexing strategy"). These investment decisions—made with indifference to price and thus without regard for price "integrity"—are at odds with *Basic*'s understanding of what motivates investment decisions. In short, *Basic*'s assump-

tion that all investors rely in common on "price integrity" is simply wrong.[5]

The majority tries (but fails) to reconcile *Basic*'s assumption about investor behavior with the reality that many investors do not behave in the way *Basic* assumed. It first asserts that *Basic* rested only on the more modest view that "'*most* investors'" rely on the integrity of a security's market price. *Ante*, at 273 (quoting not *Basic*, but *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U. S. 455, 462 (2013); emphasis added). That gloss is difficult to square with *Basic*'s plain language: "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 485 U. S., at 247; see also *id.*, at 246–247 ("'[I]t is hard to imagine that there ever is a buyer or seller who does not rely on market integrity'"). In any event, neither *Basic* nor the majority offers anything more than a judicial hunch as evidence that even "most" investors rely on price integrity.

The majority also suggests that "there is no reason to suppose" that investors who buy stock they believe to be undervalued are "indifferent to the integrity of market prices." *Ante*, at 273. Such "value investor[s]," according to the majority, "implicitly rel[y] on the fact that a stock's market price will eventually reflect material information" and "presumably tr[y] to estimate *how* undervalued or overvalued a par-

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[5] The *Basic* Court's mistaken intuition about investor behavior appears to involve a category mistake: The Court invoked a hypothesis meant to describe markets, but then used it "in the one way it is not meant to be used: as a predictor of the behavior of individual investors." Langevoort, Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited, 140 U. Pa. L. Rev. 851, 895 (1992). The efficient capital markets hypothesis does not describe "how investors behave; [it] only suggests the consequences of their collective behavior." Cox 1736. "Nothing in the hypothesis denies what most popular accounts assume: that much information searching and trading by investors, from institutions on down, is done in the (perhaps erroneous) belief that undervalued or overvalued stocks exist and can systematically be discovered." Langevoort, *supra*, at 895.

ticular stock is" by reference to the market price. *Ante*, at 273–274. Whether the majority's unsupported claims about the thought processes of hypothetical investors are accurate or not, they are surely beside the point. Whatever else an investor believes about the market, he simply does not "rely on the integrity of the market price" if he does not believe that the market price accurately reflects public information *at the time he transacts*. That is, an investor cannot claim that a public misstatement induced his transaction by distorting the market price if he did not buy at that price while believing that it accurately incorporated that public information. For that sort of investor, *Basic*'s critical fiction falls apart.

B

Basic's presumption of reliance also conflicts with our more recent cases clarifying Rule 23's class-certification requirements. Those cases instruct that "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast*, 569 U. S., at 33 (quoting *Wal-Mart*, 564 U. S., at 350). To prevail on a motion for class certification, a party must demonstrate through "evidentiary proof" that "'questions of law or fact common to class members predominate over any questions affecting only individual members.'" 569 U. S., at 33 (quoting Fed. Rule Civ. Proc. 23(b)(3)).

Basic permits plaintiffs to bypass that requirement of evidentiary proof. Under *Basic*, plaintiffs who invoke the presumption of reliance (by proving its predicates) are deemed to have met the predominance requirement of Rule 23(b)(3). See *ante*, at 276; *Amgen*, *supra*, at 463 (*Basic* "facilitates class certification by recognizing a rebuttable presumption of classwide reliance"); *Basic*, 485 U. S., at 242, 250 (holding that the District Court appropriately certified the class based on the presumption of reliance). But, invoking the *Basic* presumption does not actually prove that individual questions of reliance will not overwhelm the common ques-

tions in the case. *Basic* still requires a showing that the *individual investor* bought or sold in reliance on the integrity of the market price and, crucially, permits defendants to rebut the presumption by producing evidence that individual plaintiffs do not meet that description. See *id.*, at 249 ("Petitioners . . . could rebut the presumption of reliance as to plaintiffs who would have divested themselves of their Basic shares without relying on the integrity of the market"). Thus, by its own terms, *Basic* entitles defendants to ask each class member whether he traded in reliance on the integrity of the market price. That inquiry, like the traditional reliance inquiry, is inherently individualized; questions about the trading strategies of individual investors will not generate "'common answers apt to drive the resolution of the litigation,'" *Wal-Mart Stores*, *supra*, at 350 (emphasis deleted). See *supra*, at 291–293; see also Cox 1736, n. 55 (*Basic*'s recognition that defendants could rebut the presumption "by proof the investor would have traded anyway appears to require individual inquiries into reliance").

Basic thus exempts Rule 10b–5 plaintiffs from Rule 23's proof requirement. Plaintiffs who invoke the presumption of reliance are deemed to have shown predominance as a matter of law, even though the resulting rebuttable presumption leaves individualized questions of reliance in the case and predominance still unproved. Needless to say, that exemption was beyond the *Basic* Court's power to grant.[6]

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[6] The majority suggests that *Basic* squares with *Comcast Corp.* v. *Behrend*, 569 U. S. 27 (2013), and *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011), because it does not "relieve plaintiffs of the burden of proving . . . predominance" but "rather sets forth what they must prove to demonstrate such predominance." *Ante*, at 276. This argument misses the point. Because *Basic* offers defendants a chance to rebut the presumption on individualized grounds, the predicates that *Basic* sets forth as sufficient to invoke the presumption do not necessarily prove predominance.

C

It would be bad enough if *Basic* merely provided an end run around Rule 23. But in practice, the so-called "rebuttable presumption" is largely irrebuttable.

The *Basic* Court ostensibly afforded defendants an opportunity to rebut the presumption by providing evidence that either aspect of a plaintiff's fraud-on-the-market reliance—price impact, or reliance on the integrity of the market price—is missing. 485 U. S., at 248–249. As it turns out, however, the realities of class-action procedure make rebuttal based on an individual plaintiff's lack of reliance virtually impossible. At the class-certification stage, rebuttal is only directed at the class representatives, which means that counsel only needs to find one class member who can withstand the challenge. See Grundfest, Damages and Reliance Under Section 10(b) of the Exchange Act, 69 Bus. Lawyer 307, 362 (2014). After class certification, courts have refused to allow defendants to challenge any plaintiff's reliance on the integrity of the market price prior to a determination on classwide liability. See Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 13–14 (collecting cases rejecting postcertification attempts to rebut individual class members' reliance on price integrity as not pertinent to classwide liability). One search for rebuttals on individual-reliance grounds turned up only six cases out of the thousands of Rule 10b–5 actions brought since *Basic*. Grundfest, *supra*, at 360.[7]

[7] The absence of postcertification rebuttal is likely attributable in part to the substantial *in terrorem* settlement pressures brought to bear by certification. See, *e. g.*, Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial"); see also *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies").

The apparent unavailability of this form of rebuttal has troubling implications. Because the presumption is conclusive in practice with respect to investors' reliance on price integrity, even *Basic*'s watered-down reliance requirement has been effectively eliminated. Once the presumption attaches, the reliance element is no longer an obstacle to prevailing on the claim, even though many class members will not have transacted in reliance on price integrity, see *supra*, at 291–293. And without a functional reliance requirement, the "essential element" that ensures the plaintiff has actually been defrauded, see *Stoneridge*, 552 U. S., at 159, Rule 10b–5 becomes the very "'scheme of investor's insurance'" the *rebuttable* presumption was supposed to prevent, *Basic*, *supra*, at 252 (opinion of White, J.).[8]

* * *

For these reasons, *Basic* should be overruled in favor of the straightforward rule that "[r]eliance by the plaintiff upon the defendant's deceptive acts"—actual reliance, not the fictional "fraud-on-the-market" version—"is an essential element of the § 10(b) private cause of action." *Stoneridge*, *supra*, at 159.

III

Principles of *stare decisis* do not compel us to save *Basic*'s muddled logic and armchair economics. We have not hesitated to overrule decisions when they are "unworkable or are badly reasoned," *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); when "the theoretical underpinnings of those decisions are called into serious question," *State Oil Co.* v. *Khan*,

[8] Of course, today's decision makes clear that a defendant may rebut the presumption by producing evidence that the misstatement at issue failed to affect the market price of the security, see *ante*, at 278–283. But both parts of *Basic*'s version of reliance are key to its fiction that an investor has "indirectly" relied on the misstatement; the unavailability of rebuttal with respect to one of those parts still functionally removes reliance as an element of proof.

522 U. S. 3, 21 (1997); when the decisions have become "irreconcilable" with intervening developments in "competing legal doctrines or policies," *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); or when they are otherwise "a positive detriment to coherence and consistency in the law," *ibid.* Just one of these circumstances can justify our correction of bad precedent; *Basic* checks all the boxes.

In support of its decision to preserve *Basic*, the majority contends that *stare decisis* "has 'special force' 'in respect to statutory interpretation' because 'Congress remains free to alter what we have done.'" *Ante*, at 274 (quoting *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008); some internal quotation marks omitted). But *Basic*, of course, has nothing to do with statutory interpretation. The case concerned a judge-made evidentiary presumption for a judge-made element of the implied 10b–5 private cause of action, itself "a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge*, *supra*, at 164. We have not afforded *stare decisis* "special force" outside the context of statutory interpretation, see *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 828, n. 6 (2014) (THOMAS, J., dissenting), and for good reason. In statutory cases, it is perhaps plausible that Congress watches over its enactments and will step in to fix our mistakes, so we may leave to Congress the judgment whether the interpretive question is better left "'settled'" or "'settled right,'" *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986). But this rationale is untenable when it comes to judge-made law like "implied" private causes of action, which we retain a duty to superintend. See, *e. g.*, *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 507 (2008) ("[T]he judiciary [cannot] wash its hands of a problem it created . . . simply by calling [the judicial doctrine] legislative"). Thus, when we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around. That duty is

especially clear in the Rule 10b–5 context, where we have said that "[t]he federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b–5 right and the definition of the duties it imposes." *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 292 (1993).

Basic's presumption of reliance remains our mistake to correct. Since *Basic*, Congress has enacted two major securities laws: the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 112 Stat. 3227. The PSLRA "sought to combat perceived abuses in securities litigation," *ante*, at 277, and SLUSA prevented plaintiffs from avoiding the PSLRA's restrictions by bringing class actions in state court, *ibid.* Neither of these Acts touched the reliance element of the implied Rule 10b–5 private cause of action or the *Basic* presumption.

Contrary to respondent's argument (the majority wisely skips this next line of defense), we cannot draw from Congress' silence on this matter an inference that Congress approved of *Basic*. To begin with, it is inappropriate to give weight to "Congress' unenacted opinion" when construing judge-made doctrines, because doing so allows the Court to create law and then "effectively codif[y]" it "based only on Congress' failure to address it." *Bay Mills*, *supra*, at 827 (THOMAS, J., dissenting). Our Constitution, however, demands that laws be passed by Congress and signed by the President. Art. I, § 7. Adherence to *Basic* based on congressional inaction would invert that requirement by insulating error from correction merely because Congress *failed* to pass a law on the subject. Cf. *Patterson*, *supra*, at 175, n. 1 ("Congressional inaction cannot amend a duly enacted statute").

At any rate, arguments from legislative inaction are speculative at best. "[I]t is '"impossible to assert with any degree of assurance that congressional failure to act repre-

sents" affirmative congressional approval of' one of this Court's decisions." *Bay Mills*, *supra*, at 826 (THOMAS, J., dissenting) (quoting *Patterson*, *supra*, at 175, n. 1). "'Congressional inaction lacks persuasive significance'" because it is indeterminate; "'several equally tenable inferences may be drawn from such inaction.'" *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990)). Therefore, "[i]t does not follow . . . that Congress' failure to overturn a . . . precedent is reason for this Court to adhere to it." *Patterson*, *supra*, at 175, n. 1.

That is especially true here, because Congress passed a law to tell us *not* to draw any inference from its inaction. The PSLRA expressly states that "[n]othing in this Act . . . shall be deemed to create or ratify any implied private right of action." Notes following 15 U. S. C. § 78j–1, p. 430. If the Act did not ratify even the Rule 10b–5 private cause of action, it cannot be read to ratify *sub silentio* the presumption of reliance this Court affixed to that action. Further, the PSLRA and SLUSA operate to curtail abuses of various private causes of action under our securities laws—hardly an indication that Congress approved of *Basic*'s *expansion* of the 10b–5 private cause of action. Congress' failure to overturn *Basic* does not permit us to "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 70 (1946).

* * *

Basic took an implied cause of action and grafted on a policy-driven presumption of reliance based on nascent economic theory and personal intuitions about investment behavior. The result was an unrecognizably broad cause of action ready made for class certification. Time and experience have pointed up the error of that decision, making it all too clear that the Court's attempt to revise securities law to

fit the alleged "new realities of financial markets" should have been left to Congress. 485 U. S., at 255 (opinion of White, J.).

Syllabus

UTILITY AIR REGULATORY GROUP *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

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

No. 12–1146. Argued February 24, 2014—Decided June 23, 2014*

The Clean Air Act imposes permitting requirements on stationary sources, such as factories and powerplants. The Act's "Prevention of Significant Deterioration" (PSD) provisions make it unlawful to construct or modify a "major emitting facility" in "any area to which [the PSD program] applies" without a permit. 42 U. S. C. §§ 7475(a)(1), 7479(2)(C). A "major emitting facility" is a stationary source with the potential to emit 250 tons per year of "any air pollutant" (or 100 tons per year for certain types of sources). § 7479(1). Facilities seeking to qualify for a PSD permit must, *inter alia*, comply with emissions limitations that reflect the "best available control technology" (BACT) for "each pollutant subject to regulation under" the Act. § 7475(a)(4). In addition, Title V of the Act makes it unlawful to operate any "major source," wherever located, without a permit. § 7661a(a). A "major source" is a stationary source with the potential to emit 100 tons per year of "any air pollutant." §§ 7661(2)(B), 7602(j).

In response to *Massachusetts* v. *EPA*, 549 U. S. 497, EPA promulgated greenhouse-gas emission standards for new motor vehicles, and made stationary sources subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases. It recognized, however, that requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs and render them unadministrable. So EPA purported to "tailor" the programs to accommodate greenhouse gases by providing, among

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*Together with No. 12–1248, *American Chemistry Council et al.* v. *Environmental Protection Agency et al.*, No. 12–1254, *Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al.* v. *Environmental Protection Agency et al.*, No. 12–1268, *Southeastern Legal Foundation, Inc., et al.* v. *Environmental Protection Agency et al.*, No. 12–1269, *Texas et al.* v. *Environmental Protection Agency et al.*, and No. 12–1272, *Chamber of Commerce of the United States of America et al.* v. *Environmental Protection Agency et al.*, also on certiorari to the same court.

other things, that sources would not become newly subject to PSD or Title V permitting on the basis of their potential to emit greenhouse gases in amounts less than 100,000 tons per year.

Numerous parties, including several States, challenged EPA's actions in the D. C. Circuit, which dismissed some of the petitions for lack of jurisdiction and denied the remainder.

Held: The judgment is affirmed in part and reversed in part.

684 F. 3d 102, affirmed in part and reversed in part.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I and II, concluding:

1. The Act neither compels nor permits EPA to adopt an interpretation of the Act requiring a source to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions. Pp. 315–328.

(a) The Act does not compel EPA's interpretation. *Massachusetts* held that the Act-wide definition of "air pollutant" includes greenhouse gases, 549 U. S., at 529, but where the term "air pollutant" appears in the Act's operative provisions, including the PSD and Title V permitting provisions, EPA has routinely given it a narrower, context-appropriate meaning. *Massachusetts* did not invalidate those longstanding constructions. The Act-wide definition is not a command to regulate, but a description of the universe of substances EPA may consider regulating under the Act's operative provisions. Though Congress's profligate use of "air pollutant" is not conducive to clarity, the presumption of consistent usage "'readily yields'" to context, and a statutory term "may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Environmental Defense* v. *Duke Energy Corp.*, 549 U. S. 561, 574. Pp. 315–320.

(b) Nor does the Act permit EPA's interpretation. Agencies empowered to resolve statutory ambiguities must operate "within the bounds of reasonable interpretation," *Arlington* v. *FCC*, 569 U. S. 290, 296. EPA has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with the Act's structure and design. A review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens. EPA's interpretation would also bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160. Pp. 321–324.

(c) EPA lacked authority to "tailor" the Act's unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its

greenhouse-gas-inclusive interpretation of the permitting triggers. Agencies must always "'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 665. The power to execute the laws does not include a power to revise clear statutory terms that turn out not to work in practice. Pp. 325–328.

2. EPA reasonably interpreted the Act to require sources that would need permits based on their emission of conventional pollutants to comply with BACT for greenhouse gases. Pp. 329–333.

(a) Concerns that BACT, which has traditionally been about end-of-stack controls, is fundamentally unsuited to greenhouse-gas regulation, which is more about energy use, are not unfounded. But an EPA guidance document states that BACT analysis should consider options other than energy efficiency, including "carbon capture and storage," which EPA contends is reasonably comparable to more traditional, end-of-stack BACT technologies. Moreover, assuming that BACT may be used to force improvements in energy efficiency, important limitations on BACT may work to mitigate concerns about "unbounded" regulatory authority. Pp. 329–331.

(b) EPA's decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. The specific phrasing of the BACT provision—which requires BACT "for each pollutant subject to regulation under" the Act, § 7475(a)(4)—does not suggest that the provision can bear a narrowing construction. And even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to make EPA's interpretation unreasonable. Pp. 331–333.

SCALIA, J., announced the judgment of the Court and delivered an opinion, Parts I and II of which were for the Court. ROBERTS, C. J., and KENNEDY, J., joined that opinion in full; THOMAS and ALITO, JJ., joined as to Parts I, II–A, and II–B–1; and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined as to Part II–B–2. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 334. ALITO, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 343.

Peter D. Keisler argued the cause for the private party petitioners in all cases. With him on the briefs for petitioners in No. 12–1248 were *Roger R. Martella, Jr.*, *Timothy*

K. Webster, *Quin M. Sorenson*, and *Eric D. McArthur*. *F. William Brownell*, *Norman W. Fichthorn*, *Henry V. Nickel*, and *Allison D. Wood* filed briefs for petitioner in No. 12–1146. *John J. McMackin, Jr.*, filed a brief for petitioners in No. 12–1254. *Shannon Lee Goessling*, *Steven G. Bradbury*, *Edward A. Kazmarek*, *Harry W. MacDougald*, *Sam Kazman*, and *Hans Bader* filed briefs for petitioners in No. 12–1268. *Robert R. Gasaway*, *Jeffrey A. Rosen*, *Jeffrey Bossert Clark*, *William H. Burgess*, *Lily Fu Claffee*, *Rachel L. Brand*, *Sheldon Gilbert*, *Ellen Steen*, *Douglas A. Henderson*, *Michael C. Geraghty*, Attorney General of Alaska, and *Steven E. Mulder*, Chief Assistant Attorney General, filed briefs for petitioners in No. 12–1272.

Jonathan F. Mitchell, Solicitor General of Texas, argued the cause for the state petitioners. With him on the briefs for petitioners in No. 12–1269 were *Greg Abbott*, Attorney General, *Daniel T. Hodge*, First Assistant Attorney General, *J. Reed Clay, Jr.*, *Andrew S. Oldham*, Deputy Solicitor General, *Michael P. Murphy*, *James P. Sullivan*, and *Douglas D. Geyser*, Assistant Solicitors General, and *Herman Robinson*, and the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Gregory F. Zoeller* of Indiana, *James D. "Buddy" Caldwell* of Louisiana, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, and *Marty J. Jackley* of South Dakota.

Eric Groten, *Patrick R. Day*, *John P. Elwood*, *Paul D. Phillips*, and *John A. Bryson* filed briefs for the Coalition for Responsible Regulations, Inc., et al. as respondents in support of petitioners in all cases.

Deputy Solicitor General Verrilli argued the cause for the respondents in all cases. With him on the brief for the federal respondents were *Acting Assistant Attorney General Dreher*, *Deputy Solicitor General Stewart*, *Benjamin J. Hor-*

Counsel

wich, *Amanda Shafer Berman*, *Perry Rosen*, and *James Havard*. *Eric T. Scheiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, *Bethany A. Davis Noll*, Assistant Solicitor General, *Monica Wagner*, *Michael J. Myers*, *Morgan A. Costello*, *Kamala D. Harris*, Attorney General of California, *George Jepsen*, Attorney General of Connecticut, *Joseph R. Biden III*, Attorney General of Delaware, *Lisa Madigan*, Attorney General of Illinois, *Thomas J. Miller*, Attorney General of Iowa, *Janet T. Mills*, Attorney General of Maine, *Douglas F. Gansler*, Attorney General of Maryland, *Martha Coakley*, Attorney General of Massachusetts, *Joseph A. Foster*, Attorney General of New Hampshire, *Gary King*, Attorney General of New Mexico, *Ellen F. Rosenblum*, Attorney General of Oregon, *Peter F. Kilmartin*, Attorney General of Rhode Island, *William H. Sorrell*, Attorney General of Vermont, *Robert W. Ferguson*, Attorney General of Washington, and *Jeffrey D. Friedlander*, Acting Corporation Counsel of New York City, filed a brief for the state and local respondents in all cases. *Sean H. Donahue*, *David T. Goldberg*, *Pamela A. Campos*, *Graham McCahan*, *Vickie L. Patton*, *Peter Zalzal*, *David D. Doniger*, *Gerald Goldman*, *Benjamin H. Longstreth*, *Howard I. Fox*, *David S. Baron*, *Ann Brewster Weeks*, *Joanne Spalding*, and *James G. Murphy* filed a brief for respondent environmental organizations in all cases.†

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†Briefs of *amici curiae* urging reversal in all cases were filed for the State of Kansas et al. by *Derek Schmidt*, Attorney General of Kansas, *Jeffrey A. Chanay*, Deputy Attorney General, *C. Boyden Gray*, *Adam J. White*, and *Ronald A. Cass*, and by the Attorneys General for their respective States as follows: *Jack Conway* of Kentucky, *Timothy C. Fox* of Montana, *Michael DeWine* of Ohio, *Patrick Morrisey* of West Virginia, and *Peter K. Michael* of Wyoming; for Administrative Law Professors et al. by *Ashley C. Parrish*, *Karen F. Grohman*, and *Carrie Severino*; for the American Civil Rights Union by *Peter J. Ferrara*; for the Center for Constitutional Jurisprudence by *John C. Eastman*, *Anthony T. Caso*, and

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II.

Acting pursuant to the Clean Air Act, 69 Stat. 322, as amended, 42 U. S. C. §§ 7401–7671q, the Environmental Protection Agency recently set standards for emissions of "greenhouse gases" (substances it believes contribute to "global climate change") from new motor vehicles. We must decide whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases.

Edwin Meese III; for Climate Scientists et al. by *Francis Menton*; for the Committee for a Constructive Tomorrow by *Paul D. Kamenar*; for Five U. S. Senators by *Theodore L. Garrett*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the Pacific Legal Foundation et al. by *R. S. Radford* and *Theodore Hadzi-Antich*; for Peabody Energy Corp. by *Victor E. Schwartz*; for State and Local Chambers of Commerce et al. by *Richard O. Faulk*; for the Texas Oil & Gas Association et al. by *Charles H. Knauss*, *Shannon S. Broome*, and *Robert T. Smith*; for Henry N. Butler et al. by *Erik S. Jaffee*; for Sen. Mitch McConnell et al. by *Charles J. Cooper*, *David H. Thompson*, and *Howard C. Nielson, Jr.;* and for Thomas C. Schelling et al. by *Scott M. Abeles*.

Peter S. Glaser, *Cory L. Andrews*, and *Richard A. Samp* filed a brief of *amicus curiae* for the Washington Legal Foundation urging reversal in No. 12–1146.

Richard P. Hutchison filed a brief of *amicus curiae* for the Landmark Legal Foundation urging reversal in No. 12–1268.

Briefs of *amici curiae* urging affirmance in all cases were filed for the American Thoracic Society by *Hope M. Babcock*; for Calpine Corp. by *Wendy B. Jacobs*; for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *Simon Lazarus*; for the Institute for Policy Integrity at New York University School of Law by *Richard L. Revesz*, *Jason A. Schwartz*, and *Denise A. Grab*; and for the South Coast Air Quality Management District et al. by *Cara Horowitz*, *Ann E. Carlson*, and *Barbara Baird*.

Lawrence J. Joseph and *Nick Goldstein* filed a brief of *amicus curiae* for the American Road & Transportation Builders Association in all cases.

I. Background

A. Stationary-Source Permitting

The Clean Air Act regulates pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft. This litigation concerns permitting obligations imposed on stationary sources under Titles I and V of the Act.

Title I charges EPA with formulating national ambient air-quality standards (NAAQS) for air pollutants. §§ 7408–7409. To date, EPA has issued NAAQS for six pollutants: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. Clean Air Act Handbook 125 (J. Domike & A. Zacaroli eds., 3d ed. 2011); see generally 40 CFR pt. 50 (2013). States have primary responsibility for implementing the NAAQS by developing "State implementation plans." 42 U. S. C. § 7410. A State must designate every area within its borders as "attainment," "nonattainment," or "unclassifiable" with respect to each NAAQS, § 7407(d), and the State's implementation plan must include permitting programs for stationary sources that vary according to the classification of the area where the source is or is proposed to be located. § 7410(a)(2)(C), (I).

Stationary sources in areas designated attainment or unclassifiable are subject to the Act's provisions relating to "Prevention of Significant Deterioration" (PSD). §§ 7470–7492. EPA interprets the PSD provisions to apply to sources located in areas that are designated attainment or unclassifiable for *any* NAAQS pollutant, regardless of whether the source emits that specific pollutant. Since the inception of the PSD program, every area of the country has been designated attainment or unclassifiable for at least one NAAQS pollutant; thus, on EPA's view, all stationary sources are potentially subject to PSD review.

It is unlawful to construct or modify a "major emitting facility" in "any area to which [the PSD program] applies"

without first obtaining a permit. §§ 7475(a)(1), 7479(2)(C). To qualify for a permit, the facility must not cause or contribute to the violation of any applicable air-quality standard, § 7475(a)(3), and it must comply with emissions limitations that reflect the "best available control technology" (or BACT) for "each pollutant subject to regulation under" the Act. § 7475(a)(4). The Act defines a "major emitting facility" as any stationary source with the potential to emit 250 tons per year of "any air pollutant" (or 100 tons per year for certain types of sources). § 7479(1). It defines "modification" as a physical or operational change that causes the facility to emit more of "any air pollutant." § 7411(a)(4).[1]

In addition to the PSD permitting requirements for construction and modification, Title V of the Act makes it unlawful to *operate* any "major source," wherever located, without a comprehensive operating permit. § 7661a(a). Unlike the PSD program, Title V generally does not impose any substantive pollution-control requirements. Instead, it is designed to facilitate compliance and enforcement by consolidating into a single document all of a facility's obligations under the Act. The permit must include all "emissions limitations and standards" that apply to the source, as well as associated inspection, monitoring, and reporting require-

[1] Although the statute sets numerical thresholds (100 or 250 tons per year) for emissions that will make a facility "major," it does not specify by how much a physical or operational change must increase emissions to constitute a permit-requiring "modification." Nor does it say how much of a given regulated pollutant a "major emitting facility" must emit before it is subject to BACT for that pollutant. EPA, however, has established pollutant-specific numerical thresholds below which a facility's emissions of a pollutant, and increases therein, are considered *de minimis* for those purposes. See 40 CFR §§ 51.166(b)(2)(i), (23), (39), (j)(2)–(3), 52.21(b)(2)(i), (23), (40), (j)(2)–(3); see also *Alabama Power Co.* v. *Costle*, 636 F. 2d 323, 360–361, 400, 405 (CADC 1979) (recognizing this authority in EPA); cf. *Wisconsin Dept. of Revenue* v. *William Wrigley, Jr., Co.*, 505 U. S. 214, 231 (1992) ("*[D]e minimis non curat lex* . . . is part of the established background of legal principles against which all enactments are adopted").

ments. § 7661c(a)–(c). Title V defines a "major source" by reference to the Act-wide definition of "major stationary source," which in turn means any stationary source with the potential to emit 100 tons per year of "any air pollutant." §§ 7661(2)(B), 7602(j).

B. EPA's Greenhouse-Gas Regulations

In 2007, the Court held that Title II of the Act "authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles" if the Agency "form[ed] a 'judgment' that such emissions contribute to climate change." *Massachusetts* v. *EPA*, 549 U. S. 497, 528 (quoting § 7521(a)(1)). In response to that decision, EPA embarked on a course of regulation resulting in "the single largest expansion [in] the scope of the [Act] in its history." Clean Air Act Handbook, at xxi.

EPA first asked the public, in a notice of proposed rulemaking, to comment on how the Agency should respond to *Massachusetts*. In doing so, it explained that regulating greenhouse-gas emissions from motor vehicles could have far-reaching consequences for stationary sources. Under EPA's view, once greenhouse gases became regulated under any part of the Act, the PSD and Title V permitting requirements would apply to all stationary sources with the potential to emit greenhouse gases in excess of the statutory thresholds: 100 tons per year under Title V, and 100 or 250 tons per year under the PSD program depending on the type of source. 73 Fed. Reg. 44420, 44498, 44511 (2008). Because greenhouse-gas emissions tend to be "orders of magnitude greater" than emissions of conventional pollutants, EPA projected that numerous small sources not previously regulated under the Act would be swept into the PSD program and Title V, including "smaller industrial sources," "large office and residential buildings, hotels, large retail establishments, and similar facilities." *Id.*, at 44498–44499. The Agency warned that this would constitute an "unprece-

dented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land," yet still be "relatively ineffective at reducing greenhouse gas concentrations." *Id.*, at 44355.[2]

In 2009, EPA announced its determination regarding the danger posed by motor-vehicle greenhouse-gas emissions. EPA found that greenhouse-gas emissions from new motor vehicles contribute to elevated atmospheric concentrations of greenhouse gases, which endanger public health and welfare by fostering global "climate change." 74 Fed. Reg. 66523, 66537 (hereinafter Endangerment Finding). It denominated a "single air pollutant" the "combined mix" of six greenhouse gases that it identified as "the root cause of human-induced climate change": carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.*, at 66516, 66537. A source's greenhouse-gas emissions would be measured in "carbon dioxide equivalent units" (CO_2e), which would be calculated based on each gas's "global warming potential." *Id.*, at 66499, n. 4.

Next, EPA issued its "final decision" regarding the prospect that motor-vehicle greenhouse-gas standards would

[2] Comments from other Executive Branch agencies reprinted in the notice echoed those concerns. See, *e. g.*, 73 Fed. Reg. 44360 (Departments of Agriculture, Commerce, Transportation, and Energy noting EPA would "exercis[e] de facto zoning authority through control over thousands of what formerly were local or private decisions, impacting the construction of schools, hospitals, and commercial and residential development"); *id.*, at 44383 (Council of Economic Advisers and Office of Science and Technology Policy stating that "[s]mall manufacturing facilities, schools, and shopping centers" would be subject to "full major source permitting"); *id.*, at 44385 (Council on Environmental Quality noting "the prospect of essentially automatic and immediate regulation over a vast range of community and business activity"); *id.*, at 44391 (Small Business Administration finding it "difficult to overemphasize how potentially disruptive and burdensome such a new regulatory regime would be to small entities" such as "office buildings, retail establishments, hotels, . . . schools, prisons, and private hospitals").

trigger stationary-source permitting requirements. 75 Fed. Reg. 17004 (2010) (hereinafter Triggering Rule). EPA announced that beginning on the effective date of its greenhouse-gas standards for motor vehicles, stationary sources would be subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases. As expected, EPA in short order promulgated greenhouse-gas emission standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles to take effect on January 2, 2011. 75 Fed. Reg. 25324 (hereinafter Tailpipe Rule).

EPA then announced steps it was taking to "tailor" the PSD program and Title V to greenhouse gases. 75 Fed. Reg. 31514 (hereinafter Tailoring Rule). Those steps were necessary, it said, because the PSD program and Title V were designed to regulate "a relatively small number of large industrial sources," and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and "unrecognizable to the Congress that designed" them. *Id.*, at 31555, 31562. EPA nonetheless rejected calls to exclude greenhouse gases entirely from those programs, asserting that the Act is not "ambiguous with respect to the need to cover [greenhouse-gas] sources under either the PSD or title V program." *Id.*, at 31548, n. 31. Instead, EPA adopted a "phase-in approach" that it said would "appl[y] PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point." *Id.*, at 31523.

The phase-in, EPA said, would consist of at least three steps. During Step 1, from January 2 through June 30, 2011, no source would become newly subject to the PSD program or Title V solely on the basis of its greenhouse-gas emissions; however, sources required to obtain permits anyway because of their emission of conventional pollutants (so-called "anyway" sources) would need to comply with BACT for

greenhouse gases if they emitted those gases in significant amounts, defined as at least 75,000 tons per year CO_2e. *Ibid.* During Step 2, from July 1, 2011, through June 30, 2012, sources with the potential to emit at least 100,000 tons per year CO_2e of greenhouse gases would be subject to PSD and Title V permitting for their construction and operation and to PSD permitting for modifications that would increase their greenhouse-gas emissions by at least 75,000 tons per year CO_2e. *Id.*, at 31523–31524.[3] At Step 3, beginning on July 1, 2013, EPA said it might (or might not) further reduce the permitting thresholds (though not below 50,000 tons per year CO_2e), and it might (or might not) establish permanent exemptions for some sources. *Id.*, at 31524. Beyond Step 3, EPA promised to complete another round of rulemaking by April 30, 2016, in which it would "take further action to address small sources," which might (or might not) include establishing permanent exemptions. *Id.*, at 31525.

EPA codified Steps 1 and 2 at 40 CFR §§ 51.166(b)(48) and 52.21(b)(49) for PSD and at §§ 70.2 and 71.2 for Title V, and it codified its commitments regarding Step 3 and beyond at §§ 52.22, 70.12, and 71.13. See Tailoring Rule 31606–31608. After the decision below, EPA issued its final Step 3 rule, in which it decided not to lower the thresholds it had established at Step 2 until at least 2016. 77 Fed. Reg. 41051 (2012).

C. Decision Below

Numerous parties, including several States, filed petitions for review in the D. C. Circuit under 42 U. S. C. § 7607(b), challenging EPA's greenhouse-gas-related actions. The Court of Appeals dismissed some of the petitions for lack of jurisdiction and denied the remainder. *Coalition for Re-*

[3] EPA stated that its adoption of a 75,000-tons-per-year threshold for emissions requiring BACT and modifications requiring permits was not an exercise of its authority to establish *de minimis* exceptions and that a truly *de minimis* level might be "well below" 75,000 tons per year. Tailoring Rule 31560; cf. n. 1, *supra*.

sponsible Regulation, Inc. v. *EPA*, 684 F. 3d 102 (2012) (*per curiam*). First, it upheld the Endangerment Finding and Tailpipe Rule. *Id.*, at 119, 126. Next, it held that EPA's interpretation of the PSD permitting requirement as applying to "any regulated air pollutant," including greenhouse gases, was "compelled by the statute." *Id.*, at 133–134. The court also found it "crystal clear that PSD permittees must install BACT for greenhouse gases." *Id.*, at 137. Because it deemed petitioners' arguments about the PSD program insufficiently applicable to Title V, it held they had "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V." *Id.*, at 136. Finally, it held that petitioners were without Article III standing to challenge EPA's efforts to limit the reach of the PSD program and Title V through the Triggering and Tailoring Rules. *Id.*, at 146. The court denied rehearing en banc, with Judges Brown and Kavanaugh each dissenting. No. 09–1322 etc. (Dec. 20, 2012), App. 139, 2012 WL 6621785.

We granted six petitions for certiorari but agreed to decide only one question: "'Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.'" 571 U. S. 951 (2013).

II. Analysis

This litigation presents two distinct challenges to EPA's stance on greenhouse-gas permitting for stationary sources. First, we must decide whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit greenhouse gases. Second, we must decide whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants (an "anyway" source) may be required to limit its greenhouse-gas emissions by employing the "best available

control technology" for greenhouse gases. The Solicitor General joins issue on both points but evidently regards the second as more important; he informs us that "anyway" sources account for roughly 83% of American stationary-source greenhouse-gas emissions, compared to just 3% for the additional, non-"anyway" sources EPA sought to regulate at Steps 2 and 3 of the Tailoring Rule. Tr. of Oral Arg. 52.

We review EPA's interpretations of the Clean Air Act using the standard set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). Under *Chevron*, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. The question for a reviewing court is whether in doing so the agency has acted reasonably and thus has "stayed within the bounds of its statutory authority." *Arlington* v. *FCC*, 569 U. S. 290, 297 (2013) (emphasis deleted).

A. The PSD and Title V Triggers

We first decide whether EPA permissibly interpreted the statute to provide that a source may be required to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions.

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EPA thought its conclusion that a source's greenhouse-gas emissions may necessitate a PSD or Title V permit followed from the Act's unambiguous language. The Court of Appeals agreed and held that the statute "compelled" EPA's interpretation. 684 F. 3d, at 134. We disagree. The statute compelled EPA's greenhouse-gas-inclusive interpretation with respect to neither the PSD program nor Title V.[4]

[4] The Court of Appeals held that petitioners' arguments applied only to the PSD program and that petitioners had therefore "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V." 684

The Court of Appeals reasoned by way of a flawed syllogism: Under *Massachusetts*, the general, Act-wide definition of "air pollutant" includes greenhouse gases; the Act requires permits for major emitters of "any air pollutant"; therefore, the Act requires permits for major emitters of greenhouse gases. The conclusion follows from the premises only if the air pollutants referred to in the permit-requiring provisions (the minor premise) are the same air pollutants encompassed by the Act-wide definition as interpreted in *Massachusetts* (the major premise). Yet no one—least of all EPA—endorses that proposition, and it is obviously untenable.

The Act-wide definition says that an air pollutant is "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." §7602(g). In *Massachusetts*, the Court held that the Act-wide definition includes greenhouse gases because it is all-encompassing; it "embraces all airborne compounds of whatever stripe." 549 U. S., at 529. But where the term "air pollutant" appears in the Act's operative provisions, EPA has routinely given it a narrower, context-appropriate meaning.

That is certainly true of the provisions that require PSD and Title V permitting for major emitters of "any air pollutant." Since 1978, EPA's regulations have interpreted "air pollutant" in the PSD permitting trigger as limited to *regulated* air pollutants, 43 Fed. Reg. 26403, codified, as amended, 40 CFR §52.21(b)(1)–(2), (50)—a class much narrower than *Massachusetts*' "all airborne compounds of whatever stripe,"

F. 3d, at 136. The Solicitor General does not defend the Court of Appeals' ruling on forfeiture, and he concedes that some of the arguments petitioners have made before this Court apply to Title V as well as the PSD program. See Brief for Federal Respondents 56. We agree, and we are satisfied that those arguments were also made below. See, *e. g.*, Brief for State Petitioners et al. in No. 10–1073 etc. (CADC), pp. 59–73; Brief for Non-State Petitioners et al. in No. 10–1073 etc. (CADC), pp. 46–47.

549 U. S., at 529. And since 1993 EPA has informally taken the same position with regard to the Title V permitting trigger, a position the Agency ultimately incorporated into some of the regulations at issue here. See Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Air Division Director, Regions I–X, pp. 4–5 (Apr. 26, 1993); Tailoring Rule 31607–31608 (amending 40 CFR §§ 70.2, 71.2). Those interpretations were appropriate: It is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances. It takes some cheek for EPA to insist that it cannot possibly give "air pollutant" a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.

Nor are those the only places in the Act where EPA has inferred from statutory context that a generic reference to air pollutants does not encompass every substance falling within the Act-wide definition. Other examples abound:

- The Act authorizes EPA to enforce new source performance standards (NSPS) against a pre-existing source if, after promulgation of the standards, the source undergoes a physical or operational change that increases its emission of "any air pollutant." § 7411(a)(2), (4), (b)(1)(B). EPA interprets that provision as limited to air pollutants *for which EPA has promulgated new source performance standards*. 36 Fed. Reg. 24877 (1971), codified, as amended, 40 CFR § 60.2; 40 Fed. Reg. 58419 (1975), codified, as amended, 40 CFR § 60.14(a).
- The Act requires a permit for the construction or operation in a nonattainment area of a source with the potential to emit 100 tons per year of "any air pollutant." §§ 7502(c)(5), 7602(j). EPA interprets that provision as limited to pollutants *for which the area is designated*

nonattainment. 45 Fed. Reg. 52745 (1980), promulgating 40 CFR § 51.18(j)(2), as amended, § 51.165(a)(2).

- The Act directs EPA to require "enhanced monitoring and submission of compliance certifications" for any source with the potential to emit 100 tons per year of "any air pollutant." §§ 7414(a)(3), 7602(j). EPA interprets that provision as limited to *regulated* pollutants. 62 Fed. Reg. 54941 (1997), codified at 40 CFR §§ 64.1, 64.2.
- The Act requires certain sources of air pollutants that interfere with visibility to undergo retrofitting if they have the potential to emit 250 tons per year of "any pollutant." § 7491(b)(2)(A), (g)(7). EPA interprets that provision as limited to *visibility-impairing* air pollutants. 70 Fed. Reg. 39160 (2005), codified at 40 CFR pt. 51, App. Y, § II.A.3.

Although these limitations are nowhere to be found in the Act-wide definition, in each instance EPA has concluded—as it has in the PSD and Title V context—that the statute is not using "air pollutant" in *Massachusetts*' broad sense to mean any airborne substance whatsoever.

Massachusetts did not invalidate all these longstanding constructions. That case did not hold that EPA must always regulate greenhouse gases as an "air pollutant" everywhere that term appears in the statute, but only that EPA must "ground its reasons for action *or inaction* in the statute," 549 U. S., at 535 (emphasis added), rather than on "reasoning divorced from the statutory text," *id.*, at 532. EPA's inaction with regard to Title II was not sufficiently grounded in the statute, the Court said, in part because nothing in the Act suggested that regulating greenhouse gases under that Title would conflict with the statutory design. Title II would not compel EPA to regulate in any way that would be "extreme," "counterintuitive," or contrary to "'common sense.'" *Id.*, at 531. At most, it would require EPA to take

the modest step of adding greenhouse-gas standards to the roster of new-motor-vehicle emission regulations. *Ibid.*

Massachusetts does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme. The Act-wide definition to which the Court gave a "sweeping" and "capacious" interpretation, *id.*, at 528, 532, is not a command to regulate, but a description of the universe of substances EPA may *consider* regulating under the Act's operative provisions. *Massachusetts* does not foreclose the Agency's use of statutory context to infer that certain of the Act's provisions use "air pollutant" to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. As certain *amici* felicitously put it, while *Massachusetts* "rejected EPA's categorical contention that greenhouse gases *could not* be 'air pollutants' for any purposes of the Act," it did not "embrace EPA's current, equally categorical position that greenhouse gases *must* be air pollutants for all purposes" regardless of the statutory context. Brief for Administrative Law Professors et al. as *Amici Curiae* 17.[5]

To be sure, Congress's profligate use of "air pollutant" where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity. One ordinarily assumes "'that identical words used in different parts of the same act are intended to have the same meaning.'" *Environmental Defense* v. *Duke Energy Corp.*, 549 U. S. 561, 574

[5] Our decision in *American Elec. Power Co.* v. *Connecticut*, 564 U. S. 410 (2011), does not suggest otherwise. We there held that the Act's authorization for EPA to establish performance standards for powerplant greenhouse-gas emissions displaced any federal-common-law right that might otherwise have existed to seek abatement of those emissions. *Id.*, at 424. The authorization to which we referred was that given in the NSPS program of § 7411, a part of the Act not at issue here and one that no party in *American Electric Power* argued was ill suited to accommodating greenhouse gases.

(2007). In this respect (as in countless others), the Act is far from a *chef d'oeuvre* of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind the " 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000). As we reiterated the same day we decided *Massachusetts*, the presumption of consistent usage " 'readily yields' " to context, and a statutory term—even one defined in the statute—"may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Duke Energy*, *supra*, at 574.

We need not, and do not, pass on the validity of all the limiting constructions EPA has given the term "air pollutant" throughout the Act. We merely observe that taken together, they belie EPA's rigid insistence that when interpreting the PSD and Title V permitting requirements it is bound by the Act-wide definition's inclusion of greenhouse gases, no matter how incompatible that inclusion is with those programs' regulatory structure.

In sum, there is no insuperable textual barrier to EPA's interpreting "any air pollutant" in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.[6]

[6] During the course of this litigation, several possible limiting constructions for the PSD trigger have been proposed. Judge Kavanaugh argued below that it would be plausible for EPA to read "any air pollutant" in the PSD context as limited to the six NAAQS pollutants. See *Coalition for Responsible Regulation, Inc.* v. *EPA*, No. 09–1322 etc. (CADC, Dec. 20, 2012), App. 171–180, 2012 WL 6621785, *15–*18 (opinion dissenting from denial of rehearing en banc). Some petitioners make a slightly different argument: that because PSD permitting is required only for major emitting facilities "in any area to which [the PSD program] applies," § 7475(a),

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Having determined that EPA was mistaken in thinking the Act *compelled* a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers, we next consider the Agency's alternative position that its interpretation was justified as an exercise of its "discretion" to adopt "a reasonable construction of the statute." Tailoring Rule 31517. We conclude that EPA's interpretation is not permissible.

Even under *Chevron*'s deferential framework, agencies must operate "within the bounds of reasonable interpretation." *Arlington*, 569 U. S., at 296. And reasonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole," *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 353 (2013), does not merit deference.

EPA itself has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design. In the Tailoring Rule, EPA described the calamitous consequences of inter-

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the relevant pollutants are only those NAAQS pollutants for which the area in question is designated attainment or unclassifiable. That approach would bring EPA's interpretation of the PSD trigger in line with its longstanding interpretation of the permitting requirements for nonattainment areas. Others maintain that "any air pollutant" in the PSD provision should be limited to air pollutants with localized effects on air quality. We do not foreclose EPA or the courts from considering those constructions in the future, but we need not do so today.

preting the Act in that way. Under the PSD program, annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from $12 million to over $1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide. Tailoring Rule 31557. The picture under Title V was equally bleak: The number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from $62 million to $21 billion; and collectively the newly covered sources would face permitting costs of $147 billion. *Id.*, at 31562–31563. Moreover, "the great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting." *Id.*, at 31533. EPA stated that these results would be so "contrary to congressional intent," and would so "severely undermine what Congress sought to accomplish," that they necessitated as much as a 1,000-fold increase in the permitting thresholds set forth in the statute. *Id.*, at 31554, 31562.

Like EPA, we think it beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases at the 100- and 250-tons-per-year levels set forth in the statute would be "incompatible" with "the substance of Congress' regulatory scheme." *Brown & Williamson*, 529 U. S., at 156. A brief review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.

Start with the PSD program, which imposes numerous and costly requirements on those sources that are required to apply for permits. Among other things, the applicant must make available a detailed scientific analysis of the source's potential pollution-related impacts, demonstrate that the

source will not contribute to the violation of any applicable pollution standard, and identify and use the "best available control technology" for each regulated pollutant it emits. § 7475(a)(3), (4), (6), (e). The permitting authority (the State, usually) also bears its share of the burden: It must grant or deny a permit within a year, during which time it must hold a public hearing on the application. § 7475(a)(2), (c). Not surprisingly, EPA acknowledges that PSD review is a "complicated, resource-intensive, time-consuming, and sometimes contentious process" suitable for "hundreds of larger sources," not "tens of thousands of smaller sources." 74 Fed. Reg. 55304, 55321–55322.

Title V contains no comparable substantive requirements but imposes elaborate procedural mandates. It requires the applicant to submit, within a year of becoming subject to Title V, a permit application and a "compliance plan" describing how it will comply with "all applicable requirements" under the Act; to certify its compliance annually; and to submit to "inspection, entry, monitoring, . . . and reporting requirements." §§ 7661b(b)–(c), 7661c(a)–(c). The procedural burdens on the permitting authority and EPA are also significant. The permitting authority must hold a public hearing on the application, § 7661a(b)(6), and it must forward the application and any proposed permit to EPA and neighboring States and respond in writing to their comments, § 7661d(a), (b)(1). If it fails to issue or deny the permit within 18 months, any interested party can sue to require a decision "without additional delay." §§ 7661a(b)(7), 7661b(c). An interested party also can petition EPA to block issuance of the permit; EPA must grant or deny the petition within 60 days, and its decision may be challenged in federal court. § 7661d(b)(2)–(3). As EPA wrote, Title V is "finely crafted for thousands," not millions, of sources. Tailoring Rule 31563.

The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly ex-

cessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." *Id.*, at 160; see also *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645–646 (1980) (plurality opinion). The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. Moreover, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it. Tailoring Rule 31555. Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.[7]

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[7] A few additional points bear mentioning. The Solicitor General conjectures that EPA might eventually alter its longstanding interpretation of "potential to emit" in order to reduce the number of sources required to have permits at the statutory thresholds. But neither he nor the Agency has given us any reason to believe that there exists a plausible reading of "potential to emit" that EPA would willingly adopt and that

EPA thought that despite the foregoing problems, it could make its interpretation reasonable by adjusting the levels at which a source's greenhouse-gas emissions would oblige it to undergo PSD and Title V permitting. Although the Act, in no uncertain terms, requires permits for sources with the potential to emit more than 100 or 250 tons per year of a relevant pollutant, EPA in its Tailoring Rule wrote a new threshold of *100,000* tons per year for greenhouse gases. Since the Court of Appeals thought the statute unambiguously made greenhouse gases capable of triggering PSD and Title V, it held that petitioners lacked Article III standing to challenge the Tailoring Rule because that rule did not injure petitioners but merely relaxed the pre-existing statutory requirements. Because we, however, hold that EPA's greenhouse-gas-inclusive interpretation of the triggers was *not* compelled, and because EPA has essentially admitted that its interpretation would be unreasonable without "tailoring," we consider the validity of the Tailoring Rule.

We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.

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would eliminate the unreasonableness of EPA's interpretation. Nor have we been given any information about the ability of other possible "streamlining" techniques alluded to by EPA—such as "general" or "electronic" permitting—to reduce the administrability problems identified above; and in any event, none of those techniques would address the more fundamental problem of EPA's claiming regulatory authority over millions of small entities that it acknowledges the Act does not seek to regulate. Finally, the Solicitor General suggests that the incompatibility of greenhouse gases with the PSD program and Title V results chiefly from the inclusion of carbon dioxide in the "aggregate pollutant" defined by EPA. We decide these cases on the basis of the pollutant "greenhouse gases" as EPA has defined and regulated it, and we express no view on how our analysis might change were EPA to define it differently.

Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 665 (2007) (quoting *Chevron*, 467 U. S., at 843). It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD and Title V permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the "bounds of its statutory authority." *Arlington*, 569 U. S., at 297 (emphasis deleted).

The Solicitor General does not, and cannot, defend the Tailoring Rule as an exercise of EPA's enforcement discretion. The Tailoring Rule is not just an announcement of EPA's refusal to enforce the statutory permitting requirements; it purports to *alter* those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act. This alteration of the statutory requirements was crucial to EPA's "tailoring" efforts. Without it, small entities with the potential to emit greenhouse gases in amounts exceeding the statutory thresholds would have remained subject to citizen suits—authorized by the Act—to enjoin their construction, modification, or operation and to impose civil penalties of up to $37,500 per day of violation. §§ 7413(b), 7604(a), (f)(4); 40 CFR § 19.4. EPA itself has recently affirmed that the "independent enforcement authority" furnished by the citizen-suit provision cannot be displaced by a permitting authority's decision not to pursue enforcement. 78 Fed. Reg. 12477, 12486–12487 (2013). The Solicitor General is therefore quite right to acknowledge that the availability of citizen suits made it necessary for EPA, in seeking to mitigate the unreasonableness of its greenhouse-gas-inclusive interpretation, to go beyond merely exercising its enforcement discretion. See Tr. of Oral Arg. 87–88.

For similar reasons, *Morton* v. *Ruiz*, 415 U. S. 199 (1974)—to which the Solicitor General points as the best case sup-

porting the Tailoring Rule, see Tr. of Oral Arg. 71, 80–81—is irrelevant. In *Ruiz*, Congress had appropriated funds for the Bureau of Indian Affairs to spend on providing assistance to "'Indians throughout the United States'" and had not "impose[d] any geographical limitation on the availability of general assistance benefits." 415 U. S., at 206–207, and n. 7. Although we held the Bureau could not deny benefits to off-reservation Indians because it had not published its eligibility criteria, we stated in dictum that the Bureau could, if it followed proper administrative procedures, "create reasonable classifications and eligibility requirements in order to allocate the limited funds available." *Id.*, at 230–231. That dictum stands only for the unremarkable proposition that an agency may adopt policies to prioritize its expenditures *within the bounds established by Congress*. See also *Lincoln* v. *Vigil*, 508 U. S. 182, 192–193 (1993). Nothing in *Ruiz* remotely authorizes an agency to modify unambiguous requirements imposed by a federal statute. An agency confronting resource constraints may change its own conduct, but it cannot change the law.

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. U. S. Const., Art. II, § 3; see *Medellín* v. *Texas*, 552 U. S. 491, 526–527 (2008). The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. See, *e. g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002) (agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute").

In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multi-year voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to "tailor" the Act's unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn. Agencies are not free to "adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." App. 175, 2012 WL 6621785, *16 (Kavanaugh, J., dissenting from denial of rehearing en banc). Because the Tailoring Rule cannot save EPA's interpretation of the triggers, that interpretation was impermissible under *Chevron*.[8]

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[8] JUSTICE BREYER argues, *post,* at 342 (opinion concurring in part and dissenting in part), that when the statutory permitting thresholds of 100 or 250 tons per year do not provide a "sensible regulatory line," EPA is entitled to "read an unwritten exception" into "the particular number used by the statute"—by which he apparently means that the Agency is entitled to substitute a dramatically higher number, such as 100,000. We are aware of no principle of administrative law that would allow an agency to rewrite such a clear statutory term, and we shudder to contemplate the effect that such a principle would have on democratic governance.

JUSTICE BREYER, however, claims to perceive no difference between (a) reading the statute to exclude greenhouse gases from the term "any air pollutant" in the permitting triggers, and (b) reading the statute to exclude sources emitting less than 100,000 tons per year from the statutory phrase "any . . . source with the potential to emit two hundred and fifty tons per year or more." See *post,* at 339. The two could scarcely be further apart. As we have explained (and as EPA agrees), statutory con-

B. BACT for "Anyway" Sources

For the reasons we have given, EPA overstepped its statutory authority when it decided that a source could become subject to PSD or Title V permitting by reason of its greenhouse-gas emissions. But what about "anyway" sources, those that would need permits based on their emissions of more conventional pollutants (such as particulate matter)? We now consider whether EPA reasonably interpreted the Act to require those sources to comply with "best available control technology" emission standards for greenhouse gases.

1

To obtain a PSD permit, a source must be "subject to the best available control technology" for "each pollutant subject to regulation under [the Act]" that it emits. § 7475(a)(4). The Act defines BACT as "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation" that is "achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques." § 7479(3). BACT is determined "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." *Ibid.*

Some petitioners urge us to hold that EPA may never require BACT for greenhouse gases—even when a source must undergo PSD review based on its emissions of conventional pollutants—because BACT is fundamentally unsuited to

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text makes plain that the Act's operative provisions use "air pollutant" to denote less than the full range of pollutants covered by the Act-wide definition. See Part II–A–1, *supra*. It is therefore incumbent on EPA to specify the pollutants encompassed by that term in the context of a particular program, and to do so reasonably in light of that program's overall regulatory scheme. But there is no ambiguity whatsoever in the specific, numerical permitting thresholds, and thus no room for EPA to exercise discretion in selecting a different threshold.

greenhouse-gas regulation. BACT, they say, has traditionally been about end-of-stack controls "such as catalytic converters or particle collectors"; but applying it to greenhouse gases will make it more about regulating energy use, which will enable regulators to control "every aspect of a facility's operation and design," right down to the "light bulbs in the factory cafeteria." Brief for Petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. in No. 12–1254, p. 7; see Joint Reply Brief for Petitioners in No. 12–1248 etc., pp. 14–15 ("BACT for [greenhouse gases] becomes an unbounded exercise in command-and-control regulation" of everything from "efficient light bulbs" to "basic industrial processes"). But see Brief for Calpine Corp. as *Amicus Curiae* 10 ("[I]n Calpine's experience with 'anyway' sources, the [greenhouse-gas] analysis was only a small part of the overall permitting process").

EPA has published a guidance document that lends some credence to petitioners' fears. It states that at least initially, compulsory improvements in energy efficiency will be the "foundation" of greenhouse-gas BACT, with more traditional end-of-stack controls either not used or "added as they become more available." PSD and Title V Permitting Guidance for Greenhouse Gases 29 (Mar. 2011) (hereinafter Guidance); see Peloso & Dobbins, Greenhouse Gas PSD Permitting: The Year in Review, 42 Tex. Env. L. J. 233, 247 (2012) ("Because [other controls] tend to prove infeasible, energy efficiency measures dominate the [greenhouse-gas] BACT controls approved by the states and EPA"). But EPA's guidance also states that BACT analysis should consider options *other than* energy efficiency, such as "carbon capture and storage." Guidance 29, 32, 35–36, 42–43. EPA argues that carbon capture is reasonably comparable to more traditional, end-of-stack BACT technologies, *id.*, at 32, n. 86, and petitioners do not dispute that.

Moreover, assuming without deciding that BACT may be used to force some improvements in energy efficiency, there

are important limitations on BACT that may work to mitigate petitioners' concerns about "unbounded" regulatory authority. For one, BACT is based on "control technology" for the applicant's "proposed facility," § 7475(a)(4); therefore, it has long been held that BACT cannot be used to order a fundamental redesign of the facility. See, *e. g.*, *Sierra Club* v. *EPA*, 499 F. 3d 653, 654–655 (CA7 2007); *In re Pennsauken Cty., N. J., Resource Recovery Facility*, 2 E. A. D. 667, 673 (EAB 1988). For another, EPA has long interpreted BACT as required only for pollutants that the source itself emits, see 44 Fed. Reg. 51947 (1979); accordingly, EPA acknowledges that BACT may not be used to require "reductions in a facility's demand for energy from the electric grid." Guidance 24. Finally, EPA's guidance suggests that BACT should not require every conceivable change that could result in minor improvements in energy efficiency, such as the aforementioned light bulbs. *Id.*, at 31. The guidance explains that permitting authorities should instead consider whether a proposed regulatory burden outweighs any reduction in emissions to be achieved, and should concentrate on the facility's equipment that uses the largest amounts of energy. *Ibid.*

2

The question before us is whether EPA's decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under *Chevron*. We conclude that it is.

The text of the BACT provision is far less open-ended than the text of the PSD and Title V permitting triggers. It states that BACT is required "for each pollutant subject to regulation under this chapter" (*i. e.*, the entire Act), § 7475(a)(4), a phrase that—as the D. C. Circuit wrote 35 years ago—"would not seem readily susceptible [of] misinterpretation." *Alabama Power Co.* v. *Costle*, 636 F. 2d 323, 404 (1979). Whereas the dubious breadth of "any air pollut-

ant" in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggests that the necessary judgment has already been made by Congress. The wider statutory context likewise does not suggest that the BACT provision can bear a narrowing construction: There is no indication that the Act elsewhere uses, or that EPA has interpreted, "each pollutant subject to regulation under this chapter" to mean anything other than what it says.

Even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA's interpretation is unreasonable. We are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation. And it is not yet clear that EPA's demands will be of a significantly different character from those traditionally associated with PSD review. In short, the record before us does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases.

We acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA's current approach, nor as a free rein for any future regulatory application of BACT in this distinct context. Our narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by "anyway" sources.

However, EPA may require an "anyway" source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases. As noted above, the Tailoring Rule applies BACT only if a source

emits greenhouse gases in excess of 75,000 tons per year CO_2e, but the Rule makes clear that EPA did not arrive at that number by identifying the *de minimis* level. See nn. 1, 3, *supra*. EPA may establish an appropriate *de minimis* threshold below which BACT is not required for a source's greenhouse-gas emissions. We do not hold that 75,000 tons per year CO_2e necessarily exceeds a true *de minimis* level, only that EPA must justify its selection on proper grounds. Cf. *Alabama Power*, *supra*, at 405.[9]

* * *

To sum up: We hold that EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions. Specifically, the Agency may not treat greenhouse gases as a pollutant for purposes of defining a "major emitting facility" (or a "modification" thereof) in the PSD context or a "major source" in the Title V context. To the extent its regulations purport to do so, they are invalid. EPA may, however, continue to treat greenhouse gases as a

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[9] JUSTICE ALITO argues that BACT is "fundamentally incompatible" with greenhouse gases for two reasons. *Post*, at 346 (opinion concurring in part and dissenting in part). First, BACT requires consideration of "ambient air quality at the proposed site and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under this chapter," § 7475(e)(1); see also § 7475(e)(3)(B); and it is not obvious how that requirement should apply, or even whether it can apply, to greenhouse gases. *Post*, at 346–347. But the possibility that that requirement may be inoperative as to greenhouse gases does not convince us that they must be categorically excluded from BACT even though they are indisputably a "pollutant subject to regulation." Second, JUSTICE ALITO argues that EPA's guidance on how to implement greenhouse-gas BACT is a recipe for "arbitrary and inconsistent decisionmaking." *Post*, at 350. But we are not reviewing EPA's guidance in these cases, and we cannot say that it is impossible for EPA and state permitting authorities to devise rational ways of complying with the statute's directive to determine BACT for greenhouse gases "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." § 7479(3).

"pollutant subject to regulation under this chapter" for purposes of requiring BACT for "anyway" sources. The judgment of the Court of Appeals is affirmed in part and reversed in part.

It is so ordered.

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

In *Massachusetts* v. *EPA*, 549 U. S. 497 (2007), we held that greenhouse gases fall within the Clean Air Act's general definition of the term "air pollutant," 42 U. S. C. § 7602(g). 549 U. S., at 528–529. We also held, consequently, that the Environmental Protection Agency is empowered and required by Title II of the Act to regulate greenhouse gas emissions from mobile sources (such as cars and trucks) if it decides that greenhouse gases "contribute to . . . air pollution which may reasonably be anticipated to endanger public health or welfare," § 7521(a)(1). 549 U. S., at 532–533. The EPA determined that greenhouse gases endanger human health and welfare, 74 Fed. Reg. 66496 (2009) (Endangerment Finding), and so it issued regulations for mobile emissions, 75 Fed. Reg. 25324 (2010).

These cases take as a given our decision in *Massachusetts* that the Act's *general definition* of "air pollutant" includes greenhouse gases. One of the questions posed by these cases is whether those gases fall within the scope of the phrase "any air pollutant" as that phrase is used in the more specific provisions of the Act here at issue. The Court's answer is "no." *Ante*, at 315–328. I disagree.

The Clean Air Act provisions at issue here are Title I's Prevention of Significant Deterioration (PSD) program, § 7470 *et seq.*, and Title V's permitting regime, § 7661 *et seq.* By contrast to Title II, Titles I and V apply to stationary sources, such as powerplants and factories. Under the PSD program, "major emitting facilities" constructed in the

United States must meet certain requirements, including obtaining a permit that imposes emissions limitations, § 7475(a)(1), and using "the best available control technology for each pollutant subject to regulation under [the Act] emitted from" the facility, § 7475(a)(4). Title V requires each "major source" to obtain an operating permit. § 7661a(a).

These cases concern the definitions of "major emitting facility" and "major source," each of which is defined to mean any stationary source that emits more than a threshold quantity of "any air pollutant." See § 7479(1) ("major emitting facility"); §§ 7602(j), 7661(2)(B) ("major source"). To simplify the exposition, I will refer only to the PSD program and its definition of "major emitting facility"; a parallel analysis applies to Title V.

As it is used in the PSD provisions,

> "[t]he term 'major emitting facility' means any of [a list of specific categories of] stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant . . . . Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." § 7479(1).

To simplify further, I will ignore the reference to specific types of sources that emit at least 100 tons per year (tpy) of any air pollutant. In effect, we are dealing with a statute that says that the PSD program's regulatory requirements must be applied to

> "any stationary source that has the potential to emit two hundred fifty tons per year or more of any air pollutant."

The interpretive difficulty in these cases arises out of the definition's use of the phrase "two hundred fifty tons per year or more," which I will call the "250 tpy threshold." When applied to greenhouse gases, 250 tpy is far too low a threshold. As the Court explains, tens of thousands of stationary sources emit large quantities of one greenhouse gas,

carbon dioxide. See *ante*, at 321–325, and n. 7. To apply the programs at issue here to all those sources would be extremely expensive and burdensome, counterproductive, and perhaps impossible; it would also contravene Congress' intent that the programs' coverage be limited to those large sources whose emissions are substantial enough to justify the regulatory burdens. *Ibid.* The EPA recognized as much, and it addressed the problem by issuing a regulation—the Tailoring Rule—that purports to raise the coverage threshold for greenhouse gases from the statutory figure of 250 tpy to 100,000 tpy in order to keep the programs' coverage limited to "a relatively small number of large industrial sources." 75 Fed. Reg. 31514, 31555; see *id.*, at 31523–31524.

The Tailoring Rule solves the practical problems that would have been caused by the 250 tpy threshold. But what are we to do about the statute's language? The statute specifies a definite number—250, not 100,000—and it says that facilities that are covered by that number must meet the program's requirements. The statute says nothing about agency discretion to change that number. What is to be done? How, given the statute's language, can the EPA exempt from regulation sources that emit more than 250 but less than 100,000 tpy of greenhouse gases (and that also do not emit other regulated pollutants at threshold levels)?

The Court answers by (1) pointing out that regulation at the 250 tpy threshold would produce absurd results, (2) refusing to read the statute as compelling such results, and (3) consequently interpreting the phrase "*any* air pollutant" as containing an implicit exception for greenhouse gases. (Emphasis added.) Put differently, the Court reads the statute as defining "major emitting facility" to mean "stationary sources that have the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those air pollutants, such as carbon dioxide, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did*

not mean to cover." See *ante*, at 320 ("[T]here is no insuperable textual barrier to EPA's interpreting 'any air pollutant' in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written").

I agree with the Court that the word "any," when used in a statute, does not normally mean "any in the universe." Cf. *FCC* v. *NextWave Personal Communications Inc.*, 537 U. S. 293, 311 (2003) (BREYER, J., dissenting) ("'Tell all customers that . . . ' does not refer to every customer of every business in the world"). Rather, "[g]eneral terms as used on particular occasions often carry with them implied restrictions as to scope," *ibid.*, and so courts must interpret the word "any," like all other words, in context. As Judge Learned Hand pointed out when interpreting another statute many years ago, "[w]e can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time." *Borella* v. *Borden Co.*, 145 F. 2d 63, 64 (CA2 1944). The pursuit of that underlying purpose may sometimes require us to "abandon" a "literal interpretation" of a word like "any." *Id.*, at 64–65.

The law has long recognized that terms such as "any" admit of unwritten limitations and exceptions. Legal philosophers like to point out that a statute providing that "'[w]hoever shall willfully take the life of another shall be punished by death'" need not encompass a man who kills in self-defense; nor must an ordinance imposing fines upon those who occupy a public parking spot for more than two hours penalize a driver who is unable to move because of a

parade. See Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616, 619, 624 (1949); see also *United States* v. *Kirby*, 7 Wall. 482, 485–487 (1869) (holding that a statute forbidding knowing and willful obstruction of the mail contains an implicit exception permitting a local sheriff to arrest a mail carrier). The maxim *cessante ratione legis cessat et ipsa lex*—where a law's rationale ceases to apply, so does the law itself—is not of recent origin. See, *e. g.*, *Zadvydas* v. *Davis*, 533 U. S. 678, 699 (2001) (citing 1 E. Coke, Institutes *70b); *Green* v. *Liter*, 8 Cranch 229, 249 (1814) (Story, J.) ("*cessante ratione*, *cessat ipsa lex*").

I also agree with the Court's point that "a generic reference to air pollutants" in the Clean Air Act need not "encompass every substance falling within the Act-wide definition" that we construed in *Massachusetts*, § 7602(g). See *ante*, at 317. As the Court notes, the EPA has interpreted the phrase "any air pollutant," which is used several times in the Act, as limited to "air pollutants *for which EPA has promulgated new source performance standards*" in the portion of the Act dealing with those standards, as limited to "*visibility-impairing* air pollutants" in the part of the Act concerned with deleterious effects on visibility, and as limited to "pollutants *for which the area is designated nonattainment*" in the part of the Act aimed at regions that fail to attain air quality standards. *Ante*, at 317–318.

But I do not agree with the Court that the only way to avoid an absurd or otherwise impermissible result in these cases is to create an atextual greenhouse gas exception to the phrase "any air pollutant." After all, the word "any" makes an earlier appearance in the definitional provision, which defines "major emitting facility" to mean "*any* . . . source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." § 7479(1) (emphasis added). As a linguistic matter, one can just as easily read an implicit exception for small-scale greenhouse gas emissions into the phrase "any source" as into the phrase "any

air pollutant." And given the purposes of the PSD program and the Act as a whole, as well as the specific roles of the different parts of the statutory definition, finding flexibility in "any source" is far more sensible than the Court's route of finding it in "any air pollutant."

The implicit exception I propose reads almost word for word the same as the Court's, except that the location of the exception has shifted. To repeat, the Court reads the definition of "major emitting facility" as if it referred to "any source with the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those air pollutants, such as carbon dioxide, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*" I would simply move the implicit exception, which I've italicized, so that it applies to "source" rather than "air pollutant": "any *source* with the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those sources, such as those emitting unmanageably small amounts of greenhouse gases, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*"

From a legal, administrative, and functional perspective—that is, from a perspective that assumes that Congress was not merely trying to arrange words on paper but was seeking to achieve a real-world *purpose*—my way of reading the statute is the more sensible one. For one thing, my reading is consistent with the specific purpose underlying the 250 tpy threshold specified by the statute. The purpose of that number was not to prevent the regulation of dangerous air pollutants that cannot be sensibly regulated at that particular threshold, though that is the effect that the Court's reading gives the threshold. Rather, the purpose was to limit the PSD program's obligations to larger sources while exempting the many small sources whose emissions are low

enough that imposing burdensome regulatory requirements on them would be senseless.

Thus, the accompanying Senate Report explains that the PSD program "is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college." S. Rep. No. 95–127, p. 96 (1977). And the principal sponsor of the Clean Air Act amendments at issue here, Senator Edmund Muskie, told the Senate that the program would not cover "houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources." 123 Cong. Rec. 18013, 18021 (1977).

The EPA, exercising the legal authority to which it is entitled under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), understood the threshold's purpose in the same light. It explained that Congress' objective was

> "to limit the PSD program to large industrial sources because it was those sources that were the primary cause of the pollution problems in question and because those sources would have the resources to comply with the PSD requirements. Congress's mechanism for limiting PSD was the 100/250 tpy threshold limitations. Focused as it was primarily on NAAQS pollutants [that is, those air pollutants for which the EPA has issued a national ambient air quality standard under Title I of the Act, see *EPA* v. *EME Homer City Generation, L. P.*, 572 U. S. 489, 498 (2014)], Congress considered sources that emit NAAQS pollutants in those quantities generally to be the large industrial sources to which it intended PSD to be limited." Tailoring Rule, 75 Fed. Reg. 31555.

The Court similarly acknowledges that "the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens." *Ante*, at 322; see also *Alabama Power Co.* v. *Costle*, 636 F. 2d 323, 353 (CADC 1979) ("Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air").

An implicit source-related exception would serve this statutory purpose while going no further. The implicit exception that the Court reads into the phrase "any air pollutant," by contrast, goes well beyond the limited congressional objective. Nothing in the statutory text, the legislative history, or common sense suggests that Congress, when it imposed the 250 tpy threshold, was trying to undermine its own deliberate decision to use the broad language "any air pollutant" by removing some substances (rather than some facilities) from the PSD program's coverage.

For another thing, a source-related exception serves the flexible nature of the Clean Air Act. We observed in *Massachusetts* that "[w]hile the Congresses that drafted" the Act "might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." 549 U. S., at 532. We recognized that "[t]he broad language of" the Act-wide definition of "air pollutant" "reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence." *Ibid.*

The Court's decision to read greenhouse gases out of the PSD program drains the Act of its flexibility and chips away at our decision in *Massachusetts*. What sense does it make

to read the Act as generally granting the EPA the authority to regulate greenhouse gas emissions and then to read it as denying that power with respect to the programs for large stationary sources at issue here? It is anomalous to read the Act to require the EPA to regulate air pollutants that pose previously unforeseen threats to human health and welfare where "two hundred fifty tons per year" is a sensible regulatory line but not where, by chemical or regulatory happenstance, a higher line must be drawn. And it is anomalous to read an unwritten exception into the more important phrase of the statutory definition ("any air pollutant") when a similar unwritten exception to less important language (the particular number used by the statute) will do just as well. The implicit exception preferred by the Court produces all of these anomalies, while the source-related exception I propose creates none of them.

In addition, the interpretation I propose leaves the EPA with the sort of discretion as to interstitial matters that Congress likely intended it to retain. My interpretation gives the EPA nothing more than the authority to *exempt* sources from regulation insofar as the Agency reasonably determines that applying the PSD program to them would expand the program so much as to contravene Congress' intent. That sort of decision, which involves the Agency's technical expertise and administrative experience, is the kind of decision that Congress typically leaves to the agencies to make. Cf. *Barnhart* v. *Walton*, 535 U. S. 212, 222 (2002) (enumerating factors that we take to indicate that Congress intends the agency to exercise the discretion provided by *Chevron*). To read the Act to grant that discretion here is to read it as furthering Congress' (and the public's) interest in more effective, less wasteful regulation.

Last, but by no means least, a source-related exception advances the Act's overall purpose. That broad purpose, as set forth at the beginning of the statute, is "to protect and enhance the quality of the Nation's air resources so as to

promote the public health and welfare and the productive capacity of its population." § 7401(b)(1); see also § 7470(1) (A purpose of the PSD program in particular is "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution"); § 7602(h) ("All language [in the Act] referring to effects on welfare includes . . . effects on . . . weather . . . and climate"). The expert agency charged with administering the Act has determined in its Endangerment Finding that greenhouse gases endanger human health and welfare, and so sensible regulation of industrial emissions of those pollutants is at the core of the purpose behind the Act. The broad "no greenhouse gases" exception that the Court reads into the statute unnecessarily undercuts that purpose, while my narrow source-related exception would leave the EPA with the tools it needs to further it.

* * *

I agree with the Court's holding that stationary sources that are subject to the PSD program because they emit other (non-greenhouse-gas) pollutants in quantities above the statutory threshold—those facilities that the Court refers to as "anyway" sources—must meet the "best available control technology" requirement of § 7475(a)(4) with respect to greenhouse gas emissions. I therefore join Part II–B–2 of the Court's opinion. But as for the Court's holding that the EPA cannot interpret the language at issue here to cover facilities that emit more than 100,000 tpy of greenhouse gases by virtue of those emissions, I respectfully dissent.

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

In *Massachusetts* v. *EPA*, 549 U. S. 497 (2007), this Court considered whether greenhouse gases fall within the Clean Air Act's general definition of an air "pollutant." *Id.*, at

528–529. The Environmental Protection Agency cautioned us that "key provisions of the [Act] cannot cogently be applied to [greenhouse-gas] emissions," Brief for Federal Respondent in *Massachusetts* v. *EPA*, O. T. 2006, No. 05–1120, p. 22, but the Court brushed the warning aside and had "little trouble" concluding that the Act's "sweeping definition" of a pollutant encompasses greenhouse gases. 549 U. S., at 528–529. I believed *Massachusetts* v. *EPA* was wrongly decided at the time, and these cases further expose the flaws with that decision.

I

As the present cases now show, trying to fit greenhouse gases into "key provisions" of the Clean Air Act involves more than a "little trouble." These cases concern the provisions of the Act relating to the "Prevention of Significant Deterioration" (PSD), 42 U. S. C. §§ 7470–7492, as well as Title V of the Act, § 7661. And in order to make those provisions apply to greenhouse gases in a way that does not produce absurd results, the EPA effectively amended the Act. The Act contains specific emissions thresholds that trigger PSD and Title V coverage, but the EPA crossed out the figures enacted by Congress and substituted figures of its own.

I agree with the Court that the EPA is neither required nor permitted to take this extraordinary step, and I therefore join Parts I and II–A of the Court's opinion.

II

I do not agree, however, with the Court's conclusion that what it terms "anyway sources," *i. e.*, sources that are subject to PSD and Title V permitting as the result of the emission of conventional pollutants, must install "best available control technology" (BACT) for greenhouse gases. As is the case with the PSD and Title V thresholds, trying to fit greenhouse gases into the BACT analysis badly distorts the scheme that Congress adopted.

The Court gives two main reasons for concluding that BACT applies to "anyway" sources, one based on text and one based on practical considerations. Neither is convincing.

A

With respect to the text, it is curious that the Court, having departed from a literal interpretation of the term "pollutant" in Part II–A, turns on its heels and adopts a literal interpretation in Part II–B. The coverage thresholds at issue in Part II–A apply to any "pollutant." The Act's general definition of this term is broad, and in *Massachusetts* v. *EPA*, *supra*, the Court held that this definition covers greenhouse gases. The Court does not disturb that holding, but it nevertheless concludes that, as used in the provision triggering PSD coverage, the term "pollutant" actually means "pollutant, other than a greenhouse gas."

In Part II–B, the relevant statutory provision says that BACT must be installed for any "pollutant subject to regulation under [the Act]." § 7475(a)(4). If the term "pollutant" means "pollutant, other than a greenhouse gas," as the Court effectively concludes in Part II–A, the term "pollutant subject to regulation under [the Act]" in § 7475(a)(4) should mean "pollutant, other than a greenhouse gas, subject to regulation under [the Act], and that is subject to regulation under [the Act]." The Court's literalism is selective, and it results in a strange and disjointed regulatory scheme.

Under the Court's interpretation, a source can emit an unlimited quantity of greenhouse gases without triggering the need for a PSD permit. Why might Congress have wanted to allow this? The most likely explanation is that the PSD permitting process is simply not suited for use in regulating this particular pollutant. And if that is so, it makes little sense to require the installation of BACT for greenhouse gases in those instances in which a source happens to be required to obtain a permit due to the emission of a qualify-

ing quantity of some other pollutant that is regulated under the Act.

B

The Court's second reason for holding that BACT applies to "anyway" sources is its belief that this can be done without disastrous consequences. Only time will tell whether this hope is well founded, but it seems clear that BACT analysis is fundamentally incompatible with the regulation of greenhouse-gas emissions for at least two important reasons.

1

First, BACT looks to the effects of covered pollutants in the area in which a source is located. The PSD program is implemented through "emission limitations and such other measures" as are "necessary . . . to prevent significant deterioration of air quality *in each region*." § 7471 (emphasis added). The Clean Air Act provides that BACT must be identified "on a case-by-case basis," § 7479(3), and this necessarily means that local conditions must be taken into account. For this reason, the Act instructs the EPA to issue regulations requiring an analysis of "the ambient air quality . . . *at the site of the proposed major emitting facility and in the area potentially affected* by the emissions from such facility for each pollutant regulated under [the Act]." § 7475(e)(3)(B) (emphasis added). The Act also requires a public hearing on the "air quality *at the proposed site and in areas which may be affected* by emissions from such facility for each pollutant subject to regulation under [the Act] which will be emitted from such facility." §§ 7475(a)(2), (e)(1) (emphasis added). Accordingly, if BACT is required for greenhouse gases, the Act demands that the impact of these gases in the area surrounding a site must be monitored, explored at a public hearing, and considered as part of the permitting process. The effects of greenhouse gases, however, are global, not local. See PSD and Title V Permitting Guidance for Greenhouse Gases 41–42 (Mar. 2011) (here-

inafter Guidance). As a result, the EPA has declared that PSD permit applicants and permitting officials may disregard these provisions of the Act. 75 Fed. Reg. 31520 (2010).

2

Second, as part of the case-by-case analysis required by BACT, a permitting authority must balance the environmental benefit expected to result from the installation of an available control measure against adverse consequences that may result, including any negative impact on the environment, energy conservation, and the economy. And the EPA itself has admitted that this cannot be done on a case-by-case basis with respect to greenhouse gases.

The Clean Air Act makes it clear that BACT must be determined on a "case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." § 7479(3). To implement this directive, the EPA adopted a five-step framework for making a BACT determination. See New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting (Oct. 1990).[1] Under the fourth step of this analysis, po-

[1] The EPA describes these steps as follows:

(1) The applicant must identify all available control options that are potentially applicable by consulting the EPA's BACT clearinghouse along with other reliable sources.

(2) The technical feasibility of the control options identified in step 1 are eliminated based on technical infeasibility.

(3) The control technologies are ranked based on control effectiveness, by considering: the percentage of the pollutant removed; expected emission rate for each new source review (NSR) pollutant; expected emission reduction for each regulated NSR pollutant; and output based emissions limit.

(4) Control technologies are eliminated based on collateral impacts, such as: energy impacts; other environmental impacts; solid or hazardous waste; water discharge from control device; emissions of air toxics and other non-NSR regulated pollutants; and economic impacts.

(5) The most effective control option not eliminated in step 4 is proposed as BACT for the pollutant and emission unit under review.

tentially applicable and feasible control technologies that are candidates for selection as BACT for a particular source are eliminated from consideration based on their "collateral impacts," such as any adverse environmental effects or adverse effects on energy consumption or the economy.

More recently, the EPA provided guidance to permitting authorities regarding the treatment of greenhouse-gas emissions under this framework, and the EPA's guidance demonstrates the insuperable problem that results when an attempt is made to apply this framework to greenhouse-gas emissions. As noted above, at step 4 of the framework, a permitting authority must balance the positive effect likely to result from requiring a particular source to install a particular technology against a variety of negative effects that are likely to occur if that step is taken. But in the case of greenhouse gases, how can a permitting authority make this individualized, source-specific determination?

The EPA instructs permitting authorities to take into consideration all the adverse effects that the EPA has found to result from *the overall increase* in greenhouse gases in the atmosphere. These include an increased risk of dangerous heat waves, hurricanes, floods, wildfires, and drought, as well as risks to agriculture, forestry, and water resources. Guidance 40–41. But the EPA admits that it is simply not possible for a permitting authority to calculate in any meaningful way the degree to which any potential reduction in greenhouse-gas emissions from any individual source might reduce these risks. And without making such a calculation in even a very rough way, a permitting authority cannot do what the Clean Air Act and the EPA's framework demand—compare the benefits of some specified reduction in the emission of greenhouse gases from a particular source with any adverse environmental or economic effects that might result from mandating such a reduction.

Suppose, for example, that a permitting authority must decide whether to mandate a change that both decreases a source's emission of greenhouse gases and increases its emission of a conventional pollutant that has a negative effect on public health. How should a permitting authority decide whether to require this change? Here is the EPA's advice:

> "[W]hen considering the trade-offs between the environmental impacts of a particular level of GHG [greenhouse-gas] reduction and a collateral increase in another regulated NSR pollutant,[2] rather than attempting to determine or characterize specific environmental impacts from GHGs emitted at particular locations, EPA recommends that permitting authorities focus on the amount of GHG emission reductions that may be gained or lost by employing a particular control strategy and how that compares to the environmental or other impacts resulting from the collateral emissions increase of other regulated NSR pollutants." *Id.*, at 42.

As best I can make out, what this means is that permitting authorities should not even try to assess the net impact on public health. Instead of comparing the positive and negative public health effects of a particular option, permitting authorities are instructed to compare the adverse public health effects of increasing the emissions of the conventional pollutants with the amount of the reduction of the source's emissions of greenhouse gases. But without knowing the positive effects of the latter, this is a meaningless comparison.

The EPA tries to ameliorate this problem by noting that permitting authorities are entitled to "'a great deal of discretion,'" *id.*, at 41, but without a comprehensible standard,

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[2] "New source review pollutants" are those pollutants for which a national ambient air quality standard has been set and a few others, such as sulfur dioxide. See 40 CFR §51.165(a)(1)(xxxvii) (2013).

what this will mean is arbitrary and inconsistent decision-making. That is not what the Clean Air Act contemplates.[3]

* * *

BACT analysis, like the rest of the Clean Air Act, was developed for use in regulating the emission of conventional pollutants and is simply not suited for use with respect to greenhouse gases. I therefore respectfully dissent from Part II–B–2 of the opinion of the Court.

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[3] While I do not think that BACT applies at all to "anyway sources," if it is to apply, the limitations suggested in Part II–B–1 might lessen the inconsistencies highlighted in Part II of this opinion, and on that understanding I join Part II–B–1.

Syllabus

LOUGHRIN *v.* UNITED STATES

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

No. 13–316. Argued April 1, 2014—Decided June 23, 2014

A part of the federal bank fraud statute, 18 U. S. C. § 1344(2), makes it a crime to "knowingly execut[e] a scheme . . . to obtain" property owned by, or under the custody of, a bank "by means of false or fraudulent pretenses." Petitioner Kevin Loughrin was charged with bank fraud after he was caught forging stolen checks, using them to buy goods at a Target store, and then returning the goods for cash. The District Court declined to give Loughrin's proposed jury instruction that a conviction under § 1344(2) required proof of "intent to defraud a financial institution." The jury convicted Loughrin, and the Tenth Circuit affirmed.

Held: Section 1344(2) does not require the Government to prove that a defendant intended to defraud a financial institution. Pp. 355–366.

(a) Section 1344(2) requires only that the defendant intend to obtain bank property and that this end is accomplished "by means of" a false statement. No additional requirement of intent to defraud a bank appears in the statute's text. And imposing that requirement would prevent § 1344(2) from applying to cases falling within the statute's clear terms, such as frauds directed against a third-party custodian of bank-owned property. Loughrin's construction would also make § 1344(2) a mere subset of § 1344(1), which prohibits any scheme "to defraud a financial institution." That view is untenable because those clauses are separated by the disjunctive "or," signaling that each is intended to have separate meaning. And to read clause (1) as fully encompassing clause (2) contravenes two related interpretive canons: that different language signals different meaning, and that no part of a statute should be superfluous. Pp. 355–358.

(b) Loughrin claims that his view is supported by similar language in the federal mail fraud statute and by federalism principles, but his arguments are unpersuasive. Pp. 358–366.

(1) In *McNally* v. *United States*, 483 U. S. 350, this Court interpreted similar language in the mail fraud statute, § 1341—which served as a model for § 1344—to set forth just one offense, despite the use of the word "or." But the two statutes have notable textual differences. The mail fraud law contains two phrases strung together in a single, unbroken sentence, whereas § 1344's two clauses have separate number-

Syllabus

ing, line breaks, and equivalent indentation—all indications of separate meaning. Moreover, Congress likely did not intend to adopt *McNally*'s interpretation when it enacted § 1344, because at that time (three years before *McNally*) every Court of Appeals had interpreted the word "or" in the mail fraud statute in its usual, disjunctive sense. And while *McNally* found that unique features of the mail fraud statute's history supported its view, the legislative history surrounding the adoption of § 1344 points the other way. Pp. 359–361.

(2) Loughrin also contends that without an element of intent to defraud a bank, § 1344(2) would apply to every minor fraud in which the victim happens to pay by check. This, he says, would unduly expand the reach of federal criminal law into an area traditionally left to the States. But this argument ignores a significant textual limit on § 1344(2)'s reach: The criminal must acquire (or attempt to acquire) the bank property "*by means of*" the misrepresentation. That language limits § 1344(2)'s application to cases (like this one) in which the misrepresentation has some real connection to a federally insured bank, and thus to the pertinent federal interest. Pp. 361–366.

710 F. 3d 1111, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Parts I and II, Part III–A except the last paragraph, and the last footnote of Part III–B. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 366. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 370.

Kevin K. Russell argued the cause for petitioner. With him on the briefs were *Thomas C. Goldstein*, *Kathryn N. Nestor*, and *Scott Keith Wilson*.

Anthony A. Yang argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Scott A. C. Meisler*.*

**Daniel B. Levin* and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

JUSTICE KAGAN delivered the opinion of the Court.

A provision of the federal bank fraud statute, 18 U. S. C. § 1344(2), makes criminal a knowing scheme to obtain property owned by, or in the custody of, a bank "by means of false or fraudulent pretenses, representations, or promises." The question presented is whether the Government must prove that a defendant charged with violating that provision intended to defraud a bank. We hold that the Government need not make that showing.

I

Petitioner Kevin Loughrin executed a scheme to convert altered or forged checks into cash. Pretending to be a Mormon missionary going door-to-door in a neighborhood in Salt Lake City, he rifled through residential mailboxes and stole any checks he found. Sometimes, he washed, bleached, ironed, and dried the checks to remove the existing writing, and then filled them out as he wanted; other times, he did nothing more than cross out the name of the original payee and add another. And when he was lucky enough to stumble upon a blank check, he completed it and forged the accountholder's signature. Over several months, Loughrin made out six of these checks to the retailer Target, for amounts of up to $250. His *modus operandi* was to go to a local store and, posing as the accountholder, present an altered check to a cashier to purchase merchandise. After the cashier accepted the check (which, remarkably enough, happened time after time), Loughrin would leave the store, then turn around and walk back inside to return the goods for cash.

Each of the six checks that Loughrin presented to Target was drawn on an account at a federally insured bank, including Bank of America and Wells Fargo. Employees in Target's back office identified three of the checks as fraudulent, and so declined to submit them for payment. Target deposited the other three checks. The bank refused payment on one, after the accountholder notified the bank that she had

seen a man steal her mail. Target appears to have received payment for the other two checks, though the record does not conclusively establish that fact. See Brief for United States 6, 7, n. 3.

The Federal Government eventually caught up with Loughrin and charged him with six counts of committing bank fraud—one for each of the altered checks presented to Target. The federal bank fraud statute, 18 U. S. C. § 1344, provides as follows:

> "Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> "(1) to defraud a financial institution; or
>
> "(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> "shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."[1]

Ruling (for a reason not material here) that Circuit precedent precluded convicting Loughrin under the statute's first clause, § 1344(1), the District Court allowed the case to go to the jury on the statute's second, § 1344(2).

The court instructed the jury that it could convict Loughrin under that clause if, in offering the fraudulent checks to Target, he had "knowingly executed or attempted to execute a scheme or artifice to obtain money or property from the [banks on which the checks were drawn] by means of false or fraudulent pretenses, representations, or promises." App. 7. Loughrin asked as well for another instruction: The jury, he argued, must also find that he acted with "intent to defraud a financial institution." App. to Pet. for Cert. 43a.

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[1] A "financial institution," as defined in 18 U. S. C. § 20, includes a federally insured bank of the kind involved here.

The court, however, declined to give that charge, and the jury convicted Loughrin on all six counts.

The United States Court of Appeals for the Tenth Circuit affirmed. See 710 F. 3d 1111 (2013). As relevant here, it rejected Loughrin's argument that "a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the [altered] checks had been drawn." *Id.*, at 1115. That intent, the court reasoned, is necessary only under the bank fraud law's first clause. The court acknowledged that under its interpretation, § 1344(2) "cast[s] a wide net for bank fraud liability," but concluded that such a result is "dictated by the plain language of the statute." *Id.*, at 1117.

We granted certiorari, 571 U. S. 1107 (2013), to resolve a Circuit split on whether § 1344(2) requires the Government to show that a defendant intended to defraud a federally insured bank or other financial institution.[2] We now affirm the Tenth Circuit's decision.

II

We begin with common ground. All parties agree, as do we and the Courts of Appeals, that § 1344(2) requires that a defendant "knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice" with at least two elements. First, the clause requires that the defendant intend "to obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution." (We refer to that element, more briefly, as intent "to obtain bank property.") Brief for United States 11, 17, 20, 22, 32; Brief for Petitioner 30–31. And second, the clause requires that the

[2] Compare 710 F. 3d 1111, 1116 (CA10 2013) (case below) (§ 1344(2) does not require intent to defraud a bank); *United States* v. *Everett*, 270 F. 3d 986, 991 (CA6 2001) (same), with *United States* v. *Thomas*, 315 F. 3d 190, 197 (CA3 2002) (§ 1344(2) requires such intent); *United States* v. *Kenrick*, 221 F. 3d 19, 29 (CA1 2000) (same); *United States* v. *Jacobs*, 117 F. 3d 82, 92–93 (CA2 1997) (same).

envisioned result—*i. e.*, the obtaining of bank property—occur "by means of false or fraudulent pretenses, representations, or promises." See Brief for United States 21–22; Reply Brief 18–19. Loughrin does not contest the jury instructions on either of those two elements. Nor does he properly challenge the sufficiency of the evidence supporting them here.[3]

The single question presented is whether the Government must prove yet another element: that the defendant intended to defraud a bank. As Loughrin describes it, that element would compel the Government to show not just that a defendant intended to obtain bank property (as the jury here found), but also that he specifically intended to deceive a bank. See Reply Brief 17. And that difference, Loughrin claims, would have mattered in this case, because his intent to deceive ran only to Target, and not to any of the banks on which his altered checks were drawn.

But the text of § 1344(2) precludes Loughrin's argument. That clause focuses, first, on the scheme's goal (obtaining bank property) and, second, on the scheme's means (a false representation). We will later address how the "means" component of § 1344(2) imposes certain inherent limits on its reach. See *infra*, at 362–366. But nothing in the clause

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[3] Loughrin argued to the jury that the evidence failed to show that he intended to obtain bank property: He claimed that once he "obtained cash from Target, . . . he was indifferent to whether Target ever submitted the check to a bank or whether a bank ever made payment on it." Brief for Petitioner 32; see Tr. 233–235; App. to Pet. for Cert. 46a. The jury rejected that contention, as did the District Court on a motion for judgment of acquittal. See Record 168. In his appeal, Loughrin waived the argument by conceding that if the District Court correctly instructed the jury on § 1344(2)'s elements, "then there was sufficient evidence to convict." Appellant's Opening Brief in No. 11–4158 (CA10), p. 34. And although Loughrin's briefs to this Court attempt to cast doubt on the jury's finding that he intended to obtain bank property, see Brief for Petitioner 30–32, that issue is not "fairly included" in the question his certiorari petition presented, this Court's Rule 14.1(a).

additionally demands that a defendant have a specific intent to deceive a bank. And indeed, imposing that requirement would prevent § 1344(2) from applying to a host of cases falling within its clear terms. In particular, the clause covers property "owned by" the bank but in someone else's custody and control (say, a home that the bank entrusted to a real estate company after foreclosure); thus, a person violates § 1344(2)'s plain text by deceiving a non-bank custodian into giving up bank property that it holds. Yet under Loughrin's view, the clause would not apply to such a case except in the (presumably rare) circumstance in which the fraudster's intent to deceive extended beyond the custodian to the bank itself. His proposed inquiry would thus function as an extra-textual limit on the clause's compass.

And Loughrin's construction of § 1344(2) becomes yet more untenable in light of the rest of the bank fraud statute. That is because the *first* clause of § 1344, as all agree, includes the requirement that a defendant intend to "defraud a financial institution"; indeed, that is § 1344(1)'s whole sum and substance. See Brief for United States 18; Brief for Petitioner 8. To read the next clause, following the word "or," as somehow repeating that requirement, even while using different words, is to disregard what "or" customarily means. As we have recognized, that term's "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States* v. *Woods*, 571 U. S. 31, 45–46 (2013). Yet Loughrin would have us construe the two entirely distinct statutory phrases that the word "or" joins as containing an identical element. And in doing so, his interpretation would make § 1344's second clause a mere subset of its first: If, that is, § 1344(2) implicitly required intent to defraud a bank, it would apply only to conduct already falling within § 1344(1). Loughrin's construction thus effectively reads "or" to mean "including"—a definition foreign to any dictionary we know of.

As that account suggests, Loughrin's view collides as well with more general canons of statutory interpretation. We have often noted that when "Congress includes particular language in one section of a statute but omits it in another"—let alone in the very next provision—this Court "presume[s]" that Congress intended a difference in meaning. *Russello* v. *United States*, 464 U. S. 16, 23 (1983). And here, as just stated, overriding that presumption would render § 1344's second clause superfluous. Loughrin's view thus runs afoul of the "cardinal principle" of interpretation that courts "must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000).[4]

III

Loughrin makes two principal arguments to avoid the import of the statute's plain text. First, he relies on this Court's construction of comparable language in the federal mail fraud statute to assert that Congress intended § 1344(2) merely to explicate the scope of § 1344(1)'s prohibition on scheming to defraud a bank, rather than to cover any additional conduct. And second, he contends that unless we read the second clause in that duplicative way, its coverage would extend to a vast range of fraudulent schemes, thus intruding on the historic criminal jurisdiction of the States.

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[4] Loughrin responds that our interpretation of the statute creates a converse problem of superfluity: Clause (2), he says, would emerge so broad as to wholly swallow Clause (1). See Reply Brief 7. But that is not right. The Courts of Appeals, for example, have unanimously agreed that the Government can prosecute check kiting (*i. e.*, writing checks against an account with insufficient funds in a way designed to keep them from bouncing) only under Clause (1), because such schemes do not involve any false representations. See Tr. of Oral Arg. 46–47; see, *e. g.*, *United States* v. *Doherty*, 969 F. 2d 425, 427–428 (CA7 1992) (citing *Williams* v. *United States*, 458 U. S. 279, 284–285 (1982)). No doubt, the overlap between the two clauses is substantial on our reading, but that is not uncommon in criminal statutes. See, *e. g.*, *Hubbard* v. *United States*, 514 U. S. 695, 714, n. 14 (1995).

Neither argument is without force, but in the end, neither carries the day.

A

"[D]espite appearances," Loughrin avers, § 1344(2) has no independent meaning: It merely specifies part of what § 1344(1) already encompasses. Brief for Petitioner 8. To support that concededly counterintuitive argument, Loughrin invokes our decision in *McNally* v. *United States*, 483 U. S. 350 (1987), interpreting similar language in the mail fraud statute, 18 U. S. C. § 1341. That law, which served as a model for § 1344, see *Neder* v. *United States*, 527 U. S. 1, 20–21 (1999), prohibits using the mail to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Loughrin rightly explains that, despite the word "or," *McNally* understood that provision as setting forth just one offense—using the mails to advance a scheme to defraud. The provision's back half, we held, merely codified a prior judicial decision applying the front half: In other words, the back clarified that the front included certain conduct, rather than doing independent work. 483 U. S., at 358–359. According to Loughrin, we should read the bank fraud statute in the same way.

But the two statutes, as an initial matter, have notable textual differences. The mail fraud law contains two phrases strung together in a single, unbroken sentence. By contrast, § 1344's two clauses have separate numbers, line breaks before, between, and after them, and equivalent indentation—thus placing the clauses visually on an equal footing and indicating that they have separate meanings. The legislative structure thus reinforces the usual (even if not *McNally*'s) understanding of the word "or" as meaning . . . well, "or"—rather than, as Loughrin would have it, "including."

Moreover, Loughrin's reliance on *McNally* encounters a serious chronological problem. Congress passed the bank

fraud statute in 1984, three years *before* we decided that case. And at that time, every Court of Appeals to have addressed the issue had concluded that the two relevant phrases of the mail fraud law must be read "in the disjunctive" and "construed independently." 483 U. S., at 358 (citing, *e. g.*, *United States* v. *Clapps*, 732 F. 2d 1148, 1152 (CA3 1984); *United States* v. *States*, 488 F. 2d 761, 764 (CA8 1973)). *McNally* disagreed, eschewing the most natural reading of the text in favor of evidence it found in the drafting history of the statute's money-or-property clause. But the Congress that passed the bank fraud statute could hardly have predicted that *McNally* would overturn the lower courts' uniform reading. We thus see no reason to doubt that in enacting § 1344, Congress said what it meant and meant what it said, see *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992)—*i. e.*, that it both said "or" and meant "or" in the usual sense.

And a peek at history, of the kind *McNally* found decisive, only cuts against Loughrin's reading of the bank fraud statute. According to *McNally*, Congress added the mail fraud statute's second, money-or-property clause merely to affirm a decision of ours interpreting the ban on schemes "to defraud": The second clause, *McNally* reasoned, thus worked no substantive change in the law. See 483 U. S., at 356–359 (discussing Congress's codification of *Durland* v. *United States*, 161 U. S. 306 (1896)). By contrast, Congress passed the bank fraud statute to *disapprove* prior judicial rulings and thereby expand federal criminal law's scope—and indeed, partly to cover cases like Loughrin's. One of the decisions prompting enactment of the bank fraud law, *United States* v. *Maze*, 414 U. S. 395 (1974), involved a defendant who used a stolen credit card to obtain food and lodging. (Substitute a check for a credit card and Maze becomes Loughrin.) The Government brought charges of mail fraud, relying on post-purchase mailings between the merchants and issuing bank to satisfy the statute's mailing element. But

the Court held those mailings insufficiently integral to the fraudulent scheme to support the conviction. See *id.*, at 402. Hence, *Maze* created a "serious gap[ ] . . . in Federal jurisdiction over frauds against banks." S. Rep. No. 98–225, p. 377 (1983). Congress passed § 1344 to fill that gap, enabling the Federal Government to prosecute fraudsters like Maze and Loughrin. We will not deprive that enactment of its full effect because *McNally* relied on different history to adopt a counter-textual reading of a similar provision.

B

Loughrin also appeals to principles of federalism to support his proffered construction. Unless we read § 1344(2) as requiring intent to defraud a bank, Loughrin contends, the provision will extend to every fraud, no matter how prosaic, happening to involve payment with a check—even when that check is perfectly valid. Consider, for example, a garden-variety con: A fraudster sells something to a customer, misrepresenting its value. There are countless variations, but let's say the fraudster passes off a cheap knock-off as a Louis Vuitton handbag. The victim pays for the bag with a good check, which the criminal cashes. Voila!, Loughrin says, bank fraud has just happened—unless we adopt his narrowing construction. After all, the criminal has intended to "obtain . . . property . . . under the custody or control of" the bank (the money in the victim's checking account), and has made "false or fraudulent . . . representations" (the lies to the victim about the handbag).[5] But if the bank fraud stat-

[5] One might think the Federal Government would never use the bank fraud statute to prosecute such ordinary frauds just because they happen to involve payment by check rather than cash. But in fact, the Government has brought a number of cases alleging violations of § 1344(2) on that theory (so far, it appears, unsuccessfully). See, *e. g.*, *Thomas*, 315 F. 3d 190 (a home health care worker got a valid check from a patient to buy groceries, but then cashed the check and pocketed the money); *United States* v. *Rodriguez*, 140 F. 3d 163 (CA2 1998) (an employee filed fake

ute were to encompass all such schemes, Loughrin continues, it would interfere with matters "squarely within the traditional criminal jurisdiction of the state courts." Brief for Petitioner 29. We should avoid such a "sweeping expansion of federal criminal" law, he concludes, by reading § 1344(2), just like § 1344(1), as requiring intent to defraud a bank. Reply Brief 3 (quoting *Cleveland* v. *United States*, 531 U. S. 12, 24 (2000)).

We agree with this much of what Loughrin argues: Unless the text requires us to do so, we should not construe § 1344(2) as a plenary ban on fraud, contingent only on use of a check (rather than cash). As we have often (and recently) repeated, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bond* v. *United States*, 572 U. S. 844, 858–859 (2014) (quoting *United States* v. *Bass*, 404 U. S. 336, 349 (1971)); see *Cleveland*, 531 U. S., at 24 ("We resist the Government's reading . . . because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); *Jones* v. *United States*, 529 U. S. 848, 858 (2000) (similar). Just such a rebalancing of criminal jurisdiction would follow from interpreting § 1344(2) to cover every pedestrian swindle happening to involve payment by check, but in no other way affecting financial institutions. Indeed, even the Government expresses some mild discomfort with "federalizing frauds that are only tangentially related to the banking system." Brief for United States 41.

But in claiming that we must therefore recognize an invisible element, Loughrin fails to take account of a significant *textual* limitation on § 1344(2)'s reach. Under that clause, it is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement. The provision as well includes a relational component: The criminal must

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invoices with her employer, causing the company to issue valid checks to her friend for services never rendered).

acquire (or attempt to acquire) bank property "by means of" the misrepresentation. That phrase typically indicates that the given result (the "end") is achieved, at least in part, *through* the specified action, instrument, or method (the "means"), such that the connection between the two is something more than oblique, indirect, and incidental. See, *e. g.*, Webster's Third New International Dictionary 1399 (2002) (defining "by means of" as "through the instrumentality of: by the use of as a means"); 9 Oxford English Dictionary 516 (2d ed. 1989) (defining "means" as "[a]n instrument, agency, method, or course of action, by the employment of which some object is or may be attained, or which is concerned in bringing about some result"). In other words, not every but-for cause will do. If, to pick an example out of a hat, Jane traded in her car for money to take a bike trip cross-country, no one would say she "crossed the Rockies by means of a car," even though her sale of the car somehow figured in the trip she took. The relation between those things would be (as the Government puts it) too "tangential[ ]" to make use of the phrase at all appropriate. Brief for United States 41.

Section 1344(2)'s "by means of" language is satisfied when, as here, the defendant's false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control. That occurs, most clearly, when a defendant makes a misrepresentation to the bank itself—say, when he attempts to cash, at the teller's window, a forged or altered check. In that event, the defendant seeks to obtain bank property by means of presenting the forgery directly to a bank employee. But no less is the counterfeit check the "means" of obtaining bank funds when a defendant like Loughrin offers it as payment to a third party like Target.[6] After all, a merchant accepts a check

[6] The Government in such a case may, of course, face the separate claim that the defendant did not intend to obtain bank property at all: As noted earlier, Loughrin argued this point to the jury, contending (unsuccessfully)

only to pass it along to a bank for payment; and upon receipt from the merchant, that check triggers the disbursement of bank funds just as if presented by the fraudster himself. So in either case, the forged or altered check—*i. e.*, the false statement—serves in the ordinary course as the means (or to use other words, the mechanism or instrumentality) of obtaining bank property. To be sure, a merchant might detect the fraud (as Target sometimes did) and decline to submit the forged or altered check to the bank. But that is to say only that the defendant's scheme to obtain bank property by means of a false statement may not succeed. And we have long made clear that such failure is irrelevant in a bank fraud case, because § 1344 punishes not "completed frauds," but instead fraudulent "scheme[s]." *Neder*, 527 U. S., at 25.

By contrast, the cases Loughrin hopes will unnerve us—exemplified by the handbag swindle—do not satisfy § 1344(2)'s "means" requirement.[7] Recall that in such a case the check is perfectly valid; so the check itself is not (as it was here) a false or fraudulent means of obtaining bank money. And the false pretense that has led, say, the handbag buyer to give a check to the fraudster has nothing to do with the bank that will cash it: No one would dream of passing on to the bank (as Target would forward a forged check) the lie that a knock-off is a Louis Vuitton. The bank's involvement in the scheme is, indeed, wholly fortuitous—a function of the victim's paying the fraudster by (valid) check rather than cash. Of course, the bank would not have disbursed funds had the misrepresentation never occurred, and in that sense, the lie counts as a but-for cause of the bank's

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that he merely wanted to get cash from Target. See n. 3, *supra*. All we say here, for the reasons next stated, is that when the defendant has the requisite intent to acquire bank property, his presentation of a forged or altered check to a third party satisfies § 1344(2)'s "means" requirement.

[7] Even the Government, we note, acknowledges that § 1344(2) is reasonably read to exclude such cases from its coverage. See Brief for United States 40–44; Tr. of Oral Arg. 43–47.

payment. But as we have said, § 1344(2)'s "by means of" language requires more, see *supra*, at 362–364: It demands that the defendant's false statement is the mechanism naturally inducing a bank (or custodian) to part with its money. And in cases like the handbag swindle, where no false statement will ever go to a financial institution, the fraud is not the means of obtaining bank property.[8]

The premise of Loughrin's federalism argument thus collapses. He claims that we must import an unstated element

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[8] JUSTICE SCALIA takes issue with our limitation of § 1344(2), contending first that the fraudster's "indifferen[ce] to the victim's method of payment" does not "cause what is a means not to be a means." *Post*, at 368 (opinion concurring in part and concurring in judgment) (emphasis deleted). To illustrate the point, he offers an example: Someone "obtain[s] 7-Eleven coffee by means of [his] two dollars" even if he went to 7-Eleven rather than Sheetz only because it happened to be the closest. *Ibid.* But that objection is based on a misunderstanding of our opinion. The "by means of" phrase calls for an inquiry into the directness of the relationship between means and ends, not the fraudster's subjective intent. (We take it JUSTICE SCALIA agrees; he recognizes that "not every but-for cause of an act is a cause 'by means of' which the act has occurred." *Ibid.*) And we concur with the bottom line of JUSTICE SCALIA's example: There, the means (the two dollars) is the thing that achieves the specified end (getting the cup of 7-Eleven coffee). By contrast, for the reasons elaborated above, the misstatement in our handbag hypothetical is not the mechanism by which the fraudster obtains *bank* property, given that the lie will never reach the bank.

And so JUSTICE SCALIA tries another example, this one (involving Little Bobby) contesting our view of directness. *Post*, at 369. But such hypotheticals mostly show that what relationships count as close enough to satisfy the phrase "by means of" will depend almost entirely on context. (We might counter with some examples of our own, but we fear that would take us down an endless rabbit hole.) Language like "by means of" is inherently elastic: It does not mean one thing as to all fact patterns—and certainly not in all statutes, given differences in context and purpose. All we say here is that the phrase, as used in § 1344(2), is best read, for the federalism-related reasons we have given, see *supra*, at 360–362, as drawing a line at frauds that have some real connection to a federally insured bank—namely, frauds in which a false statement will naturally reach such a bank (or a custodian of the bank's property).

into § 1344(2) to avoid covering run-of-the-mill frauds, properly of concern only to States. But in fact, the text of § 1344(2) already limits its scope to deceptions that have some real connection to a federally insured bank, and thus implicate the pertinent federal interest. See S. Rep. No. 98–225, at 378 (noting that federal "jurisdiction is based on the fact that the victim of the offense is a federally controlled or insured institution"). And Loughrin's own crime, as we have explained, is one such scheme, because he made false statements, in the form of forged and altered checks, that a merchant would, in the ordinary course of business, forward to a bank for payment. See *supra*, at 363–365. We therefore reject Loughrin's reading of § 1344(2) and his challenge to his conviction.[9]

For the reasons stated, we affirm the judgment of the Tenth Circuit.

It is so ordered.

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

I join Parts I and II of the Court's opinion, Part III–A except the last paragraph, and the last footnote in Part III–B. I do not join the remainder of Part III–B.

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[9] As a last-gasp argument, Loughrin briefly asserts that § 1344(2) at least requires the Government to prove that the defendant's scheme created a risk of financial loss to the bank. See Brief for Petitioner 36–40. But once again, nothing like that element appears in the clause's text. Indeed, the broad language in § 1344(2) describing the property at issue—"property owned by or under the custody or control of" a bank—appears calculated to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud. See *United States* v. *Nkansah*, 699 F. 3d 743, 754 (CA2 2012) (Lynch, J., concurring in part and concurring in judgment in part). And Loughrin's argument fits poorly with our prior holding that the gravamen of § 1344 is the "scheme," rather than "the completed fraud," and that the offense therefore does not require "damage" or "reliance." *Neder* v. *United States*, 527 U. S. 1, 25 (1999); see *supra*, at 364.

I agree with the Court that neither intent to defraud a bank nor exposure of a bank to a risk of loss is an element of the crime codified in 18 U. S. C. § 1344(2). But I am *dubitante* on the point that one obtains bank property "by means of" a fraudulent statement only if that statement is "the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control," *ante*, at 363. The Government suggested that test, but only briefly claimed it was to be found in the "by means of" language, Brief for United States 40–41—so briefly that Loughrin responded that "[t]he Government does not claim any textual basis for this [naturally inducing] rule," Reply Brief 13. We have heard scant argument (nothing but the Government's bare-bones assertion) in favor of the "by means of" textual limitation, and no adversary presentation whatever opposing it. The Court's opinion raises the subject in order to reply to Loughrin's argument that, unless we adopt his proposed nontextual limitations, all frauds effected by receipt of a check will become federal crimes. It seems to me enough to say that Loughrin's solutions to the problem of the statute's sweep are, for the reasons well explained by the Court's opinion, not correct. What the proper solution may be should in my view be left for another day. I discuss below my difficulties with the "by means of" solution.

Recall the Court's hypothetical garden-variety con. A "fraudster [makes a statement] pass[ing] off a cheap knockoff as a Louis Vuitton handbag. The victim pays for the bag with a good check, which the criminal cashes." *Ante*, at 361. The fraudster unquestionably has obtained bank property. But how? By presenting the check to a bank teller, yes. But also by duping the buyer. Yet according to the Court, the fraudster's deceit was not a "means" of obtaining the cash, because tricking a buyer into swapping a check for a counterfeit carryall is not a "mechanism naturally inducing a bank . . . to part with money in its control." *Ante*, at 363. The bank's involvement, it says, is mere happenstance.

I do not know where the Court's crabbed definition of "means" comes from. Certainly not the dictionary entries that it quotes. Quite the contrary, those suggest that the handbag fraudster's deceitful statement *was* a "means": Undoubtedly, the trickery was a "'method, or course of action, by the employment of which [bank property was] attained.'" *Ibid.* Though the dictionaries do not appear to add that the connection between "means" and end must be "something more than oblique, indirect, and incidental," *ibid.*, I agree that, in common usage, not every but-for cause of an act is a cause "by means of" which the act has occurred. No one would say, for example, that the handbag fraudster obtained bank property by means of his ancestors' emigration to the United States. But all *would* say, I think, that he obtained the property by means of the lie. His deceit is far from merely incidental to, or an oblique or indirect way of, obtaining the money. That was the lie's very purpose.

That the fraudster likely was *indifferent* to the victim's method of payment—making his receipt of *bank* money instead of straight cash merely "fortuitous," *ante*, at 364—does not suggest, in ordinary parlance, that the fraud was not a means of acquiring bank property. Indeed, saying that indifference is disqualifying comes close to requiring the intent to defraud a bank that the Court properly rejects. In any case, indifference certainly does not cause what is a means not to be a means. Suppose I resolve to purchase (with the two dollars in my billfold) a coffee at the first convenience store I pass on my way to work. I am indifferent to what store that might be. I catch sight of a 7-Eleven, pull in, and, with my cash, buy the drink. That it is a 7-Eleven coffee rather than a Sheetz coffee is "wholly fortuitous," *ibid.* Still, no one would say that I had not obtained 7-Eleven coffee *by means of* my two dollars. So too with the handbag swindler: Regardless of whether the cash is the victim's or, technically, the bank's, and regardless of whether the swin-

dler cared which it was, would we not say that the fraudster has obtained it by means of the trick?

The majority responds that the measure of "means" is not indifference or the absence of fortuity but rather *directness*. And not just proximate-cause-like directness—the fraudulent statement literally must "reach the bank," *ante*, at 365, n. 8. Once again, it seems to me the Court's definition does not accord with common usage. Suppose little Bobby falsely tells his mother that he got an A on his weekly spelling test and so deserves an extra cookie after dinner. Mother will not be home for dinner, but she leaves a note for Father: "Bobby gets an extra cookie after dinner tonight." (Much like the handbag buyer's note to the bank: "Pay $2,000 to the order of Mr. Handbag Fraudster.") Dinner wraps up, and Bobby gets his second cookie. Has he obtained it by means of the fib to his mother? Plainly yes, an ordinary English speaker would say. But plainly *no* under the Court's definition, since the lie did not make its way to the father.

The Court's chief illustration of its "by means of" gloss seems to me contrived. If "Jane traded in her car for money to take a bike trip cross-country, no one would say she 'crossed the Rockies by means of a car.' " *Ante*, at 363. Of course. By using two vehicles of conveyance, and describing the end in question as "crossing the Rockies," the statement that the car was the "means" of achieving that end invites one to think that Jane traveled by automobile. But the proper question—the one parallel to the question whether the fraudster obtained bank funds by means of fraudulently selling the counterfeit—is not whether Jane crossed the Rockies by means of the car, but whether she funded her trip by means of selling the car. Which she assuredly did. Just as the handbag swindler, in the Louis Vuitton example, obtained money by means of his false representation.

I certainly agree that this statute must be interpreted, if possible, in a manner that will not make every fraud effected by receipt of a check a federal offense. But deciding this

case does not require us to identify that manner, and I would leave that for another case.

JUSTICE ALITO, concurring in part and concurring in the judgment.

I agree with the Court's holding that 18 U. S. C. § 1344(2) requires neither intent to defraud a bank nor the creation of a risk of financial loss to a bank, but I must write separately to express disagreement with some dicta in the opinion of the Court.

In a few passages, the Court suggests that § 1344(2) requires a *mens rea* of purpose. See *ante*, at 355 ("[T]he clause requires that the defendant intend 'to obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution' " (ellipsis in original)); *ante*, at 364, n. 6 ("[W]hen the defendant has the requisite intent to acquire bank property, his presentation of a forged or altered check to a third party satisfies § 1344(2)'s 'means' requirement").* That is incorrect.

Congress expressly denoted the *mens rea* a defendant must have to violate § 1344(2), and it is not purpose. Instead, § 1344(2) imposes liability on "[w]hoever *knowingly* executes, or attempts to execute, a scheme or artifice" to obtain bank property. (Emphasis added.) It is hard to imagine how Congress could have been clearer as to the mental state required for liability.

The Court's contrary statements apparently derive from the fact that the criminal venture that a defendant must knowingly execute or attempt to execute must be a scheme or artifice "to obtain . . . property owned by . . . a financial institution." § 1344(2). A defendant must have the purpose to obtain bank property, so the argument goes, because he must execute a scheme the purpose of which is to obtain bank property.

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*Cf. *ante*, at 357 (§ 1344(1) "includes the requirement that a defendant intend to 'defraud a financial institution' ").

This argument confuses the design of the scheme with the *mens rea* of the defendant. The statute requires only that the objective of the *scheme* must be the obtaining of bank property, not that the *defendant* must have such an objective. Of course, in many cases a scheme's objective will be the same as an individual defendant's. Where the defendant acts alone, for instance, his objective will almost certainly be the same as that of the scheme, and the inquiry into the defendant's *mens rea* and the scheme's objective will accordingly merge. But in some cases, such as those involving large, complex criminal ventures, a given defendant's purpose may diverge from the scheme's objective. For instance, a defendant who is paid by a large ring of check forgers to present one of their forged checks to a bank for payment has executed "a scheme or artifice . . . to obtain" bank property, even if he only presents the check because he is paid to do so and personally does not care whether the forged check is honored. That is because the objective of the scheme as a whole is to obtain bank property, and the defendant knowingly executes that scheme.

The majority reads the word "knowingly" out of the statute. That term "'requires proof of knowledge of the facts that constitute the offense.'" *Dixon* v. *United States*, 548 U. S. 1, 5 (2006). If the majority is correct that the language "a scheme or artifice . . . to obtain" bank property demands that the defendant intend to obtain bank property, then the word "knowingly" is superfluous, because a defendant whose purpose is to obtain bank property will always know that his purpose is to obtain bank property. Why would Congress expressly specify a lesser *mens rea* element if elsewhere in the statute it commands a greater, subsuming one?

Proof that a defendant acted knowingly very often gives rise to a reasonable inference that the defendant also acted purposely, and therefore the Court's dicta may not have much practical effect. But if the issue is presented in a future case, the Court's statements must be regarded as dicta.

The Court's statements that a defendant must intend to obtain bank property to be convicted under § 1344(2) are unnecessary to its conclusion that a defendant may be convicted under this provision without proof that he either intended to defraud a bank or created a risk of loss to a bank. Furthermore, as the Court makes clear, petitioner waived any challenge to his conviction arising from an asserted statutory requirement that he must have intended to obtain bank property. See *ante*, at 356, n. 3.

Syllabus

RILEY *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

No. 13–132. Argued April 29, 2014—Decided June 25, 2014*

In No. 13–132, petitioner Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeal affirmed.

In No. 13–212, respondent Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wurie's person and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The First Circuit reversed the denial of the motion to suppress and vacated the relevant convictions.

Held: The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. Pp. 381–403.

(a) A warrantless search is reasonable only if it falls within a specific exception to the Fourth Amendment's warrant requirement. See *Kentucky* v. *King*, 563 U. S. 452, 459–460. The well-established exception at

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*Together with No. 13–212, *United States* v. *Wurie*, on certiorari to the United States Court of Appeals for the First Circuit.

issue here applies when a warrantless search is conducted incident to a lawful arrest.

Three related precedents govern the extent to which officers may search property found on or near an arrestee. *Chimel* v. *California*, 395 U. S. 752, requires that a search incident to arrest be limited to the area within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction. In *United States* v. *Robinson*, 414 U. S. 218, the Court applied the *Chimel* analysis to a search of a cigarette pack found on the arrestee's person. It held that the risks identified in *Chimel* are present in all custodial arrests, 414 U. S., at 235, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case, *id.*, at 236. The trilogy concludes with *Arizona* v. *Gant*, 556 U. S. 332, which permits searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle, *id.*, at 343. Pp. 381–385.

(b) The Court declines to extend *Robinson*'s categorical rule to searches of data stored on cell phones. Absent more precise guidance from the founding era, the Court generally determines whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U. S. 295, 300. That balance of interests supported the search incident to arrest exception in *Robinson*. But a search of digital information on a cell phone does not further the government interests identified in *Chimel*, and implicates substantially greater individual privacy interests than a brief physical search. Pp. 385–398.

(1) The digital data stored on cell phones does not present either *Chimel* risk. Pp. 386–391.

(i) Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Officers may examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. To the extent that a search of cell phone data might warn officers of an impending danger, *e. g.*, that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration of case-specific exceptions to the warrant requirement, such as exigent circumstances. See, *e. g.*, *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298–299. Pp. 387–388.

(ii) The United States and California raise concerns about the destruction of evidence, arguing that, even if the cell phone is physically

secure, information on the cell phone remains vulnerable to remote wiping and data encryption. As an initial matter, those broad concerns are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. The briefing also gives little indication that either problem is prevalent or that the opportunity to perform a search incident to arrest would be an effective solution. And, at least as to remote wiping, law enforcement currently has some technologies of its own for combating the loss of evidence. Finally, law enforcement's remaining concerns in a particular case might be addressed by responding in a targeted manner to urgent threats of remote wiping, see *Missouri* v. *McNeely*, 569 U. S. 141, 153, or by taking action to disable a phone's locking mechanism in order to secure the scene, see *Illinois* v. *McArthur*, 531 U. S. 326, 331–333. Pp. 388–391.

(2) A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but more substantial privacy interests are at stake when digital data is involved. Pp. 391–398.

(i) Cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person. Notably, modern cell phones have an immense storage capacity. Before cell phones, a search of a person was limited by physical realities and generally constituted only a narrow intrusion on privacy. But cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos. This has several interrelated privacy consequences. First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. In addition, an element of pervasiveness characterizes cell phones but not physical records. A decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives. Pp. 393–397.

(ii) The scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server. Thus, a search may extend well beyond papers and effects in the physical proximity of an arrestee, a concern that the United States recognizes but cannot definitively foreclose. Pp. 397–398.

(c) Fallback options offered by the United States and California are flawed and contravene this Court's general preference to provide clear

guidance to law enforcement through categorical rules. See *Michigan* v. *Summers*, 452 U. S. 692, 705, n. 19. One possible rule is to import the *Gant* standard from the vehicle context and allow a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. That proposal is not appropriate in this context, and would prove no practical limit at all when it comes to cell phone searches. Another possible rule is to restrict the scope of a cell phone search to information relevant to the crime, the arrestee's identity, or officer safety. That proposal would again impose few meaningful constraints on officers. Finally, California suggests an analogue rule, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. That proposal would allow law enforcement to search a broad range of items contained on a phone even though people would be unlikely to carry such a variety of information in physical form, and would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Pp. 398–401.

(d) It is true that this decision will have some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from search; it is that a warrant is generally required before a search. The warrant requirement is an important component of the Court's Fourth Amendment jurisprudence, and warrants may be obtained with increasing efficiency. In addition, although the search incident to arrest exception does not apply to cell phones, the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases. Pp. 401–402.

No. 13–132, reversed and remanded; No. 13–212, 728 F. 3d 1, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 404.

Jeffrey L. Fisher argued the cause for petitioner in No. 13–132. With him on the briefs were *Patrick Morgan Ford* and *Donald B. Ayer*.

Deputy Solicitor General Dreeben argued the cause for the United States in No. 13–212. With him on the briefs were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *John F. Bash*, and *Robert A. Parker*.

Counsel

Edward C. DuMont, Solicitor General of California, argued the cause for respondent in No. 13–132. With him on the brief were *Kamala D. Harris*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Julie L. Garland*, Senior Assistant Attorney General, *Steven T. Oetting* and *Craig J. Konnoth*, Deputy Solicitors General, and *Christine M. Levingston Bergman*, Deputy Attorney General. *Judith H. Mizner* argued the cause and filed a brief for respondent in No. 13–212.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging affirmance in No. 13–132. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General O'Neil*, *John F. Bash*, and *Robert A. Parker*.†

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†Briefs of *amici curiae* urging reversal in No. 13–132 and affirmance in No. 13–212 were filed for the American Library Association et al. by *William M. Jay*, *Grant P. Fondo*, and *Gerald G. Chacon, Jr.*; for the Center for Democracy & Technology et al. by *Andrew J. Pincus*, *Charles A. Rothfeld*, *Michael B. Kimberly*, *Paul W. Hughes*, and *Eugene R. Fidell*; for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *Brianne J. Gorod*; for Criminal Law Professors by *Tillman J. Breckenridge* and *Patricia E. Roberts*; and for the National Press Photographers Association et al. by *Robert Corn-Revere*, *Ronald G. London*, *Lisa B. Zycherman*, and *Thomas R. Burke*.

Briefs of *amici curiae* urging reversal in No. 13–132 were filed for the American Civil Liberties Union et al. by *Susan N. Herman*, *Steven R. Shapiro*, *Ezekiel R. Edwards*, *Catherine Crump*, and *Linda Lye*; for the Cato Institute by *Jim Harper* and *Ilya Shapiro*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg*; and for the National Association of Criminal Defense Lawyers et al. by *Bronson D. James*, *Jeffrey T. Green*, and *Michael W. Price*.

Briefs of *amici curiae* urging affirmance in No. 13–132 were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Robert L. Ellman*, Solicitor General, *Joseph T. Maziarz*, Chief Counsel, and *Michael T. O'Toole*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *James D. Caldwell* of Louisiana, *Jim Hood* of Mississippi, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

These two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I

A

In the first case, petitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood. See Cal. Penal Code Ann. §§ 12025(a)(1), 12031(a)(1) (West 2009).

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also

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Mexico, *Wayne Stenehjem* of North Dakota, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming; and for the Association of State Criminal Investigative Agencies et al. by *Gaëtan Gerville-Réache*, *John J. Bursch*, and *Matthew T. Nelson*.

Briefs of *amici curiae* urging affirmance in No. 13–212 were filed for the Cato Institute by *Messrs. Harper* and *Shapiro*; for Downsize DC Foundation et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Michael Connelly*; for the National Association of Federal Defenders et al. by *Jeffrey T. Green*, *Jacqueline G. Cooper*, *Sara S. Gannett*, *Daniel Kaplan*, *Keith M. Donoghue*, *Mason C. Clutter*, and *Sarah O. Schrup*; for The Rutherford Institute by *Anand Agneshwar*, *Carl S. Nadler*, and *John W. Whitehead*; and for Anna Aran et al. by *Norman M. Garland* and *Michael M. Epstein*, both *pro se*.

James J. Berles filed a brief in both cases for Charles E. MacLean et al. as *amici curiae*.

Donald B. Mitchell, Jr., and *James H. Hulme* filed a brief in No. 13–132 for the DKT Liberty Project as *amicus curiae*.

seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns." App. in No. 13–132, p. 20. Although there was "a lot of stuff" on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." *Id.*, at 11–13. The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Compare Cal. Penal Code Ann. § 246 (2008) with § 186.22(b)(4)(B) (2014). Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. App. in No. 13–132, at 24, 26. At Riley's trial, police officers testified about the photographs and vid-

eos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.

The California Court of Appeal affirmed. No. D059840 (Feb. 8, 2013), App. to Pet. for Cert. in No. 13–132, pp. 1a–23a. The court relied on the California Supreme Court's decision in *People* v. *Diaz*, 51 Cal. 4th 84, 244 P. 3d 501 (2011), which held that the Fourth Amendment permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee's person. See *id.*, at 93, 244 P. 3d, at 505–506.

The California Supreme Court denied Riley's petition for review, App. to Pet. for Cert. in No. 13–132, at 24a, and we granted certiorari, 571 U. S. 1161 (2014).

B

In the second case, a police officer performing routine surveillance observed respondent Brima Wurie make an apparent drug sale from a car. Officers subsequently arrested Wurie and took him to the police station. At the station, the officers seized two cell phones from Wurie's person. The one at issue here was a "flip phone," a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone. Five to ten minutes after arriving at the station, the officers noticed that the phone was repeatedly receiving calls from a source identified as "my house" on the phone's external screen. A few minutes later, they opened the phone and saw a photograph of a woman and a baby set as the phone's wallpaper. They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the "my house" label. They next used an online phone directory to trace that phone number to an apartment building.

When the officers went to the building, they saw Wurie's name on a mailbox and observed through a window a woman

who resembled the woman in the photograph on Wurie's phone. They secured the apartment while obtaining a search warrant and, upon later executing the warrant, found and seized 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash.

Wurie was charged with distributing crack cocaine, possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition. See 18 U. S. C. § 922(g); 21 U. S. C. § 841(a). He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of an unconstitutional search of his cell phone. The District Court denied the motion. 612 F. Supp. 2d 104 (Mass. 2009). Wurie was convicted on all three counts and sentenced to 262 months in prison.

A divided panel of the First Circuit reversed the denial of Wurie's motion to suppress and vacated Wurie's convictions for possession with intent to distribute and possession of a firearm as a felon. 728 F. 3d 1 (2013). The court held that cell phones are distinct from other physical possessions that may be searched incident to arrest without a warrant, because of the amount of personal data cell phones contain and the negligible threat they pose to law enforcement interests. See *id.*, at 8–11.

We granted certiorari. 571 U. S. 1161 (2014).

II

The Fourth Amendment provides:

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

As the text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v.

Stuart, 547 U. S. 398, 403 (2006). Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky* v. *King*, 563 U. S. 452, 459–460 (2011).

The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks* v. *United States*, 232 U. S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label "exception" is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant. See 3 W. LaFave, Search and Seizure § 5.2(b), p. 132, and n. 15 (5th ed. 2012).

Although the existence of the exception for such searches has been recognized for a century, its scope has been debated for nearly as long. See *Arizona* v. *Gant*, 556 U. S. 332, 350 (2009) (noting the exception's "checkered history"). That debate has focused on the extent to which officers may search property found on or near the arrestee. Three related precedents set forth the rules governing such searches.

The first, *Chimel* v. *California*, 395 U. S. 752 (1969), laid the groundwork for most of the existing search incident to

arrest doctrine. Police officers in that case arrested Chimel inside his home and proceeded to search his entire three-bedroom house, including the attic and garage. In particular rooms, they also looked through the contents of drawers. *Id.*, at 753–754.

The Court crafted the following rule for assessing the reasonableness of a search incident to arrest:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of 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." *Id.*, at 762–763.

The extensive warrantless search of Chimel's home did not fit within this exception, because it was not needed to protect officer safety or to preserve evidence. *Id.*, at 763, 768.

Four years later, in *United States* v. *Robinson*, 414 U. S. 218 (1973), the Court applied the *Chimel* analysis in the context of a search of the arrestee's person. A police officer had arrested Robinson for driving with a revoked license. The officer conducted a patdown search and felt an object that he could not identify in Robinson's coat pocket. He removed the object, which turned out to be a crumpled cigarette package, and opened it. Inside were 14 capsules of heroin. 414 U. S., at 220, 223.

The Court of Appeals concluded that the search was unreasonable because Robinson was unlikely to have evidence

of the crime of arrest on his person, and because it believed that extracting the cigarette package and opening it could not be justified as part of a protective search for weapons. This Court reversed, rejecting the notion that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.*, at 235. As the Court explained, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Ibid.* Instead, a "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Ibid.*

The Court thus concluded that the search of Robinson was reasonable even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that Robinson might be armed. *Id.*, at 236. In doing so, the Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search. It merely noted that, "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it." *Ibid.* A few years later, the Court clarified that this exception was limited to "personal property . . . immediately associated with the person of the arrestee." *United States* v. *Chadwick*, 433 U. S. 1, 15 (1977) (200-pound, locked footlocker could not be searched incident to arrest), abrogated on other grounds by *California* v. *Acevedo*, 500 U. S. 565 (1991).

The search incident to arrest trilogy concludes with *Gant*, which analyzed searches of an arrestee's vehicle. *Gant*, like *Robinson*, recognized that the *Chimel* concerns for officer safety and evidence preservation underlie the search inci-

dent to arrest exception. See 556 U. S., at 338. As a result, the Court concluded that *Chimel* could authorize police to search a vehicle "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 556 U. S., at 343. *Gant* added, however, an independent exception for a warrantless search of a vehicle's passenger compartment "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " *Ibid.* (quoting *Thornton* v. *United States*, 541 U. S. 615, 632 (2004) (SCALIA, J., concurring in judgment)). That exception stems not from *Chimel*, the Court explained, but from "circumstances unique to the vehicle context." 556 U. S., at 343.

III

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. See A. Smith, Pew Research Center, Smartphone Ownership—2013 Update (June 5, 2013). Even less sophisticated phones like Wurie's, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U. S. 295, 300 (1999).

Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here.

But while *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

A

We first consider each *Chimel* concern in turn. In doing so, we do not overlook *Robinson*'s admonition that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." 414 U. S., at 235. Rather than requiring the "case-by-case adjudication" that *Robinson* rejected, *ibid.*, we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the *Chimel* exception," *Gant*, *supra*, at 343. See also *Knowles* v. *Iowa*, 525 U. S. 113, 119 (1998) (declining to extend *Robinson* to the issuance of citations, "a

situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all").

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Perhaps the same might have been said of the cigarette pack seized from Robinson's pocket. Once an officer gained control of the pack, it was unlikely that Robinson could have accessed the pack's contents. But unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest. The officer in *Robinson* testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes. See 414 U. S., at 223, 236, n. 7. Given that, a further search was a reasonable protective measure. No such unknowns exist with respect to digital data. As the First Circuit explained, the officers who searched Wurie's cell phone "knew exactly what they would find therein: data. They also knew that the data could not harm them." 728 F. 3d, at 10.

The United States and California both suggest that a search of cell phone data might help ensure officer safety in more indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene. There is undoubtedly a strong government interest in warning officers about such possibilities, but neither the United States nor California offers evidence to suggest that their concerns are based on actual experience. The proposed consideration

would also represent a broadening of *Chimel*'s concern that an *arrestee himself* might grab a weapon and use it against an officer "to resist arrest or effect his escape." 395 U. S., at 763. And any such threats from outside the arrest scene do not "lurk[ ] in all custodial arrests." *Chadwick*, 433 U. S., at 14–15. Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances. See, *e. g.*, *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298–299 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

2

The United States and California focus primarily on the second *Chimel* rationale: preventing the destruction of evidence.

Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. See Brief for Petitioner in No. 13–132, p. 20; Brief for Respondent in No. 13–212, p. 41. That is a sensible concession. See *Illinois* v. *McArthur*, 531 U. S. 326, 331–333 (2001); *Chadwick*, *supra*, at 13, and n. 8. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal

that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing"). See Dept. of Commerce, National Institute of Standards and Technology, R. Ayers, S. Brothers, & W. Jansen, Guidelines on Mobile Device Forensics (Draft) 29, 31 (SP 800–101 Rev. 1, Sept. 2013) (hereinafter Ayers). Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but "unbreakable" unless police know the password. Brief for United States as *Amicus Curiae* in No. 13–132, p. 11.

As an initial matter, these broader concerns about the loss of evidence are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. See 395 U. S., at 763–764. With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. There, the Government focuses on the ordinary operation of a phone's security features, apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest. See Brief for Association of State Criminal Investigative Agencies et al. as *Amici Curiae* in No. 13–132, pp. 9–10; see also Tr. of Oral Arg. in No. 13–132, p. 48. Similarly, the opportunities for officers to search a password-protected phone before data becomes encrypted are quite limited. Law enforcement officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity. See, *e. g.*, iPhone User Guide for iOS 7.1

Software 10 (2014) (default lock after about one minute). This may explain why the encryption argument was not made until the merits stage in this Court, and has never been considered by the Courts of Appeals.

Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. See Tr. of Oral Arg. in No. 13–132, at 50; see also Brief for United States as *Amicus Curiae* in No. 13–132, at 19. Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. See Ayers 30–31. Such devices are commonly called "Faraday bags," after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. See Brief for Criminal Law Professors as *Amici Curiae* 9. They may not be a complete answer to the problem, see Ayers 32, but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies

around the country already encourage the use of Faraday bags. See, *e. g.*, Dept. of Justice, National Institute of Justice, Electronic Crime Scene Investigation: A Guide for First Responders 14, 32 (2d ed. Apr. 2008); Brief for Criminal Law Professors as *Amici Curiae* 4–6.

To the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If "the police are truly confronted with a 'now or never' situation"—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. *Missouri* v. *McNeely*, 569 U. S. 141, 153 (2013) (quoting *Roaden* v. *Kentucky*, 413 U. S. 496, 505 (1973); some internal quotation marks omitted). Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data. See App. to Reply Brief in No. 13–132, p. 3a (diagramming the few necessary steps). Such a preventive measure could be analyzed under the principles set forth in our decision in *McArthur*, 531 U. S. 326, which approved officers' reasonable steps to secure a scene to preserve evidence while they awaited a warrant. See *id.*, at 331–333.

B

The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. *Robinson* focused primarily on the first of those rationales. But it also quoted with approval then-Judge Cardozo's account of the historical basis for the search incident to arrest exception: "Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical

dominion." 414 U. S., at 232 (quoting *People* v. *Chiagles*, 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923)); see also 414 U. S., at 237 (Powell, J., concurring) ("an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person"). Put simply, a patdown of Robinson's clothing and an inspection of the cigarette pack found in his pocket constituted only minor additional intrusions compared to the substantial government authority exercised in taking Robinson into custody. See *Chadwick*, 433 U. S., at 16, n. 10 (searches of a person are justified in part by "reduced expectations of privacy caused by the arrest").

The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." *Maryland* v. *King*, 569 U. S. 435, 463 (2013). To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid.* One such example, of course, is *Chimel*. *Chimel* refused to "characteriz[e] the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor.'" 395 U. S., at 766–767, n. 12. Because a search of the arrestee's entire house was a substantial invasion beyond the arrest itself, the Court concluded that a warrant was required.

Robinson is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee's person. In an earlier case, this Court had approved a search of a zipper bag carried by an arrestee, but the Court analyzed only the validity of the arrest itself. See *Draper* v. *United States*, 358 U. S. 307, 310–311 (1959). Lower courts applying *Robinson* and *Chimel*, however, have approved searches of a variety of personal items carried by an arrestee. See, *e. g.*, *United States* v. *Carrion*, 809 F. 2d 1120, 1123, 1128 (CA5 1987) (billfold and address book);

United States v. *Watson*, 669 F. 2d 1374, 1383–1384 (CA11 1982) (wallet); *United States* v. *Lee*, 501 F. 2d 890, 892 (CADC 1974) (purse).

The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. Brief for United States in No. 13–212, p. 26. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as telephones. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. See Kerr, Foreword: Accounting for Technological Change, 36 Harv. J. L. & Pub. Pol'y 403, 404–405 (2013). Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have

read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, *supra*, rather than a container the size of the cigarette package in *Robinson*.

But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. See Kerr, *supra*, at 404; Brief for Center for Democracy & Technology et al. as *Amici Curiae* 7–8. Cell phones couple that capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on. See *id.*, at 30; *United States* v. *Flores-Lopez*, 670 F. 3d 803, 806 (CA7 2012). We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the

past several months, as would routinely be kept on a phone.[1]

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. See Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013). A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. See, *e. g.*, *United States* v. *Frankenberry*, 387 F. 2d 337 (CA2 1967) (*per curiam*). But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. See *Ontario* v. *Quon*, 560 U. S. 746, 760 (2010). Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to

[1] Because the United States and California agree that these cases involve *searches* incident to arrest, these cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.

WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States* v. *Jones*, 565 U. S. 400, 415 (2012) (SOTOMAYOR, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life. See Brief for Electronic Privacy Information Center et al. as *Amici Curiae* in No. 13–132, p. 9.

In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the

home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. See *New York* v. *Belton*, 453 U. S. 454, 460, n. 4 (1981) (describing a "container" as "any object capable of holding another object"). But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen. That is what cell phones, with increasing frequency, are designed to do by taking advantage of "cloud computing." Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself. Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference. See Brief for Electronic Privacy Information Center in No. 13–132, at 12–14, 20. Moreover, the same type of data may be stored locally on the device for one user and in the cloud for another.

The United States concedes that the search incident to arrest exception may not be stretched to cover a search of files accessed remotely—that is, a search of files stored in the cloud. See Brief for United States in No. 13–212, at 43–44. Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house. But officers searching a phone's data would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud.

Although the Government recognizes the problem, its proposed solutions are unclear. It suggests that officers could disconnect a phone from the network before searching the

device—the very solution whose feasibility it contested with respect to the threat of remote wiping. Compare Tr. of Oral Arg. in No. 13–132, at 50–51, with Tr. of Oral Arg. in No. 13–212, pp. 13–14. Alternatively, the Government proposes that law enforcement agencies "develop protocols to address" concerns raised by cloud computing. Reply Brief in No. 13–212, pp. 14–15. Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols. The possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in *Robinson*.

C

Apart from their arguments for a direct extension of *Robinson*, the United States and California offer various fallback options for permitting warrantless cell phone searches under certain circumstances. Each of the proposals is flawed and contravenes our general preference to provide clear guidance to law enforcement through categorical rules. "[I]f police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *Michigan* v. *Summers*, 452 U. S. 692, 705, n. 19 (1981) (quoting *Dunaway* v. *New York*, 442 U. S. 200, 219–220 (1979) (White, J., concurring)).

The United States first proposes that the *Gant* standard be imported from the vehicle context, allowing a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. But *Gant* relied on "circumstances unique to the vehicle context" to endorse a search solely for the purpose of gathering evidence. 556 U. S., at 343. JUSTICE SCALIA's *Thornton* opinion, on which *Gant* was based, explained that those unique circumstances are "a reduced expectation of privacy" and "heightened law enforcement needs" when it comes to motor vehicles. 541 U. S., at 631; see also *Wyo-*

ming v. *Houghton*, 526 U. S., at 303–304. For reasons that we have explained, cell phone searches bear neither of those characteristics.

At any rate, a *Gant* standard would prove no practical limit at all when it comes to cell phone searches. In the vehicle context, *Gant* generally protects against searches for evidence of past crimes. See 3 W. LaFave, Search and Seizure § 7.1(d), at 709, and n. 191. In the cell phone context, however, it is reasonable to expect that incriminating information will be found on a phone regardless of when the crime occurred. Similarly, in the vehicle context *Gant* restricts broad searches resulting from minor crimes such as traffic violations. See LaFave § 7.1(d), at 713, and n. 204. That would not necessarily be true for cell phones. It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone. Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone. An individual pulled over for reckless driving might have evidence on the phone that shows whether he was texting while driving. The sources of potential pertinent information are virtually unlimited, so applying the *Gant* standard to cell phones would in effect give "police officers unbridled discretion to rummage at will among a person's private effects." 556 U. S., at 345.

The United States also proposes a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered. See Brief for United States in No. 13–212, at 51–53. This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.

We also reject the United States' final suggestion that officers should always be able to search a phone's call log, as they did in Wurie's case. The Government relies on *Smith* v. *Maryland*, 442 U. S. 735 (1979), which held that no warrant was required to use a pen register at telephone company premises to identify numbers dialed by a particular caller. The Court in that case, however, concluded that the use of a pen register was not a "search" at all under the Fourth Amendment. See *id.*, at 745–746. There is no dispute here that the officers engaged in a search of Wurie's cell phone. Moreover, call logs typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label "my house" in Wurie's case.

Finally, at oral argument California suggested a different limiting principle, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. See Tr. of Oral Arg. in No. 13–132, at 38–43; see also *Flores-Lopez*, 670 F. 3d, at 807 ("If police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number."). But the fact that a search in the pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery. The fact that someone could have tucked a paper bank statement in a pocket does not justify a search of every bank statement from the last five years. And to make matters worse, such an analogue test would allow law enforcement to search a range of items contained on a phone, even though people would be unlikely to carry such a variety of information in physical form. In Riley's case, for example, it is implausible that he would have strolled around with video tapes, photo albums, and an address book all crammed into his pockets. But because each of those items has a pre-digital analogue, police under California's proposal would be able to search a phone for all of those items—a significant diminution of privacy.

In addition, an analogue test would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear how officers could make these kinds of decisions before conducting a search, or how courts would apply the proposed rule after the fact. An analogue test would "keep defendants and judges guessing for years to come." *Sykes* v. *United States*, 564 U. S. 1, 34 (2011) (SCALIA, J., dissenting) (discussing the Court's analogue test under the Armed Career Criminal Act).

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971). Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. See *McNeely*, 569 U. S., at 154–155; *id.*, at 173 (ROBERTS, C. J., concurring in part and dissenting in part) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific excep-

tions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky* v. *King*, 563 U. S., at 460 (quoting *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978)). Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. 563 U. S., at 460. In *Chadwick*, for example, the Court held that the exception for searches incident to arrest did not justify a search of the trunk at issue, but noted that "if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage." 433 U. S., at 15, n. 9.

In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. See Reply Brief in No. 13–132, pp. 8–9; Brief for Respondent in No. 13–212, at 30, 41. The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case. See *McNeely*, *supra*, at 149–150.[2]

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[2] In Wurie's case, for example, the dissenting First Circuit Judge argued that exigent circumstances could have justified a search of Wurie's phone. See 728 F. 3d 1, 17 (2013) (opinion of Howard, J.) (discussing the repeated unanswered calls from "my house," the suspected location of a drug

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Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself. In 1761, the patriot James Otis delivered a speech in Boston denouncing the use of writs of assistance. A young John Adams was there, and he would later write that "[e]very man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance." 10 Works of John Adams 247–248 (C. Adams ed. 1856). According to Adams, Otis's speech was "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.*, at 248 (quoted in *Boyd* v. *United States*, 116 U. S. 616, 625 (1886)).

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," *id.*, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

We reverse the judgment of the California Court of Appeal in No. 13–132 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the First Circuit in No. 13–212.

It is so ordered.

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stash). But the majority concluded that the Government had not made an exigent circumstances argument. See *id.*, at 1. The Government acknowledges the same in this Court. See Brief for United States in No. 13–212, p. 28, n. 8.

JUSTICE ALITO, concurring in part and concurring in the judgment.

I agree with the Court that law enforcement officers, in conducting a lawful search incident to arrest, must generally obtain a warrant before searching information stored or accessible on a cell phone. I write separately to address two points.

I

A

First, I am not convinced at this time that the ancient rule on searches incident to arrest is based exclusively (or even primarily) on the need to protect the safety of arresting officers and the need to prevent the destruction of evidence. Cf. *ante*, at 386. This rule antedates the adoption of the Fourth Amendment by at least a century. See T. Clancy, The Fourth Amendment: Its History and Interpretation 340 (2008); T. Taylor, Two Studies in Constitutional Interpretation 28 (1969); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 764 (1994). In *Weeks* v. *United States*, 232 U. S. 383, 392 (1914), we held that the Fourth Amendment did not disturb this rule. See also Taylor, *supra*, at 45; Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L. J. 393, 401 (1995) ("The power to search incident to arrest—a search of the arrested suspect's person . . . — was well established in the mid-eighteenth century, and nothing in . . . the Fourth Amendment changed that"). And neither in *Weeks* nor in any of the authorities discussing the old common-law rule have I found any suggestion that it was based exclusively or primarily on the need to protect arresting officers or to prevent the destruction of evidence.

On the contrary, when pre-*Weeks* authorities discussed the basis for the rule, what was mentioned was the need to obtain probative evidence. For example, an 1839 case stated that "it is clear, and beyond doubt, that . . . constables . . . are entitled, upon a lawful arrest by them of one charged

with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime." See *Dillon* v. *O'Brien*, 16 Cox Crim. Cas. 245, 249–251 (1887) (citing *Regina* v. *Frost*, 9 Car. & P. 129, 173 Eng. Rep. 771 (1839)). The court noted that the origins of that rule "deriv[e] from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law." 16 Cox Crim. Cas., at 249–250. See also *Holker* v. *Hennessey*, 141 Mo. 527, 537–540, 42 S. W. 1090, 1093 (1897).

Two 19th-century treatises that this Court has previously cited in connection with the origin of the search-incident-to-arrest rule, see *Weeks*, *supra*, at 392, suggest the same rationale. See F. Wharton, Criminal Pleading and Practice § 60, p. 45 (8th ed. 1880) ("Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged"); J. Bishop, Criminal Procedure §§ 210–212, p. 127 (2d ed. 1872) (if an arresting officer finds "about the prisoner's person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct").

What ultimately convinces me that the rule is not closely linked to the need for officer safety and evidence preservation is that these rationales fail to explain the rule's well-recognized scope. It has long been accepted that written items found on the person of an arrestee may be examined and used at trial.* But once these items are taken away

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*Cf. *Hill* v. *California*, 401 U. S. 797, 799–802, and n. 1 (1971) (diary); *Marron* v. *United States*, 275 U. S. 192, 193, 198–199 (1927) (ledger and bills); *Gouled* v. *United States*, 255 U. S. 298, 309 (1921), overruled on other grounds, *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 300–301

from an arrestee (something that obviously must be done before the items are read), there is no risk that the arrestee will destroy them. Nor is there any risk that leaving these items unread will endanger the arresting officers.

The idea that officer safety and the preservation of evidence are the sole reasons for allowing a warrantless search incident to arrest appears to derive from the Court's reasoning in *Chimel* v. *California*, 395 U. S. 752 (1969), a case that involved the lawfulness of a search of the scene of an arrest, not the person of an arrestee. As I have explained, *Chimel*'s reasoning is questionable, see *Arizona* v. *Gant*, 556 U. S. 332, 361–363 (2009) (dissenting opinion), and I think it is a mistake to allow that reasoning to affect cases like these that concern the search of the person of arrestees.

B

Despite my view on the point discussed above, I agree that we should not mechanically apply the rule used in the predig-

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(1967) (papers); see *United States* v. *Rodriguez*, 995 F. 2d 776, 778 (CA7 1993) (address book); *United States* v. *Armendariz–Mata*, 949 F. 2d 151, 153 (CA5 1991) (notebook); *United States* v. *Molinaro*, 877 F. 2d 1341 (CA7 1989) (wallet); *United States* v. *Richardson*, 764 F. 2d 1514, 1527 (CA11 1985) (wallet and papers); *United States* v. *Watson*, 669 F. 2d 1374, 1383–1384 (CA11 1982) (documents found in a wallet); *United States* v. *Castro*, 596 F. 2d 674, 677 (CA5), cert. denied, 444 U. S. 963 (1979) (paper found in a pocket); *United States* v. *Jeffers*, 520 F. 2d 1256, 1267–1268 (CA7 1975) (three notebooks and meeting minutes); *Bozel* v. *Hudspeth*, 126 F. 2d 585, 587 (CA10 1942) (papers, circulars, advertising matter, "memoranda containing various names and addresses"); *United States* v. *Park Avenue Pharmacy*, 56 F. 2d 753, 755 (CA2 1932) ("numerous prescriptions blanks" and a checkbook). See also 3 W. LaFave, Search and Seizure § 5.2(c), p. 144 (5th ed. 2012) ("Lower courts, in applying *Robinson*, have deemed evidentiary searches of an arrested person to be virtually unlimited"); W. Cuddihy, Fourth Amendment: Origins and Original Meaning 847–848 (1990) (in the pre-Constitution colonial era, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched").

ital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.

The Court strikes this balance in favor of privacy interests with respect to all cell phones and all information found in them, and this approach leads to anomalies. For example, the Court's broad holding favors information in digital form over information in hard-copy form. Suppose that two suspects are arrested. Suspect number one has in his pocket a monthly bill for his land-line phone, and the bill lists an incriminating call to a long-distance number. He also has in his wallet a few snapshots, and one of these is incriminating. Suspect number two has in his pocket a cell phone, the call log of which shows a call to the same incriminating number. In addition, a number of photos are stored in the memory of the cell phone, and one of these is incriminating. Under established law, the police may seize and examine the phone bill and the snapshots in the wallet without obtaining a warrant, but under the Court's holding today, the information stored in the cell phone is out.

While the Court's approach leads to anomalies, I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.

II

This brings me to my second point. While I agree with the holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the

privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.

The regulation of electronic surveillance provides an instructive example. After this Court held that electronic surveillance constitutes a search even when no property interest is invaded, see *Katz* v. *United States*, 389 U. S. 347, 353–359 (1967), Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211. See also 18 U. S. C. § 2510 *et seq.* Since that time, electronic surveillance has been governed primarily, not by decisions of this Court, but by the statute, which authorizes, but imposes detailed restrictions on, electronic surveillance. See *ibid.*

Modern cell phones are of great value for both lawful and unlawful purposes. They can be used in committing many serious crimes, and they present new and difficult law enforcement problems. See Brief for United States in No. 13–212, pp. 2–3. At the same time, because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate. Many forms of modern technology are making it easier and easier for both government and private entities to amass a wealth of information about the lives of ordinary Americans, and at the same time, many ordinary Americans are choosing to make public much information that was seldom revealed to outsiders just a few decades ago.

In light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.

Syllabus

FIFTH THIRD BANCORP ET AL. *v.* DUDENHOEFFER ET AL.

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

No. 12–751. Argued April 2, 2014—Decided June 25, 2014

Petitioner Fifth Third Bancorp maintains a defined-contribution retirement savings plan for its employees. Plan participants may direct their contributions into any of a number of investment options, including an "employee stock ownership plan" (ESOP), which invests its funds primarily in Fifth Third stock. Respondents, former Fifth Third employees and ESOP participants, filed this lawsuit against petitioners, Fifth Third and several of its officers who are alleged to be fiduciaries of the ESOP. The complaint alleges that petitioners breached the fiduciary duty of prudence imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1104(a)(1)(B). Specifically, the complaint alleges that petitioners should have known—on the basis of both publicly available information and inside information available to petitioners because they were Fifth Third officers—that Fifth Third stock was overpriced and excessively risky. It further alleges that a prudent fiduciary in petitioners' position would have responded to this information by selling off the ESOP's holdings of Fifth Third stock, refraining from purchasing more Fifth Third stock, or disclosing the negative inside information so that the market could correct the stock's price downward. According to the complaint, petitioners did none of these things, and the price of Fifth Third stock ultimately fell, reducing respondents' retirement savings. The District Court dismissed the complaint for failure to state a claim, but the Sixth Circuit reversed. It concluded that ESOP fiduciaries are entitled to a "presumption of prudence" that does not apply to other ERISA fiduciaries but that the presumption is an evidentiary one and therefore does not apply at the pleading stage. The court went on to hold that the complaint stated a claim for breach of fiduciary duty.

Held:

1. ESOP fiduciaries are not entitled to any special presumption of prudence. Rather, they are subject to the same duty of prudence that applies to ERISA fiduciaries in general, § 1104(a)(1)(B), except that they need not diversify the fund's assets, § 1104(a)(2). This conclusion follows from the relevant provisions of ERISA. Section 1104(a)(1)(B) "imposes a 'prudent person' standard by which to measure fiduciaries' in-

vestment decisions and disposition of assets." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 143, n. 10. Section 1104(a)(1)(C) requires ERISA fiduciaries to diversify plan assets. And § 1104(a)(2) establishes the extent to which those duties are loosened in the ESOP context by providing that "the diversification requirement of [§ 1104(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [§ 1104(a)(1)(B)] [are] not violated by acquisition or holding of [employer stock]." Section 1104(a)(2) makes no reference to a special "presumption" in favor of ESOP fiduciaries and does not require plaintiffs to allege that the employer was, *e. g.*, on the "brink of collapse." It simply modifies the duties imposed by § 1104(a)(1) in a precisely delineated way. Thus, aside from the fact that ESOP fiduciaries are not liable for losses that result from a failure to diversify, they are subject to the duty of prudence like other ERISA fiduciaries. Pp. 415–425.

2. On remand, the Sixth Circuit should reconsider whether the complaint states a claim by applying the pleading standard as discussed in *Ashcroft* v. *Iqbal*, 556 U. S. 662, 677–680, and *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 554–563, in light of the following considerations. Pp. 425–430.

(a) Where a stock is publicly traded, allegations that a fiduciary should have recognized on the basis of publicly available information that the market was overvaluing or undervaluing the stock are generally implausible and thus insufficient to state a claim under *Twombly* and *Iqbal*. Pp. 426–427.

(b) To state a claim for breach of the duty of prudence, a complaint must plausibly allege an alternative action that the defendant could have taken, that would have been legal, and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. Where the complaint alleges that a fiduciary was imprudent in failing to act on the basis of inside information, the analysis is informed by the following points. First, ERISA's duty of prudence never requires a fiduciary to break the law, and so a fiduciary cannot be imprudent for failing to buy or sell stock in violation of the insider trading laws. Second, where a complaint faults fiduciaries for failing to decide, based on negative inside information, to refrain from making additional stock purchases or for failing to publicly disclose that information so that the stock would no longer be overvalued, courts should consider the extent to which imposing an ERISA-based obligation either to refrain from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements set forth by the federal securities laws or with the objectives of those laws. Third, courts confronted with such claims should consider whether the complaint has plausibly alleged

that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund. Pp. 427–430.

692 F. 3d 410, vacated and remanded.

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

Robert A. Long, Jr., argued the cause for petitioners. With him on the briefs were *John M. Vine*, *David M. Zionts*, *James E. Burke*, *Danielle M. D'Addesa*, and *David T. Bules*.

Ronald J. Mann argued the cause for respondents. With him on the brief were *Maurice R. Mitts*, *Joseph H. Meltzer*, *Edward W. Ciolko*, *Shannon O. Braden*, and *Thomas J. McKenna*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *John F. Bash*, *M. Patricia Smith*, *G. William Scott*, and *Elizabeth Hopkins*.*

JUSTICE BREYER delivered the opinion of the Court.

The Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*, requires the fiduciary of a pension plan to act prudently in

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Myron D. Rumeld*, *Mark D. Harris*, *Kate Comerford Todd*, *Debra A. Davis*, and *Patrick Forrest*; for Delta Air Lines, Inc., by *Paul D. Clement* and *Jeffrey M. Harris*; for the ESOP Association by *Charles M. Dyke*, *Sean T. Strauss*, *Laurence A. Goldberg*, and *Lynn H. Dubois*; for Keycorp by *Daniel R. Warren*, *Scott C. Holbrook*, *James A. Slater*, *Jr.*, and *David A. Carney*; and for Securities Industry and Financial Markets Association by *Mark A. Perry*, *Paul Blankenstein*, and *Kevin Carroll*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Jay E. Shushelsky* and *Melvin Radowitz*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, *James B. Coppess*, and *Laurence Gold*; and for Law Professors by *Lynn L. Sarko*.

managing the plan's assets. § 1104(a)(1)(B). This case focuses upon that duty of prudence as applied to the fiduciary of an "employee stock ownership plan" (ESOP), a type of pension plan that invests primarily in the stock of the company that employs the plan participants.

We consider whether, when an ESOP fiduciary's decision to buy or hold the employer's stock is challenged in court, the fiduciary is entitled to a defense-friendly standard that the lower courts have called a "presumption of prudence." The Courts of Appeals that have considered the question have held that such a presumption does apply, with the presumption generally defined as a requirement that the plaintiff make a showing that would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse.

We hold that no such presumption applies. Instead, ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets. § 1104(a)(2).

I

Petitioner Fifth Third Bancorp, a large financial services firm, maintains for its employees a defined-contribution retirement savings plan (Plan). Employees may choose to contribute a portion of their compensation to the Plan as retirement savings, and Fifth Third provides matching contributions of up to 4% of an employee's compensation. The Plan's assets are invested in 20 separate funds, including mutual funds and an ESOP. Plan participants can allocate their contributions among the funds however they like; Fifth Third's matching contributions, on the other hand, are always invested initially in the ESOP, though the participant can then choose to move them to another fund. The Plan requires the ESOP's funds to be "invested primarily in shares of common stock of Fifth Third." App. 350.

Respondents, who are former Fifth Third employees and ESOP participants, filed this putative class action in Federal District Court in Ohio. They claim that petitioners, Fifth Third and various Fifth Third officers, were fiduciaries of the Plan and violated the duties of loyalty and prudence imposed by ERISA. See §§ 1109(a), 1132(a)(2). We limit our review to the duty-of-prudence claims.

The complaint alleges that by July 2007, the fiduciaries knew or should have known that Fifth Third's stock was overvalued and excessively risky for two separate reasons. First, publicly available information such as newspaper articles provided early warning signs that subprime lending, which formed a large part of Fifth Third's business, would soon leave creditors high and dry as the housing market collapsed and subprime borrowers became unable to pay off their mortgages. Second, nonpublic information (which petitioners knew because they were Fifth Third insiders) indicated that Fifth Third officers had deceived the market by making material misstatements about the company's financial prospects. Those misstatements led the market to overvalue Fifth Third stock—the ESOP's primary investment—and so petitioners, using the participants' money, were consequently paying more for that stock than it was worth.

The complaint further alleges that a prudent fiduciary in petitioners' position would have responded to this information in one or more of the following ways: (1) by selling the ESOP's holdings of Fifth Third stock before the value of those holdings declined, (2) by refraining from purchasing any more Fifth Third stock, (3) by canceling the Plan's ESOP option, and (4) by disclosing the inside information so that the market would adjust its valuation of Fifth Third stock downward and the ESOP would no longer be overpaying for it.

Rather than follow any of these courses of action, petitioners continued to hold and buy Fifth Third stock. Then the

market crashed, and Fifth Third's stock price fell by 74% between July 2007 and September 2009, when the complaint was filed. Since the ESOP's funds were invested primarily in Fifth Third stock, this fall in price eliminated a large part of the retirement savings that the participants had invested in the ESOP. (The stock has since made a partial recovery to around half of its July 2007 price.)

The District Court dismissed the complaint for failure to state a claim. 757 F. Supp. 2d 753 (SD Ohio 2010). The court began from the premise that where a lawsuit challenges ESOP fiduciaries' investment decisions, "the plan fiduciaries start with a presumption that their 'decision to remain invested in employer securities was reasonable.'" *Id.*, at 758 (quoting *Kuper* v. *Iovenko*, 66 F. 3d 1447, 1459 (CA6 1995)). The court next held that this rule is applicable at the pleading stage and then concluded that the complaint's allegations were insufficient to overcome it. 757 F. Supp. 2d, at 758–759, 760–762.

The Court of Appeals for the Sixth Circuit reversed. 692 F. 3d 410 (2012). Although it agreed that ESOP fiduciaries are entitled to a presumption of prudence, it took the view that the presumption is evidentiary only and therefore does not apply at the pleading stage. *Id.*, at 418–419. Thus, the Sixth Circuit simply asked whether the allegations in the complaint were sufficient to state a claim for breach of fiduciary duty. *Id.*, at 419. It held that they were. *Id.*, at 419–420.

In light of differences among the Courts of Appeals as to the nature of the presumption of prudence applicable to ESOP fiduciaries, we granted the fiduciaries' petition for certiorari. Compare *In re Citigroup ERISA Litigation*, 662 F. 3d 128, 139–140 (CA2 2011) (presumption of prudence applies at the pleading stage and requires the plaintiff to establish that the employer was "in a 'dire situation' that was objectively unforeseeable by the settlor" (quoting *Edgar* v. *Avaya, Inc.*, 503 F. 3d 340, 348 (CA3 2007))), with *Pfeil* v.

State Street Bank & Trust Co., 671 F. 3d 585, 592–596 (CA6 2012) (presumption of prudence applies only at summary judgment and beyond and only requires the plaintiff to establish that "'a prudent fiduciary acting under similar circumstances would have made a different investment decision'" (quoting *Kuper*, *supra*, at 1459)).

II

A

In applying a "presumption of prudence" that favors ESOP fiduciaries' purchasing or holding of employer stock, the lower courts have sought to reconcile congressional directives that are in some tension with each other. On the one hand, ERISA itself subjects pension plan fiduciaries to a duty of prudence. In a section titled "Fiduciary duties," it says:

> "(a) **Prudent man standard of care**
>
> "(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> "(A) for the exclusive purpose of:
>
> "(i) providing benefits to participants and their beneficiaries; and
>
> "(ii) defraying reasonable expenses of administering the plan;
>
> "(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> "(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> "(D) in accordance with the documents and instruments governing the plan insofar as such documents and

> instruments are consistent with the provisions of this subchapter and subchapter III of this chapter." § 1104.

See also *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985) (Section 1104(a)(1) imposes "strict standards of trustee conduct . . . derived from the common law of trusts—most prominently, a standard of loyalty and a standard of care").

On the other hand, Congress recognizes that ESOPs are "designed to invest primarily in" the stock of the participants' employer, § 1107(d)(6)(A), meaning that they are *not* prudently diversified. And it has written into law its "interest in encouraging" their use. One statutory provision says:

> "Intent of Congress Concerning Employee Stock Ownership Plans.—The Congress, in a series of laws [including ERISA] has made clear its interest in encouraging [ESOPs] as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat [ESOPs] as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans." Tax Reform Act of 1976, § 803(h), 90 Stat. 1590.

In addition, and in keeping with this statement of intent, Congress has given ESOP fiduciaries a statutory exemption from some of the duties imposed on ERISA fiduciaries. ERISA specifically provides that, in the case of ESOPs and other eligible individual account plans,

> "the diversification requirement of [§ 1104(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [§ 1104(a)(1)(B)] [are] not violated by acquisition or holding of [employer stock]." § 1104(a)(2).

Thus, an ESOP fiduciary is not obliged under § 1104(a)(1)(C) to "diversif[y] the investments of the plan so as to minimize the risk of large losses" or under § 1104(a)(1)(B) to act "with the care, skill, prudence, and diligence" of a "prudent man" insofar as that duty "requires diversification."

B

Several Courts of Appeals have gone beyond ERISA's express provision that ESOP fiduciaries need not diversify by giving ESOP fiduciaries a "presumption of prudence" when their decisions to hold or buy employer stock are challenged as imprudent. Thus, the Third Circuit has held that "an ESOP fiduciary who invests the [ESOP's] assets in employer stock is entitled to a presumption that it acted consistently with ERISA" in doing so. *Moench* v. *Robertson*, 62 F. 3d 553, 571 (1995). The Ninth Circuit has said that to "overcome the presumption of prudent investment, plaintiffs must . . . make allegations that clearly implicate the company's viability as an ongoing concern or show a precipitous decline in the employer's stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement." *Quan* v. *Computer Sciences Corp.*, 623 F. 3d 870, 882 (2010) (brackets and internal quotation marks omitted). And the Seventh Circuit has described the presumption as requiring plaintiffs to "allege and ultimately prove that the company faced 'impending collapse' or 'dire circumstances' that could not have been foreseen by the founder of the plan." *White* v. *Marshall & Ilsley Corp.*, 714 F. 3d 980, 989 (2013).

The Sixth Circuit agreed that some sort of presumption favoring an ESOP fiduciary's purchase of employer stock is

appropriate. But it held that this presumption is an evidentiary rule that does not apply at the pleading stage. It further held that, to overcome the presumption, a plaintiff need not show that the employer was on the "brink of collapse" or the like. Rather, the plaintiff need only show that "'a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" 692 F. 3d, at 418 (quoting *Kuper*, 66 F. 3d, at 1459).

Petitioners argue that the lower courts are right to apply a presumption of prudence, that it should apply from the pleading stage onward, and that the presumption should be strongly in favor of ESOP fiduciaries' purchasing and holding of employer stock.

In particular, petitioners propose a rule that a challenge to an ESOP fiduciary's decision to hold or buy company stock "cannot prevail unless extraordinary circumstances, such as a serious threat to the employer's viability, mean that continued investment would substantially impair the purpose of the plan." Brief for Petitioners 16. In petitioners' view, the "purpose of the plan," in the case of an ESOP, is promoting employee ownership of the employer's stock over the long term. And, petitioners assert, that purpose is "substantially impair[ed]"—rendering continued investment imprudent—only when "a serious threat to the employer's viability" makes it likely that the employer will go out of business. This is because the goal of employee ownership will be substantially impaired only if the employer goes out of business, leaving the employees with no company to own. *Id.*, at 24.

We must decide whether ERISA contains some such presumption.

III

A

In our view, the law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of

prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings. This conclusion follows from the pertinent provisions of ERISA, which are set forth above.

Section 1104(a)(1)(B) "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 143, n. 10 (1985). Section 1104(a)(1)(C) requires ERISA fiduciaries to diversify plan assets. And § 1104(a)(2) establishes the extent to which those duties are loosened in the ESOP context to ensure that employers are permitted and encouraged to offer ESOPs. Section 1104(a)(2) makes no reference to a special "presumption" in favor of ESOP fiduciaries. It does not require plaintiffs to allege that the employer was on the "brink of collapse," under "extraordinary circumstances," or the like. Instead, § 1104(a)(2) simply modifies the duties imposed by § 1104(a)(1) in a precisely delineated way: It provides that an ESOP fiduciary is exempt from § 1104(a)(1)(C)'s diversification requirement and also from § 1104(a)(1)(B)'s duty of prudence, but "*only to the extent that it requires diversification.*" § 1104(a)(2) (emphasis added).

Thus, ESOP fiduciaries, unlike ERISA fiduciaries generally, are not liable for losses that result from a failure to diversify. But aside from that distinction, because ESOP fiduciaries are ERISA fiduciaries and because § 1104(a)(1)(B)'s duty of prudence applies to all ERISA fiduciaries, ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are.

B

Petitioners make several arguments to the contrary. First, petitioners argue that the special purpose of an ESOP—investing participants' savings in the stock of their employer—calls for a presumption that such investments are

prudent. Their argument is as follows: ERISA defines the duty of prudence in terms of what a prudent person would do "in the conduct of an enterprise of a like character and with like aims." § 1104(a)(1)(B). The "character" and "aims" of an ESOP differ from those of an ordinary retirement investment, such as a diversified mutual fund. An ordinary plan seeks (1) to maximize retirement savings for participants while (2) avoiding excessive risk. But an ESOP also seeks (3) to promote employee ownership of employer stock. For instance, Fifth Third's Plan requires the ESOP's assets to be "invested primarily in shares of common stock of Fifth Third." App. 350. In light of this additional goal, an ESOP fiduciary's decision to buy more shares of employer stock, even if it would be imprudent were it viewed solely as an attempt to secure financial retirement benefits while avoiding excessive risk, might nonetheless be prudent if understood as an attempt to promote employee ownership of employer stock, a goal that Congress views as important. See Tax Reform Act of 1976, § 803(h), 90 Stat. 1590. Thus, a claim that an ESOP fiduciary's investment in employer stock was imprudent as a way of securing retirement savings should be viewed unfavorably because, unless the company was about to go out of business, that investment was advancing the additional goal of employee ownership of employer stock.

We cannot accept the claim that underlies this argument, namely, that the content of ERISA's duty of prudence varies depending upon the specific nonpecuniary goal set out in an ERISA plan, such as what petitioners claim is the nonpecuniary goal here. Taken in context, § 1104(a)(1)(B)'s reference to "an enterprise of a like character and with like aims" means an enterprise with what the immediately preceding provision calls the "exclusive purpose" to be pursued by all ERISA fiduciaries: "providing benefits to participants and their beneficiaries" while "defraying reasonable expenses of administering the plan." §§ 1104(a)(1)(A)(i), (ii). Read in

the context of ERISA as a whole, the term "benefits" in the provision just quoted must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. Cf. § 1002(2)(A) (defining "employee pension benefit plan" and "pension plan" to mean plans that provide employees with "retirement income" or other "deferral of income"). The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.

Consider the statute's requirement that fiduciaries act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter*." § 1104(a)(1)(D) (emphasis added). This provision makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary. See also § 1110(a) (With irrelevant exceptions, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility . . . for any . . . duty under this part shall be void as against public policy"). This rule would make little sense if, as petitioners argue, the duty of prudence is defined by the aims of the particular plan as set out in the plan documents, since in that case the duty of prudence could never conflict with a plan document.

Consider also § 1104(a)(2), which exempts an ESOP fiduciary from § 1104(a)(1)(B)'s duty of prudence but "only to the extent that it requires diversification." What need would there be for this specific provision were the nature of § 1104(a)(1)(B)'s duty of prudence altered anyway in the case of an ESOP in light of the ESOP's aim of promoting employee ownership of employer stock? Cf. *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1 (2006) ("[I]t is generally presumed that statutes do not contain surplusage").

Petitioners are right to point out that *Congress*, in seeking to permit and promote ESOPs, was pursuing purposes other than the financial security of plan participants. See, *e. g.*, Tax Reform Act of 1976, § 803(h), 90 Stat. 1590 (Congress intended ESOPs to help "secur[e] capital funds for necessary capital growth and . . . brin[g] about stock ownership by all corporate employees"). Congress pursued those purposes by promoting ESOPs with tax incentives. See 26 U. S. C. §§ 402(e)(4), 404(k), 1042. And it also pursued them by exempting ESOPs from ERISA's diversification requirement, which otherwise would have precluded their creation. 29 U. S. C. § 1104(a)(2). But we are not convinced that Congress *also* sought to promote ESOPs by further relaxing the duty of prudence as applied to ESOPs with the sort of presumption proposed by petitioners.

Second, and relatedly, petitioners contend that the duty of prudence should be read in light of the rule under the common law of trusts that "the settlor can reduce or waive the prudent man standard of care by specific language in the trust instrument." G. Bogert & G. Bogert, Law of Trusts and Trustees § 541, p. 172 (rev. 2d ed. 1993); see also Restatement (Second) of Trusts § 174, Comment *d* (1957) ("By the terms of the trust the requirement of care and skill may be relaxed or modified"). The argument is that, by commanding the ESOP fiduciary to invest primarily in Fifth Third stock, the plan documents waived the duty of prudence to the extent that it comes into conflict with investment in Fifth Third stock—at least unless "extraordinary circumstances" arise that so threaten the goal of employee ownership of Fifth Third stock that the fiduciaries must assume that the settlor would want them to depart from that goal under the common-law "deviation doctrine." See *id.*, § 167. This argument fails, however, in light of this Court's holding that, by contrast to the rule at common law, "trust documents cannot excuse trustees from their duties under ERISA." *Central States, Southeast & Southwest Areas*

Pension Fund, 472 U. S., at 568; see also 29 U. S. C. §§ 1104(a)(1)(D), 1110(a).

Third, petitioners argue that subjecting ESOP fiduciaries to a duty of prudence without the protection of a special presumption will lead to conflicts with the legal prohibition on insider trading. The potential for conflict arises because ESOP fiduciaries often are company insiders and because suits against insider fiduciaries frequently allege, as the complaint in this case alleges, that the fiduciaries were imprudent in failing to act on inside information they had about the value of the employer's stock.

This concern is a legitimate one. But an ESOP-specific rule that a fiduciary does not act imprudently in buying or holding company stock unless the company is on the brink of collapse (or the like) is an ill-fitting means of addressing it. While ESOP fiduciaries may be more likely to have insider information about a company that the fund is investing in than are other ERISA fiduciaries, the potential for conflict with the securities laws would be the same for a non-ESOP fiduciary who had relevant inside information about a potential investment. And the potential for conflict is the same for an ESOP fiduciary whose company is on the brink of collapse as for a fiduciary who is invested in a healthier company. (Surely a fiduciary is not obligated to break the insider trading laws even if his company is about to fail.) The potential for conflict therefore does not persuade us to accept a presumption of the sort adopted by the lower courts and proposed by petitioners. We discuss alternative means of dealing with the potential for conflict in Part IV, *infra*.

Finally, petitioners argue that, without some sort of special presumption, the threat of costly duty-of-prudence lawsuits will deter companies from offering ESOPs to their employees, contrary to the stated intent of Congress. Cf. *Massachusetts Mut. Life Ins. Co.*, 473 U. S., at 148, n. 17 ("Congress was concerned lest the cost of federal standards discourage the growth of private pension plans"). ESOP

plans instruct their fiduciaries to invest in company stock, and § 1104(a)(1)(D) requires fiduciaries to follow plan documents so long as they do not conflict with ERISA. Thus, in many cases an ESOP fiduciary who fears that continuing to invest in company stock may be imprudent finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently in violation of § 1104(a)(1)(B), but if he stops investing and the stock goes up he may be sued for disobeying the plan documents in violation of § 1104(a)(1)(D). See, *e. g.*, *White*, 714 F. 3d, at 987 ("[F]iduciaries could be liable either for the company stock's poor performance if they continue to invest in employer stock, or for missing the opportunity to benefit from good performance if they do not. . . . Such a high exposure to litigation risks in either direction could discourage employers from offering ESOPs, which are favored by Congress"); *Evans* v. *Akers*, 534 F. 3d 65, 68 (CA1 2008) (describing two lawsuits challenging the decisions of a plan's fiduciaries with "diametrically opposed theor[ies] of liability": one arguing that the fiduciaries acted imprudently by continuing to invest in company stock, and the other contending that they acted imprudently by divesting "despite the company's solid potential to emerge from bankruptcy with substantial value for shareholders"). Petitioners argue that, given the threat of such expensive litigation, ESOPs cannot thrive unless their fiduciaries are granted a defense-friendly presumption.

Petitioners are basically seeking relief from what they believe are meritless, economically burdensome lawsuits. We agree that Congress sought to encourage the creation of ESOPs. And we have recognized that "ERISA represents a '"careful balancing" between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.'" *Conkright* v. *Frommert*, 559 U. S. 506, 517 (2010) (quoting *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 215 (2004)); see also *Varity Corp.* v. *Howe*, 516

U. S. 489, 497 (1996) (In "interpret[ing] ERISA's fiduciary duties," "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place").

At the same time, we do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite "balancing." The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats. That important task can be better accomplished through careful, context-sensitive scrutiny of a complaint's allegations. We consequently stand by our conclusion that the law does not create a special presumption of prudence for ESOP fiduciaries.

IV

We consider more fully one important mechanism for weeding out meritless claims, the motion to dismiss for failure to state a claim. That mechanism, which gave rise to the lower court decisions at issue here, requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently. See Fed. Rule Civ. Proc. 12(b)(6); *Ashcroft* v. *Iqbal*, 556 U. S. 662, 677–680 (2009); *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 554–563 (2007). Because the content of the duty of prudence turns on "the circumstances . . . prevailing" at the time the fiduciary acts, § 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific.

The District Court in this case granted petitioners' motion to dismiss the complaint because it held that respondents

could not overcome the presumption of prudence. The Court of Appeals, by contrast, concluded that no presumption applied. And we agree with that conclusion. The Court of Appeals, however, went on to hold that respondents had stated a plausible duty-of-prudence claim. 692 F. 3d, at 419–420. The arguments made here, along with our review of the record, convince us that the judgment of the Court of Appeals should be vacated and the case remanded. On remand, the Court of Appeals should apply the pleading standard as discussed in *Twombly* and *Iqbal* in light of the following considerations.

A

Respondents allege that, as of July 2007, petitioners knew or should have known in light of publicly available information, such as newspaper articles, that continuing to hold and purchase Fifth Third stock was imprudent. App. 48–53. The complaint alleges, among other things, that petitioners "continued to allow the Plan's investment in Fifth Third Stock even during the time that the stock price was declining in value as a result of [the] collapse of the housing market" and that "[a] prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets were decimated." *Id.*, at 53.

In our view, where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was overvaluing or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. Many investors take the view that "'they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information,'" and accordingly they "'rely on the security's market price as an unbiased assessment of the security's value in light of all public information.'" *Halliburton Co.* v. *Erica P. John Fund, Inc.*, *ante*, at 273 (quoting *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. 455, 462 (2013)). ERISA

fiduciaries, who likewise could reasonably see "little hope of outperforming the market . . . based solely on their analysis of publicly available information," *ibid.*, may, as a general matter, likewise prudently rely on the market price.

In other words, a fiduciary usually "is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him." *Summers* v. *State Street Bank & Trust Co.*, 453 F. 3d 404, 408 (CA7 2006); see also *White*, 714 F. 3d, at 992 (A fiduciary's "fail[ure] to outsmart a presumptively efficient market . . . is . . . not a sound basis for imposing liability"); cf. *Quan*, 623 F. 3d, at 881 ("Fiduciaries are not expected to predict the future of the company stock's performance").

We do not here consider whether a plaintiff could nonetheless plausibly allege imprudence on the basis of publicly available information by pointing to a special circumstance affecting the reliability of the market price as " 'an unbiased assessment of the security's value in light of all public information,' " *Halliburton Co.*, *ante*, at 273 (quoting *Amgen Inc.*, *supra*, at 462), that would make reliance on the market's valuation imprudent. In this case, the Court of Appeals held that the complaint stated a claim because respondents "allege that Fifth Third engaged in lending practices that were equivalent to participation in the subprime lending market, that Defendants were aware of the risks of such investments by the start of the class period, and that such risks made Fifth Third stock an imprudent investment." 692 F. 3d, at 419–420. The Court of Appeals did not point to any special circumstance rendering reliance on the market price imprudent. The court's decision to deny dismissal therefore appears to have been based on an erroneous understanding of the prudence of relying on market prices.

B

Respondents also claim that petitioners behaved imprudently by failing to act on the basis of *nonpublic* information

that was available to them because they were Fifth Third insiders. In particular, the complaint alleges that petitioners had inside information indicating that the market was overvaluing Fifth Third stock and that they could have used this information to prevent losses to the fund by (1) selling the ESOP's holdings of Fifth Third stock; (2) refraining from future stock purchases (including by removing the Plan's ESOP option altogether); or (3) publicly disclosing the inside information so that the market would correct the stock price downward, with the result that the ESOP could continue to buy Fifth Third stock without paying an inflated price for it. See App. 17, 88–89, 113.

To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. The following three points inform the requisite analysis.

First, in deciding whether the complaint states a claim upon which relief can be granted, courts must bear in mind that the duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law. Cf. Restatement (Second) of Trusts § 166, Comment *a* ("The trustee is not under a duty to the beneficiary to do an act which is criminal or tortious"). Federal securities laws "are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information." *United States* v. *O'Hagan*, 521 U. S. 642, 651–652 (1997). As every Court of Appeals to address the question has held, ERISA's duty of prudence cannot require an ESOP fiduciary to perform an action—such as divesting the fund's holdings of the employer's stock on the basis of inside information—that would violate the securities laws. See, *e. g.*, *Rinehart* v. *Akers*, 722 F. 3d 137, 146–147 (CA2 2013); *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F. 3d 243, 256 (CA5

2008); *White*, *supra,* at 992; *Quan*, *supra*, at 881–882, and n. 8; *Lanfear* v. *Home Depot, Inc.*, 679 F. 3d 1267, 1282 (CA11 2012). To the extent that the Sixth Circuit denied dismissal based on the theory that the duty of prudence required petitioners to sell the ESOP's holdings of Fifth Third stock, its denial of dismissal was erroneous.

Second, where a complaint faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued, additional considerations arise. The courts should consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws. Cf. 29 U. S. C. § 1144(d) ("Nothing in this subchapter [which includes § 1104] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law"); *Black & Decker Disability Plan* v. *Nord*, 538 U. S. 822, 831 (2003) ("Although Congress 'expect[ed]' courts would develop 'a federal common law of rights and obligations under ERISA-regulated plans,' the scope of permissible judicial innovation is narrower in areas where other federal actors are engaged" (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 56 (1987); citation omitted)); *Varity Corp.*, 516 U. S., at 506 (reserving the question "whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries"). The U. S. Securities and Exchange Commission has not advised us of its views on these matters, and we believe those views may well be relevant.

Third, lower courts faced with such claims should also consider whether the complaint has plausibly alleged that a pru-

dent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

* * *

We leave it to the courts below to apply the foregoing to the complaint in this case in the first instance. The judgment of the Court of Appeals for the Sixth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

AMERICAN BROADCASTING COS., INC., ET AL. *v.* AEREO, INC., FKA BAMBOOM LABS, INC.

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

No. 13–461. Argued April 22, 2014—Decided June 25, 2014

The Copyright Act of 1976 gives a copyright owner the "exclusive righ[t]" to "perform the copyrighted work publicly." 17 U. S. C. § 106(4). The Act's Transmit Clause defines that exclusive right to include the right to "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." § 101.

Respondent Aereo, Inc., sells a service that allows its subscribers to watch television programs over the Internet at about the same time as the programs are broadcast over the air. When a subscriber wants to watch a show that is currently airing, he selects the show from a menu on Aereo's Website. Aereo's system, which consists of thousands of small antennas and other equipment housed in a centralized warehouse, responds roughly as follows: A server tunes an antenna, which is dedicated to the use of one subscriber alone, to the broadcast carrying the selected show. A transcoder translates the signals received by the antenna into data that can be transmitted over the Internet. A server saves the data in a subscriber-specific folder on Aereo's hard drive and begins streaming the show to the subscriber's screen once several seconds of programming have been saved. The streaming continues, a few seconds behind the over-the-air broadcast, until the subscriber has received the entire show.

Petitioners, who are television producers, marketers, distributors, and broadcasters that own the copyrights in many of the programs that Aereo streams, sued Aereo for copyright infringement. They sought a preliminary injunction, arguing that Aereo was infringing their right to "perform" their copyrighted works "publicly." The District Court denied the preliminary injunction, and the Second Circuit affirmed.

Held: Aereo performs petitioners' works publicly within the meaning of the Transmit Clause. Pp. 438–451.

(a) Aereo "perform[s]." It does not merely supply equipment that allows others to do so. Pp. 438–444.

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(1) One of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's holdings that the activities of community antenna television (CATV) providers fell outside the Act's scope. In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390, the Court determined that a CATV provider was more like a viewer than a broadcaster, because its system "no more than enhances the viewer's capacity to receive the broadcaster's signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer's television set." *Id.*, at 399. Therefore, the Court concluded, a CATV provider did not perform publicly. The Court reached the same determination in respect to a CATV provider that retransmitted signals from hundreds of miles away in *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394. "The reception and rechanneling of [broadcast television signals] for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer," the Court said. *Id.*, at 408. Pp. 439–441.

(2) In 1976 Congress amended the Copyright Act in large part to reject the *Fortnightly* and *Teleprompter* holdings. The Act now clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." § 101. Thus, *both* the broadcaster *and* the viewer "perform," because they both show a television program's images and make audible the program's sounds. Congress also enacted the Transmit Clause (or Clause), which specifies that an entity performs when it "transmit[s] . . . a performance . . . to the public." *Ibid.* The Clause makes clear that an entity that acts like a CATV system itself performs, even when it simply enhances viewers' ability to receive broadcast television signals. Congress further created a complex licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts to the public. § 111. Congress made all three of these changes to bring cable system activities within the Copyright Act's scope. Pp. 441–442.

(3) Because Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach, Aereo is not simply an equipment provider. Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, virtually as they are being broadcast. Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' homes. By means of its technology, Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers." *Fortnightly*, *supra*, at 400.

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This Court recognizes one particular difference between Aereo's system and the cable systems at issue in *Fortnightly* and *Teleprompter*: The systems in those cases transmitted constantly, whereas Aereo's system remains inert until a subscriber indicates that she wants to watch a program. In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. Pp. 442–444.

(b) Aereo also performs petitioners' works "publicly." Under the Clause, an entity performs a work publicly when it "transmit[s] . . . a performance . . . of the work . . . to the public." § 101. What performance, if any, does Aereo transmit? Petitioners say Aereo transmits a *prior* performance of their works, whereas Aereo says the performance it transmits is the *new* performance created by its act of transmitting. This Court assumes, *arguendo*, that Aereo is correct and thus assumes, for present purposes, that to transmit a performance of an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. Under the Court's assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

What about the Clause's further requirement that Aereo transmit a performance "to the public"? Aereo claims that because it transmits from user-specific copies, using individually assigned antennas, and because each transmission is available to only one subscriber, it does not transmit a performance "to the public." Viewed in terms of Congress' regulatory objectives, these behind-the-scenes technological differences do not distinguish Aereo's system from cable systems, which do perform publicly. Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Under the Clause, an entity may transmit a performance through multiple transmissions, where the performance is of the same work. Thus when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it "transmit[s] . . . a performance" to them, irrespective of the number of discrete communications it makes and irrespective of whether it transmits using a single copy of the work or, as Aereo does, using an individual personal copy for each viewer.

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Moreover, the subscribers to whom Aereo transmits constitute "the public" under the Act. This is because Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. In addition, neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. Finally, the statute makes clear that the fact that Aereo's subscribers may receive the same programs at different times and locations is of no consequence. Aereo transmits a performance of petitioners' works "to the public." Pp. 444–449.

(c) Given the limited nature of this holding, the Court does not believe its decision will discourage the emergence or use of different kinds of technologies. Pp. 449–451.

712 F. 3d 676, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 451.

Paul D. Clement argued the cause for petitioners. With him on the briefs were *Erin E. Murphy*, *Bruce P. Keller*, *Jeffrey P. Cunard*, *Paul M. Smith*, *Richard L. Stone*, and *Amy M. Gallegos*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Deputy Solicitor General Kneedler*, *Assistant Attorney General Delery*, *Brian H. Fletcher*, *Mark R. Freeman*, *Jacqueline C. Charlesworth*, *Sarang Vijay Damle*, *Stephen S. Ruwe*, and *John R. Riley*.

David C. Frederick argued the cause for respondent. With him on the brief were *Aaron M. Panner*, *Brendan J. Crimmins*, *Brenda M. Cotter*, and *Daniel Brown*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Intellectual Property Law Association by *Robert B. Mitchell* and *David T. McDonald*; for the American Society of Composers, Authors and Publishers (ASCAP) et al. by *Steven J. Metalitz*, *Eric J. Schwartz*, and *Russell J. Frackman*; for Cablevision Systems Corp. by *Jeffrey A. Lamken* and

JUSTICE BREYER delivered the opinion of the Court.

The Copyright Act of 1976 gives a copyright owner the "exclusive righ[t]" to "perform the copyrighted work publicly." 17 U. S. C. § 106(4). The Act's Transmit Clause (or Clause) defines that exclusive right as including the right to

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Robert K. Kry; for the Copyright Alliance et al. by *Eleanor M. Lackman* and *Nancy E. Wolff*; for the International Center for Law & Economics et al. by *Hans Bader*; for the International Federation of the Phonographic Industry (IFPI) et al. by *Steven Mason*; for the Media Institute by *Rodney A. Smolla*; for the National Association of Broadcasters et al. by *Robert A. Long, David M. Zionts, Jane E. Mago, Jerianne Timmerman, Benjamin F. P. Ivins, Wade H. Hargrove, Mark Prak,* and *David Kusher*; for the National Football League et al. by *Robert Alan Garrett* and *Anthony J. Franze*; for the New York Intellectual Property Law Association by *Hilliel I. Parness, David Leichtman, Charles R. Hoffmann,* and *David F. Ryan*; for the Screen Actors Guild-American Federation of Television and Radio Artists et al. by *Duncan W. Crabtree-Ireland, Danielle S. Van Lier,* and *Anthony R. Segall*; for Time Warner Inc. et al. by *Paul T. Cappuccio, Bradley Silver,* and *John A. Rogovin*; for Viacom Inc. et al. by *Kelly M. Klaus, Daniel M. Flores, Richard M. Resnick,* and *Bradley T. Raymond*; for the Washington Legal Foundation by *Cory L. Andrews* and *Richard A. Samp*; for Peter S. Menell et al. by *Mr. Menell, pro se,* and *David Nimmer, pro se*; and for Ralph Oman by *Mr. Oman, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Cable Association by *John T. Mitchell* and *Barbara S. Esbin*; for Competition Law Professors et al. by *Michael M. Epstein, pro se*; for the Computer & Communications Industry Association et al. by *Kathleen M. Sullivan* and *Andrew H. Schapiro*; for the Consumer Federation of America et al. by *Peter Jaszi* and *Brandon Butler*; for Dish Network L.L.C. et al. by *E. Joshua Rosenkranz, Lisa T. Simpson,* and *Annette L. Hurst*; for the Electronic Frontier Foundation et al. by *Mitchell L. Stoltz, Corynne McSherry, Kurt Opsahl, Sherwin Siy,* and *Julie P. Samuels*; for Filmon X, LLC, et al. by *Ryan G. Baker*; for Law Professors and Scholars by *Sean M. Fiil-Flynn, Michael Carroll, Mr. Jaszi,* and *Meredith W. Jacob*; for Small and Independent Broadcasters by *Jason Schultz*; and for 36 Intellectual Property and Copyright Law Professors by *David G. Post.*

Briefs of *amici curiae* were filed for BSA|The Software Alliance by *Andrew J. Pincus* and *Paul W. Hughes*; for the Center for Democracy & Technology et al. by *Jonathan Band*; and for the Patent, Trademark, & Copyright Section of the Bar Association of the District of Columbia by *Kelu Sullivan.*

> "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." § 101.

We must decide whether respondent Aereo, Inc., infringes this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.

I

A

For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet, virtually as the programming is being broadcast. Much of this programming is made up of copyrighted works. Aereo neither owns the copyright in those works nor holds a license from the copyright owners to perform those works publicly.

Aereo's system is made up of servers, transcoders, and thousands of dime-sized antennas housed in a central warehouse. It works roughly as follows: First, when a subscriber wants to watch a show that is currently being broadcast, he visits Aereo's Website and selects, from a list of the local programming, the show he wishes to see.

Second, one of Aereo's servers selects an antenna, which it dedicates to the use of that subscriber (and that subscriber alone) for the duration of the selected show. A server then tunes the antenna to the over-the-air broadcast carrying the show. The antenna begins to receive the broadcast, and an Aereo transcoder translates the signals received into data that can be transmitted over the Internet.

Third, rather than directly send the data to the subscriber, a server saves the data in a subscriber-specific folder on Aereo's hard drive. In other words, Aereo's system creates a

subscriber-specific copy—that is, a "personal" copy—of the subscriber's program of choice.

Fourth, once several seconds of programming have been saved, Aereo's server begins to stream the saved copy of the show to the subscriber over the Internet. (The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo's service is not before us.) The subscriber can watch the streamed program on the screen of his personal computer, tablet, smart phone, Internet-connected television, or other Internet-connected device. The streaming continues, a mere few seconds behind the over-the-air broadcast, until the subscriber has received the entire show. See A Dictionary of Computing 494 (6th ed. 2008) (defining "streaming" as "[t]he process of providing a steady flow of audio or video data so that an Internet user is able to access it as it is transmitted").

Aereo emphasizes that the data that its system streams to each subscriber are the data from his own personal copy, made from the broadcast signals received by the particular antenna allotted to him. Its system does not transmit data saved in one subscriber's folder to any other subscriber. When two subscribers wish to watch the same program, Aereo's system activates two separate antennas and saves two separate copies of the program in two separate folders. It then streams the show to the subscribers through two separate transmissions—each from the subscriber's personal copy.

B

Petitioners are television producers, marketers, distributors, and broadcasters who own the copyrights in many of the programs that Aereo's system streams to its subscribers. They brought suit against Aereo for copyright infringement in Federal District Court. They sought a preliminary injunction, arguing that Aereo was infringing their right to "perform" their works "publicly," as the Transmit Clause defines those terms.

The District Court denied the preliminary injunction. 874 F. Supp. 2d 373 (SDNY 2012). Relying on prior Circuit precedent, a divided panel of the Second Circuit affirmed. *WNET, Thirteen* v. *Aereo, Inc.*, 712 F. 3d 676 (2013) (citing *Cartoon Network LP, LLLP* v. *CSC Holdings, Inc.*, 536 F. 3d 121 (2008)). In the Second Circuit's view, Aereo does not perform publicly within the meaning of the Transmit Clause because it does not transmit "to the public." Rather, each time Aereo streams a program to a subscriber, it sends a *private* transmission that is available only to that subscriber. The Second Circuit denied rehearing en banc, over the dissent of two judges. *WNET, Thirteen* v. *Aereo, Inc.*, 722 F. 3d 500 (2013). We granted certiorari.

II

This case requires us to answer two questions: First, in operating in the manner described above, does Aereo "perform" at all? And second, if so, does Aereo do so "publicly"? We address these distinct questions in turn.

Does Aereo "perform"? See § 106(4) ("[T]he owner of [a] copyright . . . has the exclusive righ[t] . . . to *perform* the copyrighted work publicly" (emphasis added)); § 101 ("To *perform* . . . a work 'publicly' means [among other things] to transmit . . . a performance . . . of the work . . . to the public . . . " (emphasis added)). Phrased another way, does Aereo "transmit . . . a performance" when a subscriber watches a show using Aereo's system, or is it only the subscriber who transmits? In Aereo's view, it does not perform. It does no more than supply equipment that "emulate[s] the operation of a home antenna and [digital video recorder (DVR)]." Brief for Respondent 41. Like a home antenna and DVR, Aereo's equipment simply responds to its subscribers' directives. So it is only the subscribers who "perform" when they use Aereo's equipment to stream television programs to themselves.

Considered alone, the language of the Act does not clearly indicate when an entity "perform[s]" (or "transmit[s]") and

when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo's performs.

A

History makes plain that one of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act's scope. In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968), the Court considered a CATV system that carried local television broadcasting, much of which was copyrighted, to its subscribers in two cities. The CATV provider placed antennas on hills above the cities and used coaxial cables to carry the signals received by the antennas to the home television sets of its subscribers. The system amplified and modulated the signals in order to improve their strength and efficiently transmit them to subscribers. A subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." *Id.*, at 392. The CATV provider "neither edited the programs received nor originated any programs of its own." *Ibid.*

Asked to decide whether the CATV provider infringed copyright holders' exclusive right to perform their works publicly, the Court held that the provider did not "perform" at all. See 17 U. S. C. § 1(c) (1964 ed.) (granting copyright holder the exclusive right to "perform . . . in public for profit" a nondramatic literary work), § 1(d) (granting copyright holder the exclusive right to "perform . . . publicly" a dramatic work). The Court drew a line: "Broadcasters perform. Viewers do not perform." 392 U. S., at 398 (footnote omitted). And a CATV provider "falls on the viewer's side of the line." *Id.*, at 399.

The Court reasoned that CATV providers were unlike broadcasters:

> "Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers." *Id.*, at 400.

Instead, CATV providers were more like viewers, for "the basic function [their] equipment serves is little different from that served by the equipment generally furnished by" viewers. *Id.*, at 399. "Essentially," the Court said, "a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer's television set." *Ibid.* Viewers do not become performers by using "amplifying equipment," and a CATV provider should not be treated differently for providing viewers the same equipment. *Id.*, at 398–400.

In *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974), the Court considered the copyright liability of a CATV provider that carried broadcast television programming into subscribers' homes from hundreds of miles away. Although the Court recognized that a viewer might not be able to afford amplifying equipment that would provide access to those distant signals, it nonetheless found that the CATV provider was more like a viewer than a broadcaster. *Id.*, at 408–409. It explained: "The reception and rechanneling of [broadcast television signals] for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer." *Id.*, at 408.

The Court also recognized that the CATV system exercised some measure of choice over what to transmit. But that fact did not transform the CATV system into a broadcaster. A broadcaster exercises significant creativity in choosing what to air, the Court reasoned. *Id.*, at 410. In

contrast, the CATV provider makes an initial choice about which broadcast stations to retransmit, but then "'simply carr[ies], without editing, whatever programs [it] receive[s].'" *Ibid.* (quoting *Fortnightly*, *supra*, at 400 (alterations in original)).

B

In 1976 Congress amended the Copyright Act in large part to reject the Court's holdings in *Fortnightly* and *Teleprompter*. See H. R. Rep. No. 94–1476, pp. 86–87 (1976) (hereinafter H. R. Rep.) (The 1976 amendments "completely overturned" this Court's narrow construction of the Act in *Fortnightly* and *Teleprompter*). Congress enacted new language that erased the Court's line between broadcaster and viewer, in respect to "perform[ing]" a work. The amended statute clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." § 101; see *ibid.* (defining "[a]udiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines . . . , together with accompanying sounds"). Under this new language, *both* the broadcaster *and* the viewer of a television program "perform," because they both show the program's images and make audible the program's sounds. See H. R. Rep., at 63 ("[A] broadcasting network is performing when it transmits [a singer's performance of a song] . . . and any individual is performing whenever he or she . . . communicates the performance by turning on a receiving set").

Congress also enacted the Transmit Clause, which specifies that an entity performs publicly when it "transmit[s] . . . a performance . . . to the public." § 101; see *ibid.* (defining "[t]o 'transmit' a performance" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"). Cable system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress

intended this language to cover. See H. R. Rep., at 63 ("[A] cable television system is performing when it retransmits [a network] broadcast to its subscribers"); see also *ibid.* ("[T]he concep[t] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public"). The Clause thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals.

Congress further created a new section of the Act to regulate cable companies' public performances of copyrighted works. See § 111. Section 111 creates a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts. H. R. Rep., at 88 (Section 111 is primarily "directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works").

Congress made these three changes to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act.

C

This history makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, "perform[s]" (or "transmit[s]"). Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach. See *id.*, at 89 ("[C]able systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material"). Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, almost as they are being broadcast. In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' homes. By means of its technology (antennas, transcoders, and servers),

Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers." *Fortnightly*, 392 U. S., at 400. It "carr[ies] . . . whatever programs [it] receive[s]," and it offers "all the programming" of each over-the-air station it carries. *Id.*, at 392, 400.

Aereo's equipment may serve a "viewer function"; it may enhance the viewer's ability to receive a broadcaster's programs. It may even emulate equipment a viewer could use at home. But the same was true of the equipment that was before the Court, and ultimately before Congress, in *Fortnightly* and *Teleprompter*.

We recognize, and Aereo and the dissent emphasize, one particular difference between Aereo's system and the cable systems at issue in *Fortnightly* and *Teleprompter*. The systems in those cases transmitted constantly; they sent continuous programming to each subscriber's television set. In contrast, Aereo's system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber's request, does Aereo's system activate an antenna and begin to transmit the requested program.

This is a critical difference, says the dissent. It means that Aereo's subscribers, not Aereo, "selec[t] the copyrighted content" that is "perform[ed]," *post*, at 454 (opinion of Scalia, J.), and for that reason they, not Aereo, "transmit" the performance. Aereo is thus like "a copy shop that provides its patrons with a library card." *Post*, at 456. A copy shop is not directly liable whenever a patron uses the shop's machines to "reproduce" copyrighted materials found in that library. See § 106(1) ("exclusive righ[t] . . . to reproduce the copyrighted work"). And by the same token, Aereo should not be directly liable whenever its patrons use its equipment to "transmit" copyrighted television programs to their screens.

In our view, however, the dissent's copy shop argument, in whatever form, makes too much out of too little. Given Aer-

eo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. The subscribers of the *Fortnightly* and *Teleprompter* cable systems also selected what programs to display on their receiving sets. Indeed, as we explained in *Fortnightly*, such a subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." 392 U. S., at 392. The same is true of an Aereo subscriber. Of course, in *Fortnightly* the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob. Here the signals pursue their ordinary course of travel through the universe until today's "turn of the knob"—a click on a Website—activates machinery that intercepts and reroutes them to Aereo's subscribers over the Internet. But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into "a copy shop that provides its patrons with a library card."

In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But the many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here. We conclude that Aereo is not just an equipment supplier and that Aereo "perform[s]."

III

Next, we must consider whether Aereo performs petitioners' works "publicly," within the meaning of the Transmit Clause. Under the Clause, an entity performs a work pub-

licly when it "transmit[s] . . . a performance . . . of the work . . . to the public." § 101. Aereo denies that it satisfies this definition. It reasons as follows: First, the "performance" it "transmit[s]" is the performance created by its act of transmitting. And second, because each of these performances is capable of being received by one and only one subscriber, Aereo transmits privately, not publicly. Even assuming Aereo's first argument is correct, its second does not follow.

We begin with Aereo's first argument. What performance does Aereo transmit? Under the Act, "[t]o 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Ibid.* And "[t]o 'perform'" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." *Ibid.*

Petitioners say Aereo transmits a *prior* performance of their works. Thus when Aereo retransmits a network's prior broadcast, the underlying broadcast (itself a performance) is the performance that Aereo transmits. Aereo, as discussed above, says the performance it transmits is the *new* performance created by its act of transmitting. That performance comes into existence when Aereo streams the sounds and images of a broadcast program to a subscriber's screen.

We assume, *arguendo*, that Aereo's first argument is correct. Thus, for present purposes, to transmit a performance of (at least) an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. Cf. *United States* v. *American Soc. of Composers, Authors and Publishers*, 627 F. 3d 64, 73 (CA2 2010) (holding that a download of a work is not a performance because the data transmitted are not "contemporaneously perceptible"). When an Aereo subscriber selects a program to watch, Aereo streams the program over the Internet to that subscriber. Aereo thereby "communicate[s]" to the subscriber, by means of a "device or process," the

work's images and sounds. § 101. And those images and sounds are contemporaneously visible and audible on the subscriber's computer (or other Internet-connected device). So under our assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

But what about the Clause's further requirement that Aereo transmit a performance "to the public"? As we have said, an Aereo subscriber receives broadcast television signals with an antenna dedicated to him alone. Aereo's system makes from those signals a personal copy of the selected program. It streams the content of the copy to the same subscriber and to no one else. One and only one subscriber has the ability to see and hear each Aereo transmission. The fact that each transmission is to only one subscriber, in Aereo's view, means that it does not transmit a performance "to the public."

In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform "publicly." Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder

from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Aereo's argument to the contrary relies on the premise that "to transmit . . . a performance" means to make a single transmission. But the Clause suggests that an entity may transmit a performance through multiple, discrete transmissions. That is because one can "transmit" or "communicate" something through a *set* of actions. Thus one can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each friend or a single e-mail to all at once. So can an elected official communicate an idea, slogan, or speech to her constituents, regardless of whether she communicates that idea, slogan, or speech during individual phone calls to each constituent or in a public square.

The fact that a singular noun ("a performance") follows the words "to transmit" does not suggest the contrary. One can sing a song to his family, whether he sings the same song one-on-one or in front of all together. Similarly, one's colleagues may watch a performance of a particular play—say, this season's modern-dress version of "Measure for Measure"—whether they do so at separate or at the same showings. By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.

The Transmit Clause must permit this interpretation, for it provides that one may transmit a performance to the public "whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times." § 101. Were the words "to transmit . . . a performance" limited to a single act of communication, members of the public could not receive the performance communicated "at different times." Therefore, in light of the purpose and text of the Clause, we conclude that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a

performance to them regardless of the number of discrete communications it makes.

We do not see how the fact that Aereo transmits via personal copies of programs could make a difference. The Act applies to transmissions "by means of any device or process." *Ibid.* And retransmitting a television program using user-specific copies is a "process" of transmitting a performance. A "cop[y]" of a work is simply a "material objec[t] . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated." *Ibid.* So whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance" to all of them.

Moreover, the subscribers to whom Aereo transmits television programs constitute "the public." Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. This matters because, although the Act does not define "the public," it specifies that an entity performs publicly when it performs at "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Ibid.* The Act thereby suggests that "the public" consists of a large group of people outside of a family and friends.

Neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. When, for example, a valet parking attendant returns cars to their drivers, we would not say that the parking service provides cars "to the public." We would say that it provides the cars to their owners. We would say that a car dealership, on the other

hand, does provide cars to the public, for it sells cars to individuals who lack a pre-existing relationship to the cars. Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to "the public," whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.

Finally, we note that Aereo's subscribers may receive the same programs at different times and locations. This fact does not help Aereo, however, for the Transmit Clause expressly provides that an entity may perform publicly "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." *Ibid.* In other words, "the public" need not be situated together, spatially or temporally. For these reasons, we conclude that Aereo transmits a performance of petitioners' copyrighted works to the public, within the meaning of the Transmit Clause.

IV

Aereo and many of its supporting *amici* argue that to apply the Transmit Clause to Aereo's conduct will impose copyright liability on other technologies, including new technologies, that Congress could not possibly have wanted to reach. We agree that Congress, while intending the Transmit Clause to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect.

For one thing, the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo "perform[s]," but it does not determine whether different kinds of providers in different contexts also "perform." For another, an entity only transmits a performance when it communicates contemporaneously percep-

tible images and sounds of a work. See Brief for Respondent 31 ("[I]f a distributor . . . sells [multiple copies of a digital video disc] by mail to consumers, . . . [its] distribution of the DVDs merely makes it possible for the recipients to perform the work themselves—it is not a 'device or process' by which the *distributor* publicly performs the work" (emphasis in original)).

Further, we have interpreted the term "the public" to apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted. We have said that it does not extend to those who act as owners or possessors of the relevant product. And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content. See Brief for United States as *Amicus Curiae* 31 (distinguishing cloud-based storage services because they "offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired" (emphasis in original)). In addition, an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle.

We also note that courts often apply a statute's highly general language in light of the statute's basic purposes. Finally, the doctrine of "fair use" can help to prevent inappropriate or inequitable applications of the Clause. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984).

We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that "[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which 'Congress has not plainly marked [the] course,'

should await a case in which they are squarely presented." Brief for United States as *Amicus Curiae* 34 (quoting *Sony*, *supra*, at 431 (alteration in original)). And we note that, to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress. Cf. Digital Millennium Copyright Act, 17 U. S. C. § 512.

* * *

In sum, having considered the details of Aereo's practices, we find them highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act. Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo's activities outside the scope of the Act.

For these reasons, we conclude that Aereo "perform[s]" petitioners' copyrighted works "publicly," as those terms are defined by the Transmit Clause. We therefore reverse the contrary judgment of the Court of Appeals, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

This case is the latest skirmish in the long-running copyright battle over the delivery of television programming. Petitioners, a collection of television networks and affiliates (Networks), broadcast copyrighted programs on the public airwaves for all to see. Aereo, respondent, operates an automated system that allows subscribers to receive, on

Internet-connected devices, programs that they select, including the Networks' copyrighted programs. The Networks sued Aereo for several forms of copyright infringement, but we are here concerned with a single claim: that Aereo violates the Networks' "exclusive righ[t]" to "perform" their programs "publicly." 17 U. S. C. § 106(4). That claim fails at the very outset because Aereo does not "perform" at all. The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard ("looks-like-cable-TV") that will sow confusion for years to come.

I. Legal Standard

There are two types of liability for copyright infringement: direct and secondary. As its name suggests, the former applies when an actor personally engages in infringing conduct. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 433 (1984). Secondary liability, by contrast, is a means of holding defendants responsible for infringement by third parties, even when the defendants "have not themselves engaged in the infringing activity." *Id.*, at 435. It applies when a defendant "intentionally induc[es] or encourag[es]" infringing acts by others or profits from such acts "while declining to exercise a right to stop or limit [them]." *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U. S. 913, 930 (2005).

Most suits against equipment manufacturers and service providers involve secondary-liability claims. For example, when movie studios sued to block the sale of Sony's Betamax videocassette recorder (VCR), they argued that Sony was liable because *its customers* were making unauthorized copies. See *Sony*, *supra*, at 434–435. Record labels and movie studios relied on a similar theory when they sued Grokster and StreamCast, two providers of peer-to-peer file-sharing software. See *Grokster*, *supra*, at 920–921, 927.

This suit, or rather the portion of it before us here, is fundamentally different. The Networks claim that Aereo *directly* infringes their public-performance right. Accordingly, the Networks must prove that Aereo "perform[s]" copyrighted works, § 106(4), when its subscribers log in, select a channel, and push the "watch" button. That process undoubtedly results in a performance; the question is *who* does the performing. See *Cartoon Network LP, LLLP* v. *CSC Holdings, Inc.*, 536 F. 3d 121, 130 (CA2 2008). If Aereo's subscribers perform but Aereo does not, the claim necessarily fails.

The Networks' claim is governed by a simple but profoundly important rule: A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act. See 3 W. Patry, Copyright § 9:5.50 (2013). This requirement is firmly grounded in the Act's text, which defines "perform" in active, affirmative terms: One "perform[s]" a copyrighted "audiovisual work," such as a movie or news broadcast, by "show[ing] its images in any sequence" or "mak[ing] the sounds accompanying it audible." § 101. And since the Act makes it unlawful to copy or perform copyrighted works, not to copy or perform in general, see § 501(a), the volitional-act requirement demands conduct directed to the plaintiff's copyrighted material, see *Sony*, *supra*, at 434. Every Court of Appeals to have considered an automated-service provider's direct liability for copyright infringement has adopted that rule. See *Fox Broadcasting Co.* v. *Dish Network LLC*, 747 F. 3d 1060, 1066–1068 (CA9 2014); *Cartoon Network*, *supra*, at 130–131 (CA2 2008); *CoStar Group, Inc.* v. *LoopNet, Inc.*, 373 F. 3d 544, 549–550 (CA4 2004).[1] Al-

[1] An unpublished decision of the Third Circuit is to the same effect. *Parker* v. *Google, Inc.*, 242 Fed. Appx. 833, 836–837 (2007) (*per curiam*).

The Networks muster only one case they say stands for a different approach, *New York Times Co.* v. *Tasini*, 533 U. S. 483 (2001). Reply Brief 18. But *Tasini* is clearly inapposite; it dealt with the question whether the defendants' copying was permissible, not whether the defend-

though we have not opined on the issue, our cases are fully consistent with a volitional-conduct requirement. For example, we gave several examples of direct infringement in *Sony*, each of which involved a volitional act directed to the plaintiff's copyrighted material. See 464 U. S., at 437, n. 18.

The volitional-conduct requirement is not at issue in most direct-infringement cases; the usual point of dispute is whether the defendant's conduct is infringing (*e. g.*, Does the defendant's design copy the plaintiff's?), rather than whether the defendant has acted at all (*e. g.*, Did this defendant create the infringing design?). But it comes right to the fore when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system. See, *e. g.*, *Fox Broadcasting*, *supra*, at 1067; *Cartoon Network*, *supra*, at 131. Internet service providers are a prime example. When one user sends data to another, the provider's equipment facilitates the transfer automatically. Does that mean that the provider is directly liable when the transmission happens to result in the "reproduc[tion]," § 106(1), of a copyrighted work? It does not. The provider's system is "totally indifferent to the material's content," whereas courts require "some aspect of volition" directed at the copyrighted material before direct liability may be imposed. *CoStar*, 373 F. 3d, at 550–551.[2] The defendant may be held directly liable only if the defendant *itself* "trespassed on the exclusive domain of the copyright owner." *Id.*, at 550. Most of the time that issue will come down to who selects the copyrighted content: the de-

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ants were the ones who made the copies. See 533 U. S., at 487–488, 492, 504–506.

[2] Congress has enacted several safe-harbor provisions applicable to automated network processes, see, *e. g.*, 17 U. S. C. § 512(a)–(b), but those provisions do not foreclose "any other defense," § 512(*l*), including a volitional-conduct defense.

fendant or its customers. See *Cartoon Network*, *supra*, at 131–132.

A comparison between copy shops and video-on-demand services illustrates the point. A copy shop rents out photocopiers on a per-use basis. One customer might copy his 10-year-old's drawings—a perfectly lawful thing to do—while another might duplicate a famous artist's copyrighted photographs—a use clearly prohibited by §106(1). Either way, *the customer* chooses the content and activates the copying function; the photocopier does nothing except in response to the customer's commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy. See *CoStar*, *supra*, at 550.

Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content.* When a user signs in to Netflix, for example, "thousands of . . . movies [and] TV episodes" carefully curated by Netflix are "available to watch instantly." See How [D]oes Netflix [W]ork?, online at http://help.netflix.com/en/node/412 (as visited June 20, 2014, and available in Clerk of Court's case file). That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.

The distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act. See *Cartoon Network*, 536 F. 3d, at 132–133. The volitional-conduct requirement supplies that rule; its purpose is not to excuse defendants from accountability, but to channel the claims against them into the correct analytical track. See Brief for 36 Intellectual Property and Copyright Law Professors as *Amici Curiae* 7. Thus, in the example given above, the fact that the copy shop does not choose the con-

tent simply means that its culpability will be assessed using secondary-liability rules rather than direct-liability rules. See *Sony*, *supra*, at 434–442; *Cartoon Network*, *supra*, at 132–133.

II. Application to Aereo

So which is Aereo: the copy shop or the video-on-demand service? In truth, it is neither. Rather, it is akin to a copy shop that provides its patrons with a library card. Aereo offers access to an automated system consisting of routers, servers, transcoders, and dime-sized antennae. Like a photocopier or VCR, that system lies dormant until a subscriber activates it. When a subscriber selects a program, Aereo's system picks up the relevant broadcast signal, translates its audio and video components into digital data, stores the data in a user-specific file, and transmits that file's contents to the subscriber via the Internet—at which point the subscriber's laptop, tablet, or other device displays the broadcast just as an ordinary television would. The result of that process fits the statutory definition of a performance to a tee: The subscriber's device "show[s]" the broadcast's "images" and "make[s] the sounds accompanying" the broadcast "audible." § 101. The only question is whether those performances are the product of Aereo's volitional conduct.

They are not. Unlike video-on-demand services, Aereo does not provide a prearranged assortment of movies and television shows. Rather, it assigns each subscriber an antenna that—like a library card—can be used to obtain whatever broadcasts are freely available. Some of those broadcasts are copyrighted; others are in the public domain. The key point is that subscribers call all the shots: Aereo's automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it. Aereo's operation of that system is a volitional act and a but-for cause of the resulting performances, but, as in the case of the copy shop, that degree of involvement is not enough for direct liability. See *Grokster*, 545 U. S., at 960

(BREYER, J., concurring) ("[T]he producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying").

In sum, Aereo does not "perform" for the sole and simple reason that it does not make the choice of content. And because Aereo does not perform, it cannot be held directly liable for infringing the Networks' public-performance right.[3] That conclusion does not necessarily mean that Aereo's service complies with the Copyright Act. Quite the contrary. The Networks' complaint alleges that Aereo is directly *and* secondarily liable for infringing their public-performance rights (§ 106(4)) *and also* their reproduction rights (§ 106(1)). Their request for a preliminary injunction—the only issue before this Court—is based exclusively on the direct-liability portion of the public-performance claim (and further limited to Aereo's "watch" function, as opposed to its "record" function). See App. to Pet. for Cert. 60a–61a. Affirming the judgment below would merely return this case to the lower courts for consideration of the Networks' remaining claims.

III. Guilt By Resemblance

The Court's conclusion that Aereo performs boils down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts;[4] (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs. *Ante*, at 438–444. That reasoning suffers from a trio of defects.

First, it is built on the shakiest of foundations. Perceiving the text to be ambiguous, *ante*, at 438–439, the Court

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[3] Because I conclude that Aereo does not perform at all, I do not reach the question whether the performances in this case are to the public. See *ante*, at 444–449.

[4] See *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974); *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968).

reaches out to decide the case based on a few isolated snippets of legislative history, *ante,* at 441–442 (citing H. R. Rep. No. 94–1476 (1976)). The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress. Little else need be said here about the severe shortcomings of that interpretative methodology. See *Lawson* v. *FMR LLC*, 571 U. S. 429, 459–460 (2014) (SCALIA, J., concurring in principal part and concurring in judgment).

Second, the Court's reasoning fails on its own terms because there are material differences between the cable systems at issue in *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974), and *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968), on the one hand and Aereo on the other. The former (which were then known as community-antenna television systems) captured the full range of broadcast signals and forwarded them to all subscribers at all times, whereas Aereo transmits only specific programs selected by the user, at specific times selected by the user. The Court acknowledges this distinction but blithely concludes that it "does not make a critical difference." *Ante,* at 444. Even if that were true, the Court fails to account for other salient differences between the two technologies.[5] Though cable systems started out essentially as dumb pipes that routed signals from point A to point B, see *ante,* at 439, by the 1970's, that kind of service "'no longer exist[ed],'" Brief for Petitioners in *Columbia Broadcasting*

[5] The Court observes that "[t]he subscribers of the *Fortnightly* and *Teleprompter* cable systems . . . selected what programs to display on their receiving sets," but acknowledges that those choices were possible only because "the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob." *Ante,* at 444. The latter point is dispositive: The signals were "ready to emerge" because the cable system—much like a video-on-demand provider—took affirmative, volitional steps to *put* them there. As discussed above, the same cannot be said of the programs available through Aereo's automated system.

System, Inc. v. *Teleprompter Corp.*, O. T. 1973, No. 72–1633, p. 22. At the time of our *Teleprompter* decision, cable companies "perform[ed] the same functions as 'broadcasters' by deliberately selecting and importing distant signals, originating programs, [and] selling commercials," *id.*, at 20, thus making them curators of content—more akin to video-on-demand services than copy shops. So far as the record reveals, Aereo does none of those things.

Third, and most importantly, even accepting that the 1976 amendments had as their purpose the overruling of our cable-TV cases, what they were meant to do and how they did it are two different questions—and it is the latter that governs the case before us here. The injury claimed is not violation of a law that says operations similar to cable TV are subject to copyright liability, but violation of § 106(4) of the Copyright Act. And whatever soothing reasoning the Court uses to reach its result ("this looks like cable TV"), the consequence of its holding is that someone who implements this technology *"perform[s]" under that provision*. That greatly disrupts settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work. If that test is not outcome determinative in this case, presumably it is not outcome determinative elsewhere as well. And it is not clear what the Court proposes to replace it. Perhaps the Court means to adopt (invent, really) a two-tier version of the Copyright Act, one part of which applies to "cable companies and their equivalents" while the other governs everyone else. *Ante*, at 443–444, 449.

The rationale for the Court's ad hoc rule for cable-system lookalikes is so broad that it renders nearly a third of the Court's opinion superfluous. Part II of the opinion concludes that Aereo performs because it resembles a cable company, and Congress amended the Act in 1976 "to bring the activities of cable systems within [its] scope." *Ante*, at 442. Part III of the opinion purports to address separately

the question whether Aereo performs "publicly." *Ante*, at 444–449. Trouble is, that question cannot remain open if Congress's supposed intent to regulate whatever looks like a cable company must be given legal effect (as the Court says in Part II). The Act reaches only public performances, see § 106(4), so Congress could not have regulated "the activities of cable systems" without deeming their retransmissions public performances. The upshot is this: If Aereo's similarity to a cable company means that it performs, then by necessity that same characteristic means that it does so publicly, and Part III of the Court's opinion discusses an issue that is no longer relevant—though discussing it certainly gives the opinion the "feel" of real textual analysis.

Making matters worse, the Court provides no criteria for determining when its cable-TV-lookalike rule applies. Must a defendant offer access to live television to qualify? If similarity to cable-television service is the measure, then the answer must be yes. But consider the implications of that answer: Aereo would be free to do exactly what it is doing right now so long as it built mandatory time shifting into its "watch" function.[6] Aereo would not be providing *live* television if it made subscribers wait to tune in until after a show's live broadcast ended. A subscriber could watch the 7 p.m. airing of a 1-hour program any time after 8 p.m. Assuming the Court does not intend to adopt such a do-nothing rule (though it very well may), there must be some other means of identifying who is and is not subject to its guilt-by-resemblance regime.

Two other criteria come to mind. One would cover any automated service that captures and stores live television broadcasts at a user's direction. That can't be right, since it

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[6] Broadcasts accessible through the "watch" function are technically not live because Aereo's servers take anywhere from a few seconds to a few minutes to begin transmitting data to a subscriber's device. But the resulting delay is so brief that it cannot reasonably be classified as time shifting.

is exactly what remote storage digital video recorders (RS–DVRs) do, see *Cartoon Network*, 536 F. 3d, at 124–125, and the Court insists that its "limited holding" does not decide the fate of those devices, *ante*, at 449. The other potential benchmark is the one offered by the Government: The cable-TV-lookalike rule embraces any entity that "operates an integrated system, substantially dependent on physical equipment that is used in common by [its] subscribers." Brief for United States as *Amicus Curiae* 20. The Court sensibly avoids that approach because it would sweep in Internet service providers and a host of other entities that quite obviously do not perform.

That leaves as the criterion of cable-TV-resemblance nothing but th'ol' totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation). It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances.) The Court vows that its ruling will not affect cloud-storage providers and cable-television systems, see *ante*, at 450–451, but it cannot deliver on that promise given the imprecision of its result-driven rule. Indeed, the difficulties inherent in the Court's makeshift approach will become apparent in this very case. Today's decision addresses the legality of Aereo's "watch" function, which provides nearly contemporaneous access to live broadcasts. On remand, one of the first questions the lower courts will face is whether Aereo's "record" function, which allows subscribers to save a program while it is airing and watch it later, infringes the Networks' public-performance right. The volitional-conduct rule provides a clear answer to that question: Because Aereo does not select the programs viewed by its users, it does not perform. But it is impossible to say how the issue will come out under the Court's

analysis, since cable companies did not offer remote record ing and playback services when Congress amended the Copyright Act in 1976.

* * *

I share the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed. But perhaps we need not distort the Copyright Act to forbid it. As discussed at the outset, Aereo's secondary liability for performance infringement is yet to be determined, as is its primary and secondary liability for reproduction infringement. If that does not suffice, then (assuming one shares the majority's estimation of right and wrong) what we have before us must be considered a "loophole" in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I may add, in a much more targeted, better informed, and less disruptive fashion than the crude "looks-like-cable-TV" solution the Court invents today.

We came within one vote of declaring the VCR contraband 30 years ago in *Sony*. See 464 U. S., at 441, n. 21. The dissent in that case was driven in part by the plaintiffs' prediction that VCR technology would wreak all manner of havoc in the television and movie industries. See *id.*, at 483 (opinion of Blackmun, J.); see also Brief for CBS, Inc., as *Amicus Curiae*, O. T. 1982, No. 81–1687, p. 2 (arguing that VCRs "directly threatened" the bottom line of "[e]very broadcaster").

The Networks make similarly dire predictions about Aereo. We are told that nothing less than "the very existence of broadcast television as we know it" is at stake. Brief for Petitioners 39. Aereo and its *amici* dispute those forecasts and make a few of their own, suggesting that a decision in the Networks' favor will stifle technological innovation

and imperil billions of dollars of investments in cloud-storage services. See Brief for Respondent 48–51; Brief for BSA, The Software Alliance as *Amicus Curiae* 5–13. We are in no position to judge the validity of those self-interested claims or to foresee the path of future technological development. See *Sony*, *supra*, at 430–431; see also *Grokster*, 545 U. S., at 958 (BREYER, J., concurring). Hence, the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade. I conclude, as the Court concluded in *Sony*: "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be [affirmed]." 464 U. S., at 456.

I respectfully dissent.

Syllabus

McCULLEN ET AL. *v.* COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

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

No. 12–1168. Argued January 15, 2014—Decided June 26, 2014

In 2007, Massachusetts amended its Reproductive Health Care Facilities Act, which had been enacted in 2000 to address clashes between abortion opponents and advocates of abortion rights outside clinics where abortions were performed. The amended version of the Act makes it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Mass. Gen. Laws, ch. 266, §§ 120E½(a), (b). The Act exempts from this prohibition four classes of individuals, including "employees or agents of such facility acting within the scope of their employment." § 120E½(b)(2). Another provision of the Act proscribes the knowing obstruction of access to an abortion clinic. § 120E½(e).

McCullen and the other petitioners are individuals who attempt to engage women approaching Massachusetts abortion clinics in "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. They claim that the 35-foot buffer zones have displaced them from their previous positions outside the clinics, considerably hampering their counseling efforts. Their attempts to communicate with patients are further thwarted, they claim, by clinic "escorts," who accompany arriving patients through the buffer zones to the clinic entrances.

Petitioners sued Attorney General Coakley and other Commonwealth officials, seeking to enjoin the Act's enforcement on the ground that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied both challenges, and the First Circuit affirmed. With regard to petitioners' facial challenge, the First Circuit held that the Act was a reasonable "time, place, and manner" regulation under the test set forth in *Ward* v. *Rock Against Racism*, 491 U. S. 781.

Held: The Massachusetts Act violates the First Amendment. Pp. 476–497.

(a) By its very terms, the Act restricts access to "public way[s]" and "sidewalk[s]," places that have traditionally been open for speech activi-

ties and that the Court has accordingly labeled "traditional public fora," *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 469. The government's ability to regulate speech in such locations is "very limited." *United States* v. *Grace*, 461 U. S. 171, 177. "[E]ven in a public forum," however, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information,'" *Ward, supra,* at 791. Pp. 476–477.

(b) Because the Act is neither content nor viewpoint based, it need not be analyzed under strict scrutiny. Pp. 478–485.

(1) The Act is not content based simply because it establishes buffer zones only at abortion clinics, as opposed to other kinds of facilities. First, the Act does not draw content-based distinctions on its face. Whether petitioners violate the Act "depends" not "on what they say," *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 27, but on where they say it. Second, even if a facially neutral law disproportionately affects speech on certain topics, it remains content neutral so long as it is "'justified without reference to the content of the regulated speech.'" *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48. The Act's purposes include protecting public safety, patient access to healthcare, and unobstructed use of public sidewalks and streets. The Court has previously deemed all these concerns to be content neutral. See *Boos* v. *Barry,* 485 U. S. 312, 321. An intent to single out for regulation speech about abortion cannot be inferred from the Act's limited scope. "States adopt laws to address the problems that confront them." *Burson* v. *Freeman*, 504 U. S. 191, 207. There was a record of crowding, obstruction, and even violence outside Massachusetts abortion clinics but not at other kinds of facilities in the Commonwealth. Pp. 479–482.

(2) The Act's exemption for clinic employees and agents acting within the scope of their employment does not appear to be an attempt to favor one viewpoint about abortion over the other. *City of Ladue* v. *Gilleo,* 512 U. S. 43, 51, distinguished. Given that some kind of exemption was necessary to allow individuals who work at the clinics to enter or remain within the buffer zones, the "scope of employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. Even assuming that some clinic escorts have expressed their views on abortion inside the zones, the record does not suggest that such speech was within the scope of the escorts' employment. If it turned out that a particular clinic authorized its employees to speak about abortion in the buffer zones, that

would support an as-applied challenge to the zones at that clinic. Pp. 482–485.

(c) Although the Act is content neutral, it is not "narrowly tailored" because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U. S., at 799. Pp. 486–496.

(1) The buffer zones serve the Commonwealth's legitimate interests in maintaining public safety on streets and sidewalks and in preserving access to adjacent reproductive healthcare facilities. See *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 376. At the same time, however, they impose serious burdens on petitioners' speech, depriving them of their two primary methods of communicating with arriving patients: close, personal conversations and distribution of literature. Those forms of expression have historically been closely associated with the transmission of ideas. While the Act may allow petitioners to "protest" outside the buffer zones, petitioners are not protestors; they seek not merely to express their opposition to abortion, but to engage in personal, caring, consensual conversations with women about various alternatives. It is thus no answer to say that petitioners can still be seen and heard by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message. Pp. 486–490.

(2) The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. Subsection (e) of the Act already prohibits deliberate obstruction of clinic entrances. Massachusetts could also enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994, 18 U. S. C. §248(a)(1), which imposes criminal and civil sanctions for obstructing, intimidating, or interfering with persons obtaining or providing reproductive health services. Obstruction of clinic driveways can readily be addressed through existing local traffic ordinances. While the Commonwealth contends that individuals can inadvertently obstruct access to clinics simply by gathering in large numbers, that problem could be addressed through a law requiring crowds blocking a clinic entrance to disperse for a limited period when ordered to do so by the police. In any event, crowding appears to be a problem only at the Boston clinic, and even there, only on Saturday mornings.

The Commonwealth has not shown that it seriously undertook to address these various problems with the less intrusive tools readily available to it. It identifies not a single prosecution or injunction against individuals outside abortion clinics since the 1990s. The Commonwealth responds that the problems are too widespread for individual

prosecutions and injunctions to be effective. But again, the record indicates that the problems are limited principally to the Boston clinic on Saturday mornings, and the police there appear perfectly capable of singling out lawbreakers. The Commonwealth also claims that it would be difficult to prove intentional or deliberate obstruction or intimidation and that the buffer zones accordingly make the police's job easier. To meet the narrow tailoring requirement, however, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. In any event, to determine whether someone intends to block access to a clinic, a police officer need only order him to move; if he refuses, then there is no question that his continued conduct is knowing or intentional. For similar reasons, the Commonwealth's reliance on *Burson* v. *Freeman*, 504 U. S. 191, is misplaced. There, the Court upheld a law establishing buffer zones outside polling places on the ground that less restrictive measures were inadequate. But whereas "[v]oter intimidation and election fraud" are "difficult to detect," *id.*, at 208, obstruction and harassment at abortion clinics are anything but subtle. And while the police "generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," *id.*, at 207, they maintain a significant presence outside Massachusetts abortion clinics. In short, given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked. Pp. 490–496.

708 F. 3d 1, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 497. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 511.

Mark L. Rienzi argued the cause for petitioners. With him on the briefs were *Edward C. DuMont*, *Todd C. Zubler*, *Jason D. Hirsch*, *Michael J. DePrimo*, and *Philip D. Moran*.

Jennifer Grace Miller, Assistant Attorney General of Massachusetts, argued the cause for respondents. With her on the brief were *Martha Coakley*, Attorney General, and *Jonathan B. Miller* and *Sookyoung Shin*, Assistant Attorneys General.

Counsel

Deputy Solicitor General Gershengorn argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Samuels*, *Elaine J. Goldenberg*, *Diana K. Flynn*, and *Sasha Samberg-Champion*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *John J. Bursch*, Solicitor General, *Aaron D. Lindstrom*, Assistant Solicitor General, and *Nicole Grimm*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Derek Schmidt* of Kansas, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, and *Patrick Morrisey* of West Virginia; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Matthew J. Ginsburg*, *Harold C. Becker*, and *James B. Coppess*; for Bioethics Defense Fund et al. by *Nikolas T. Nikas* and *Dorinda C. Bordlee*; for the Cato Institute by *Ilya Shapiro*; for Democrats for Life of America et al. by *Thomas Berg*; for Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister*; for Life Legal Defense Foundation et al. by *Catherine W. Short*; for the National Hispanic Christian Leadership Conference et al. by *John D. Inazu*, *Michael W. McConnell*, and *Kimberlee Wood Colby*; for The Rutherford Institute by *John W. Whitehead*; for 12 Women Who Attest to the Importance of Free Speech in their Abortion Decisions by *Carrie Severino*; for 40 Days for Life by *William L. Saunders*; and for Eugene Volokh et al. by *Matthew A. Fitzgerald*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Andrea Oser*, Deputy Solicitor General, and *Zainab A. Chaudhry*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Ellen F. Rosenblum* of Oregon, *William H. Sorrell* of Vermont, *Vincent F. Frazer* of the Virgin Islands,

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A Massachusetts statute makes it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Mass. Gen. Laws, ch. 266, §§ 120E½(a), (b) (West 2012). Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities' entrances. The question presented is whether the statute violates the First Amendment.

I

A

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws, ch. 266, § 120E½ (West 2000). The law was designed

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and *Robert W. Ferguson* of Washington; for the American College of Obstetricians and Gynecologists et al. by *Jack R. Bierig*; for the Anti-Defamation League et al. by *Jeffrey S. Robbins, A. W. Phinney III*, and *Steven M. Freeman*; for Civil Rights Organizations by *Stephanie Toti*; for the City and County of San Francisco, California, et al. by *Abigail K. Hemani, Paul E. Nemser, Dennis J. Herrera, Christine Van Aken, George Nilson, Suzanne Sangree, Edward M. Pikula, Benna Ruth Solomon, Meghan L. Riley, Sara Grewing, Claudia M. McKenna, Susan L. Segal, Lara N. Baker-Morrish*, and *David M. Feldman*; for Law Professors by *Jonathan M. Albano*; for the National Abortion Federation et al. by *Maria T. Vullo*; for the National League of Cities et al. by *Mary Jean Dolan, Charles W. Thompson, Jr.*, and *Lisa Soronen*; for the Planned Parenthood League of Massachusetts et al. by *Walter Dellinger* and *Claire Laporte*; and for the Victim Rights Law Center et al. by *Lisa S. Blatt, Jonathan S. Martel*, and *Robert N. Weiner*.

Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro, Ben Wizner*, and *Matthew R. Segal*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; and for the Institute for Justice by *William H. Mellor* and *Robert P. Frommer*.

to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act established a defined area with an 18-foot radius around the entrances and driveways of such facilities. § 120E½(b). Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person—unless that person consented—"for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Ibid.* A separate provision subjected to criminal punishment anyone who "knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." § 120E½(e).

The statute was modeled on a similar Colorado law that this Court had upheld in *Hill* v. *Colorado*, 530 U. S. 703 (2000). Relying on *Hill*, the United States Court of Appeals for the First Circuit sustained the Massachusetts statute against a First Amendment challenge. *McGuire* v. *Reilly*, 386 F. 3d 45 (2004) (*McGuire II*), cert. denied, 544 U. S. 974 (2005); *McGuire* v. *Reilly*, 260 F. 3d 36 (2001) (*McGuire I*).

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley, for example, testified that protestors violated the statute "on a routine basis." App. 78. To illustrate this claim, she played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without the latter individuals' consent. Clinic employees and volunteers also testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.

Captain William B. Evans of the Boston Police Department, however, testified that his officers had made "no more than five or so arrests" at the Planned Parenthood clinic in Boston and that what few prosecutions had been brought were unsuccessful. *Id.*, at 68–69. Witnesses attributed the dearth of enforcement to the difficulty of policing the six-foot no-approach zones. Captain Evans testified that the 18-foot zones were so crowded with protestors that they resembled "a goalie's crease," making it hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. *Id.*, at 69–71. For similar reasons, Attorney General Coakley concluded that the six-foot no-approach zones were "unenforceable." *Id.*, at 79. What the police needed, she said, was a fixed buffer zone around clinics that protestors could not enter. *Id.*, at 74, 76. Captain Evans agreed, explaining that such a zone would "make our job so much easier." *Id.*, at 68.

To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18-foot area) with a 35-foot fixed buffer zone from which individuals are categorically excluded. The statute now provides:

> "No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway." Mass. Gen. Laws, ch. 266, § 120E½(b) (West 2012).

A "reproductive health care facility," in turn, is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." § 120E½(a).

The 35-foot buffer zone applies only "during a facility's business hours," and the area must be "clearly marked and posted." § 120E½(c). In practice, facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to $500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between $500 and $5,000, up to two and a half years in prison, or both. § 120E½(d).

The Act exempts four classes of individuals: (1) "persons entering or leaving such facility"; (2) "employees or agents of such facility acting within the scope of their employment"; (3) "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment"; and (4) "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." §§ 120E½(b)(1)–(4). The legislature also retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility. § 120E½(e).

B

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: "Good morning, may I give you my literature? Is there anything I can do for you? I'm available if you have any questions." App. 138. If the woman seems receptive, McCullen will provide additional information. McCullen

and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners' view tend only to antagonize their intended audience. In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions.

The buffer zones have displaced petitioners from their previous positions outside the clinics. McCullen offers counseling outside a Planned Parenthood clinic in Boston, as do petitioners Jean Zarrella and Eric Cadin. Petitioner Gregory Smith prays the rosary there. The clinic occupies its own building on a street corner. Its main door is recessed into an open foyer, approximately 12 feet back from the public sidewalk. Before the Act was amended to create the buffer zones, petitioners stood near the entryway to the foyer. Now a buffer zone—marked by a painted arc and a sign—surrounds the entrance. This zone extends 23 feet down the sidewalk in one direction, 26 feet in the other, and outward just one foot short of the curb. The clinic's entrance adds another seven feet to the width of the zone. *Id.*, at 293–295. The upshot is that petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the clinic.[1]

Petitioners Mark Bashour and Nancy Clark offer counseling and information outside a Planned Parenthood clinic in Worcester. Unlike the Boston clinic, the Worcester clinic sits well back from the public street and sidewalks. Patients enter the clinic in one of two ways. Those arriving on foot turn off the public sidewalk and walk down a nearly 54-foot-long private walkway to the main entrance. More

[1] The zone could have extended an additional 21 feet in width under the Act. Only the smaller area was marked off, however, so only that area has legal effect. See Mass. Gen. Laws, ch. 266, § 120E½(c).

than 85% of patients, however, arrive by car, turning onto the clinic's driveway from the street, parking in a private lot, and walking to the main entrance on a private walkway.

Bashour and Clark would like to stand where the private walkway or driveway intersects the sidewalk and offer leaflets to patients as they walk or drive by. But a painted arc extends from the private walkway 35 feet down the sidewalk in either direction and outward nearly to the curb on the opposite side of the street. Another arc surrounds the driveway's entrance, covering more than 93 feet of the sidewalk (including the width of the driveway) and extending across the street and nearly six feet onto the sidewalk on the opposite side. *Id.*, at 295–297. Bashour and Clark must now stand either some distance down the sidewalk from the private walkway and driveway or across the street.

Petitioner Cyril Shea stands outside a Planned Parenthood clinic in Springfield, which, like the Worcester clinic, is set back from the public streets. Approximately 90% of patients arrive by car and park in the private lots surrounding the clinic. Shea used to position himself at an entrance to one of the five driveways leading to the parking lots. Painted arcs now surround the entrances, each spanning approximately 100 feet of the sidewalk parallel to the street (again, including the width of the driveways) and extending outward well into the street. *Id.*, at 297–299. Like petitioners at the Worcester clinic, Shea now stands far down the sidewalk from the driveway entrances.

Petitioners at all three clinics claim that the buffer zones have considerably hampered their counseling efforts. Although they have managed to conduct some counseling and to distribute some literature outside the buffer zones—particularly at the Boston clinic—they say they have had many fewer conversations and distributed many fewer leaflets since the zones went into effect. *Id.*, at 136–137, 180, 200.

The second statutory exemption allows clinic employees and agents acting within the scope of their employment to

enter the buffer zones. Relying on this exemption, the Boston clinic uses "escorts" to greet women as they approach the clinic, accompanying them through the zones to the clinic entrance. Petitioners claim that the escorts sometimes thwart petitioners' attempts to communicate with patients by blocking petitioners from handing literature to patients, telling patients not to "pay any attention" or "listen to" petitioners, and disparaging petitioners as "crazy." *Id.*, at 165, 178.

C

In January 2008, petitioners sued Attorney General Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied petitioners' facial challenge after a bench trial based on a stipulated record. 573 F. Supp. 2d 382 (Mass. 2008).

The Court of Appeals for the First Circuit affirmed. 571 F. 3d 167 (2009). Relying extensively on its previous decisions upholding the 2000 version of the Act, see *McGuire II*, 386 F. 3d 45; *McGuire I*, 260 F. 3d 36, the court upheld the 2007 version as a reasonable "time, place, and manner" regulation under the test set forth in *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989). 571 F. 3d, at 174–181. It also rejected petitioners' arguments that the Act was substantially overbroad, void for vagueness, and an impermissible prior restraint. *Id.*, at 181–184.

The case then returned to the District Court, which held that the First Circuit's decision foreclosed all but one of petitioners' as-applied challenges. 759 F. Supp. 2d 133 (2010). After another bench trial, it denied the remaining as-applied challenge, finding that the Act left petitioners ample alternative channels of communication. 844 F. Supp. 2d 206 (2012). The Court of Appeals once again affirmed. 708 F. 3d 1 (2013).

We granted certiorari. 570 U. S. 916 (2013).

II

By its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]." Mass. Gen. Laws, ch. 266, § 120E½(b) (Supp. 2007). Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. *United States* v. *Grace*, 461 U. S. 171, 180 (1983). These places—which we have labeled "traditional public fora"—"'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 469 (2009) (quoting *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983)).

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 377 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny. See Brief for Respondents 26 (although "[b]y its terms, the Act regulates

only conduct," it "incidentally regulates the place and time of protected speech").

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is "very limited." *Grace*, *supra*, at 177. In particular, the guiding First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" applies with full force in a traditional public forum. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). As a general rule, in such a forum the government may not "selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others." *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 209 (1975).

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward*, 491 U. S., at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)).[2]

While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test's three requirements.

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[2] A different analysis would of course be required if the government property at issue were not a traditional public forum but instead "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 470 (2009).

III

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000). Respondents do not argue that the Act can survive this exacting standard.

JUSTICE SCALIA objects to our decision to consider whether the statute is content based and thus subject to strict scrutiny, given that we ultimately conclude that it is not narrowly tailored. *Post*, at 498 (opinion concurring in judgment). But we think it unexceptional to perform the first part of a multipart constitutional analysis first. The content-neutrality prong of the *Ward* test is logically antecedent to the narrow tailoring prong, because it determines the appropriate level of scrutiny. It is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive. See, *e. g.*, *Bartnicki* v. *Vopper*, 532 U. S. 514, 526–527 (2001); *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 25–28 (2010) (concluding that a law was content based even though it ultimately survived strict scrutiny).

The Court does sometimes assume, without deciding, that a law is subject to a less stringent level of scrutiny, as we did earlier this Term in *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. 185, 199 (2014) (plurality opinion). But the distinction between that case and this one seems clear: Applying any standard of review other than intermediate scrutiny in *McCutcheon*—the standard that was assumed to apply—would have required overruling a precedent. There

is no similar reason to forgo the ordinary order of operations in this case.

At the same time, there is good reason to address content neutrality. In discussing whether the Act is narrowly tailored, see Part IV, *infra*, we identify a number of less restrictive alternative measures that the Massachusetts Legislature might have adopted. Some apply only at abortion clinics, which raises the question whether those provisions are content neutral. See *infra* this page and 480–482. While we need not (and do not) endorse any of those measures, it would be odd to consider them as possible alternatives if they were presumptively unconstitutional because they were content based and thus subject to strict scrutiny.

A

The Act applies only at a "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Mass. Gen. Laws, ch. 266, § 120E½(a). Given this definition, petitioners argue, "virtually all speech affected by the Act is speech concerning abortion," thus rendering the Act content based. Brief for Petitioners 23.

We disagree. To begin, the Act does not draw content-based distinctions on its face. Contrast *Boos* v. *Barry*, 485 U. S. 312, 315 (1988) (ordinance prohibiting the display within 500 feet of a foreign embassy of any sign that tends to bring the foreign government into "'public odium'" or "'public disrepute'"); *Carey* v. *Brown*, 447 U. S. 455, 465 (1980) (statute prohibiting all residential picketing except "peaceful labor picketing"). The Act would be content based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred. *League of Women Voters of Cal.*, 468 U. S., at 383. But it does not. Whether petitioners violate the Act "depends" not "on what they say," *Humanitarian Law Project*, *supra*, at 27, but simply on where they say it. Indeed,

petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. Brief for Petitioners 24 (quoting *United States* v. *O'Brien*, 391 U. S. 367, 384 (1968)). But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U. S., at 791. The question in such a case is whether the law is "'justified without reference to the content of the regulated speech.'" *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (quoting *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976); emphasis deleted).

The Massachusetts Act is. Its stated purpose is to "increase forthwith public safety at reproductive health care facilities." 2007 Mass. Acts p. 660. Respondents have articulated similar purposes before this Court—namely, "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Brief for Respondents 27; see, *e. g.*, App. 51 (testimony of Attorney General Coakley); *id.*, at 67–70 (testimony of Captain William B. Evans of the Boston Police); *id.*, at 79–80 (testimony of Mary Beth Heffernan, Undersecretary for Criminal Justice); *id.*, at 122–124 (affidavit of Captain Evans). It is not the case that "[e]very objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion." *Post*, at 502.

We have previously deemed the foregoing concerns to be content neutral. See *Boos*, 485 U. S., at 321 (identifying "congestion," "interference with ingress or egress," and "the need to protect . . . security" as content-neutral concerns).

Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from "the direct impact of speech on its audience" or "[l]isteners' reactions to speech." *Ibid.* If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener's reactions. Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Commonwealth's interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests "apply outside every building in the State that hosts any activity that might occasion protest or comment," not just abortion clinics. Brief for Petitioners 24. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to "single[ ] out for regulation speech about one particular topic: abortion." Reply Brief 9.

We cannot infer such a purpose from the Act's limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. See Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 451–452 (1996). At the same time, however, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson*

v. *Freeman*, 504 U. S. 191, 207 (1992) (plurality opinion). The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with "every building in the State that hosts any activity that might occasion protest or comment." Brief for Petitioners 24. In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

JUSTICE SCALIA objects that the statute does restrict more speech than necessary, because "only one [Massachusetts abortion clinic] is known to have been beset by the problems that the statute supposedly addresses." *Post*, at 503. But there are no grounds for inferring content-based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. On these facts, the poor fit noted by JUSTICE SCALIA goes to the question of narrow tailoring, which we consider below. See *infra*, at 493–495.

B

Petitioners also argue that the Act is content based because it exempts four classes of individuals, Mass. Gen. Laws, ch. 266, §§ 120E½(b)(1)–(4), one of which comprises "employees or agents of [a reproductive healthcare] facility acting within the scope of their employment." § 120E½(b)(2). This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination—an "egregious form of content discrimination," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). In particular, petitioners argue

that the exemption allows clinic employees and agents—including the volunteers who "escort" patients arriving at the Boston clinic—to speak inside the buffer zones.

It is of course true that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U. S. 43, 51 (1994) (quoting *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785–786 (1978)). At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance, see App. 95 (affidavit of Michael T. Baniukiewicz).

Given the need for an exemption for clinic employees, the "scope of their employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. It performs the same function as the identical "scope of their employment" restriction on the exemption for "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents." § 120E½(b)(3). Contrary to the suggestion of JUSTICE SCALIA, *post*, at 507–508, there is little reason to suppose that the Massachusetts Legislature intended to incorporate a common law doctrine developed for determining vicarious liability in tort when it used the phrase "scope of their employment" for the wholly different purpose of defining the scope of an exemption to a criminal statute. The limitation instead makes clear—with respect to both clinic

employees and municipal agents—that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers. There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. The "scope of their employment" limitation thus seems designed to protect against exactly the sort of conduct that petitioners and JUSTICE SCALIA fear.

Petitioners did testify in this litigation about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways. See App. 165, 168–169, 177–178, 189–190. It is unclear from petitioners' testimony whether these alleged incidents occurred within the buffer zones. There is no viewpoint discrimination problem if the incidents occurred outside the zones because petitioners are equally free to say whatever they would like in that area.

Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts' employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act's express terms. Petitioners' complaint would then be that the police were failing to *enforce* the Act equally against clinic escorts. Cf. *Hoye* v. *Oakland*, 653 F. 3d 835, 849–852 (CA9 2011) (finding selective enforcement of a similar ordinance in Oakland, California). While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement.

It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. See *post*, at 511–512 (ALITO, J., concurring in judgment). In that case, the escorts would not seem to be

violating the Act because the speech would be within the scope of their employment.[3] The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.[4]

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

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[3] Less than two weeks after the instant litigation was initiated, the Massachusetts Attorney General's Office issued a guidance letter clarifying the application of the four exemptions. The letter interpreted the exemptions as not permitting clinic employees or agents, municipal employees or agents, or individuals passing by clinics "to express their views about abortion or to engage in any other partisan speech within the buffer zone." App. 93–94. While this interpretation supports our conclusion that the employee exemption does not render the Act viewpoint based, we do not consider it in our analysis because it appears to *broaden* the scope of the Act—a criminal statute—rather than to adopt a "'limiting construction.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 796 (1989) (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494, n. 5 (1982)).

[4] Of course we do not hold that "[s]peech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed." *Post*, at 509. We instead apply an uncontroversial principle of constitutional adjudication: that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him. Specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so. JUSTICE SCALIA can decry this analysis as "astonishing" only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges. *Ibid.*

IV

Even though the Act is content neutral, it still must be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U. S., at 796 (internal quotation marks omitted). The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988).

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U. S., at 799. Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of" serving the government's interests. *Id.*, at 798. But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.*, at 799.

A

As noted, respondents claim that the Act promotes "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Brief for Respondents 27. Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the legitimacy of the government's interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting

a woman's freedom to seek pregnancy-related services." *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 376 (1997). See also *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 767–768 (1994). The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners' speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways. The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling."

For example, in uncontradicted testimony, McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. App. 135. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear "untrustworthy" or "suspicious." *Id.*, at 135, 152. Given these limitations, McCullen is often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey. *Id.*, at 133, 152–153. Clark gave similar testimony about her experience at the Worcester clinic. *Id.*, at 243–244.

These burdens on petitioners' speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, App. to Pet. for Cert. 42a, she also says that she reaches "far fewer people" than she did before the amendment, App. 137. Zarrella reports an even more precipitous decline in her success rate: She estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since. *Id.*, at

180. And as for the Worcester clinic, Clark testified that "only one woman out of 100 will make the effort to walk across [the street] to speak with [her]." *Id.*, at 217.

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands—the most effective means of getting the patients to accept it. *Id.*, at 179. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. *Id.*, at 213, 218, 252–253. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

The Court of Appeals and respondents are wrong to downplay these burdens on petitioners' speech. As the Court of Appeals saw it, the Constitution does not accord "special protection" to close conversations or "handbilling." 571 F. 3d, at 180. But while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others.

In the context of petition campaigns, we have observed that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer* v. *Grant*, 486 U. S. 414, 424 (1988). See also *Schenck*, *supra*, at 377 (invalidating a "floating" buffer zone around people entering an abortion clinic partly on the ground that it prevented protestors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks"). And "handing out leaflets in the advocacy of a politically controversial view-

point . . . is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 347 (1995). See also *Schenck*, *supra*, at 377 ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment"). When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.[5]

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of "protest"—such as chanting slogans and displaying signs—outside the buffer zones. Brief for Respondents 50–54. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While the record indicates that petitioners have been able to have a number of quiet conversations outside the buffer zones, respondents have not refuted petitioners' testimony that the conversations have been far less frequent and far less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be "seen and heard" by women within the buffer zones. *Id.*, at 51–53. If all that the women can see and hear are

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[5] As a leading historian has noted:

"It was in this form—as pamphlets—that much of the most important and characteristic writing of the American Revolution appeared. For the Revolutionary generation, as for its predecessors back to the early sixteenth century, the pamphlet had peculiar virtues as a medium of communication. Then, as now, it was seen that the pamphlet allowed one to do things that were not possible in any other form." B. Bailyn, The Ideological Origins of the American Revolution 2 (1967).

vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message.

Finally, respondents suggest that, at the Worcester and Springfield clinics, petitioners are prevented from communicating with patients not by the buffer zones but by the fact that most patients arrive by car and park in the clinics' private lots. *Id.*, at 52. It is true that the layout of the two clinics would prevent petitioners from approaching the clinics' *doorways*, even without the buffer zones. But petitioners do not claim a right to trespass on the clinics' property. They instead claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot. Before the buffer zones, they could do so. Now they must stand a substantial distance away. The Act alone is responsible for that restriction on their ability to convey their message.

B

1

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their *amici* identify no other State with a law that creates fixed buffer zones around abortion clinics.[6] That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth's interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, sub

[6] *Amici* do identify five localities with laws similar to the Act here. Brief for State of New York et al. as *Amici Curiae* 14, n. 7.

section (e)—unchallenged by petitioners—that prohibits much of this conduct. That provision subjects to criminal punishment "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." Mass. Gen. Laws, ch. 266, § 120E½(e).[7] If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U. S. C. § 248(a)(1), which subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." Some dozen other States have done so. See Brief for State of New York et al. as *Amici Curiae* 13, and n. 6. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility." N. Y. C. Admin. Code § 8–803(a)(3) (2014).[8]

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[7] Massachusetts also has a separate law prohibiting similar kinds of conduct at any "medical facility," though that law, unlike the Act, requires explicit notice before any penalty may be imposed. Mass. Gen. Laws, ch. 266, § 120E.

[8] We do not "give [our] approval" to this or any of the other alternatives we discuss. *Post*, at 500. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as whether the term "harassment" had been authoritatively construed to avoid vagueness and overbreadth problems of the sort noted by JUSTICE SCALIA.

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. See App. 18, 41, 51, 88–89, 99, 118–119. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances. See, *e. g.*, Worcester, Mass., Revised Ordinances of 2008, ch. 12, § 25(b) ("No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon"); Boston, Mass., Municipal Code, ch. 16–41.2(d) (2013) ("No person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps)").

All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, subsection (e) of the Act, the FACE Act, and the New York City antiharassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. See Mass. Gen. Laws § 120E½(f); 18 U. S. C. § 248(c)(1); N. Y. C. Admin. Code §§ 8–804, 8–805. We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction "regulates the activities, and perhaps the speech, of a group," but only "because of the group's past *actions* in the context of a specific dispute between real parties." *Madsen*, 512 U. S., at 762 (emphasis added). Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. See, *e. g.*, *id.*, at 770; *Schenck*, 519 U. S., at 380–381. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-

exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. According to respondents, even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period. See Brief for State of New York et al. as *Amici Curiae* 14–15, and n. 10. We upheld a similar law forbidding three or more people "'to congregate within 500 feet of [a foreign embassy], and refuse to disperse after having been ordered so to do by the police,'" *Boos*, 485 U. S., at 316 (quoting D. C. Code § 22–1115 (1938))—an order the police could give only when they "'reasonably believe[d] that a threat to the security or peace of the embassy [was] present,'" 485 U. S., at 330 (quoting *Finzer* v. *Barry*, 798 F. 2d 1450, 1471 (CADC 1986)).

And to the extent the Commonwealth argues that even these types of laws are ineffective, it has another problem. The portions of the record that respondents cite to support the anticongestion interest pertain mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings. App. 69–71, 88–89, 96, 123. Respondents point us to no evidence that individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access. For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is

instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

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Respondents have but one reply: "We have tried other approaches, but they do not work." Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth's allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. They also point to the Commonwealth's experience under the 2000 version of the Act, during which the police found it difficult to enforce the six-foot no-approach zones given the "frenetic" activity in front of clinic entrances. Brief for Respondents 43. According to respondents, this history shows that Massachusetts has tried less restrictive alternatives to the buffer zones, to no avail.

We cannot accept that contention. Although respondents claim that Massachusetts "tried other laws already on the books," *id.*, at 41, they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth "tried injunctions," *ibid.*, the last injunctions they cite date to the 1990s, see *id.*, at 42 (citing *Planned Parenthood League of Mass., Inc.* v. *Bell*, 424 Mass. 573, 677 N. E. 2d 204 (1997); *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 406 Mass. 701, 550 N. E. 2d 1361 (1990)). In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.

Respondents contend that the alternatives we have discussed suffer from two defects: First, given the "widespread" nature of the problem, it is simply not "practicable" to rely on individual prosecutions and injunctions. Brief for Respondents 45. But far from being "widespread," the

problem appears from the record to be limited principally to the Boston clinic on Saturday mornings. Moreover, by their own account, the police appear perfectly capable of singling out lawbreakers. The legislative testimony preceding the 2007 Act revealed substantial police and video monitoring at the clinics, especially when large gatherings were anticipated. Captain Evans testified that his officers are so familiar with the scene outside the Boston clinic that they "know all the players down there." App. 69. And Attorney General Coakley relied on video surveillance to show legislators conduct she thought was "clearly against the law." *Id.*, at 78. If Commonwealth officials can compile an extensive record of obstruction and harassment to support their preferred legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law.

The second supposed defect in the alternatives we have identified is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. Brief for Respondents 45–47. As Captain Evans predicted in his legislative testimony, fixed buffer zones would "make our job so much easier." App. 68.

Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. In any case, we do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional.

For similar reasons, respondents' reliance on our decision in *Burson* v. *Freeman* is misplaced. There, we upheld a state statute that established 100-foot buffer zones outside polling places on election day within which no one could display or distribute campaign materials or solicit votes. 504 U. S., at 193–194. We approved the buffer zones as a valid prophylactic measure, noting that existing "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.*, at 206–207 (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 28 (1976) (*per curiam*)). Such laws were insufficient because "[v]oter intimidation and election fraud are . . . difficult to detect." *Burson*, 504 U. S., at 208. Obstruction of abortion clinics and harassment of patients, by contrast, are anything but subtle.

We also noted in *Burson* that under state law, "law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," with the result that "many acts of interference would go undetected." *Id.*, at 207. Not so here. Again, the police maintain a significant presence outside Massachusetts abortion clinics. The buffer zones in *Burson* were justified because less restrictive measures were inadequate. Respondents have not shown that to be the case here.

Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.[9]

* * *

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably

[9] Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication. Nor need we consider petitioners' overbreadth challenge.

significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. See, *e. g.*, *Hill* v. *Colorado*, 530 U. S. 703 (2000); *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994).

The second half of the Court's analysis today, invalidating the law at issue because of inadequate "tailoring," is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court's analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny. The Court reaches out to decide that question unnecessarily—or at least unnecessarily insofar as legal analysis is concerned.

I disagree with the Court's dicta (Part III) and hence see no reason to opine on its holding (Part IV).

I. The Court's Content-Neutrality Discussion Is Unnecessary

The gratuitous portion of today's opinion is Part III, which concludes—in eight pages of the purest dicta—that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content-based speech regulations.[1] Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny.

Just a few months past, the Court found it unnecessary to "parse the differences between . . . two [available] standards" where a statute challenged on First Amendment grounds "fail[s] even under the [less demanding] test." *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. 185, 199 (2014) (plurality opinion). What has changed since then? Quite simple: This is an abortion case, and *McCutcheon* was not.[2] By engaging in constitutional dictum here (and reaching the wrong result), the majority can preserve the ability of jurisdictions

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[1] To reiterate, the challenged provision states that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway" of such a facility or within an alternative rectangular area. Mass. Gen. Laws, ch. 266, § 120E½(b) (West 2012). And the statute defines a "reproductive health care facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." § 120E½(a).

[2] The Court claims that *McCutcheon* declined to consider the more rigorous standard of review because applying it "would have required overruling a precedent." *Ante*, at 478. That hardly distinguishes the present case, since, as discussed later in text, the conclusion that this legislation escapes strict scrutiny does violence to a great swath of our First Amendment jurisprudence.

across the country to restrict antiabortion speech without fear of rigorous constitutional review. With a dart here and a pleat there, such regulations are sure to satisfy the tailoring standards applied in Part IV of the majority's opinion.

The Court cites two cases for the proposition that "[i]t is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive." *Ante*, at 478 (citing *Bartnicki* v. *Vopper*, 532 U. S. 514, 526–527 (2001); *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 25–28 (2010)). Those cases provide little cover. In both, there was no disagreement among the Members of the Court about whether the statutes in question discriminated on the basis of content.[3] There was thus little harm in answering the constitutional question that was "logically antecedent." *Ante*, at 478. In the present case, however, content neutrality is far from clear (the Court is divided 5-to-4), and the parties vigorously dispute the point, see *ibid.* One would have thought that the Court would avoid the issue by simply assuming without deciding the logically antecedent point. We have done that often before. See, *e. g.*, *Herrera* v. *Collins*, 506 U. S. 390, 417 (1993); *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 222–223 (1985); *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 91–92 (1978).

The Court points out that its opinion goes on to suggest (in Part IV) possible alternatives that apply only at abortion clinics, which therefore "raises the question whether those

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[3] See *Bartnicki*, 532 U. S., at 526 ("We agree with petitioners that § 2511(1)(c), as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability"); *id.*, at 544 (Rehnquist, C. J., dissenting) ("The Court correctly observes that these are 'content-neutral law[s] of general applicability' " (brackets in original)); *Humanitarian Law Project*, 561 U. S., at 27 ("[Section] 2339B regulates speech on the basis of its content"); *id.*, at 45 (BREYER, J., dissenting) ("[W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications 'strictly' ").

provisions are content neutral." *Ante*, at 479. Of course, the Court has no obligation to provide advice on alternative speech restrictions, and appending otherwise unnecessary constitutional pronouncements to such advice produces nothing but an impermissible advisory opinion.

By the way, there is dictum favorable to advocates of abortion rights even in Part IV. The Court invites Massachusetts, as a means of satisfying the tailoring requirement, to "consider an ordinance such as the one adopted in New York City that . . . makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Ante*, at 491 (quoting N. Y. C. Admin. Code §8–803(a)(3) (2014)). Is it harassment, one wonders, for Eleanor McCullen to ask a woman, quietly and politely, two times, whether she will take literature or whether she has any questions? Three times? Four times? It seems to me far from certain that First Amendment rights can be imperiled by threatening jail time (only at "reproductive health care facilit[ies]," of course) for so vague an offense as "follow[ing] and harass[ing]." It is wrong for the Court to give its approval to such legislation without benefit of briefing and argument.

II. The Statute Is Content Based and Fails Strict Scrutiny

Having eagerly volunteered to take on the level-of-scrutiny question, the Court provides the wrong answer. Petitioners argue for two reasons that subsection (b) articulates a content-based speech restriction—and that we must therefore evaluate it through the lens of strict scrutiny.

A. Application to Abortion Clinics Only

First, petitioners maintain that the Act targets abortion-related—for practical purposes, abortion-opposing—speech because it applies outside abortion clinics only (rather than outside other buildings as well).

Public streets and sidewalks are traditional forums for speech on matters of public concern. Therefore, as the Court acknowledges, they hold a "'special position in terms of First Amendment protection.'" *Ante*, at 476 (quoting *United States* v. *Grace*, 461 U. S. 171, 180 (1983)). Moreover, "the public spaces outside of [abortion-providing] facilities . . . ha[ve] become, by necessity and by virtue of this Court's decisions, a forum of last resort for those who oppose abortion." *Hill*, 530 U. S., at 763 (SCALIA, J., dissenting). It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

The majority says, correctly enough, that a facially neutral speech restriction escapes strict scrutiny, even when it "may disproportionately affect speech on certain topics," so long as it is "justified without reference to the content of the regulated speech." *Ante*, at 480 (internal quotation marks omitted). But the cases in which the Court has previously found that standard satisfied—in particular, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), and *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), both of which the majority cites—are a far cry from what confronts us here.

Renton upheld a zoning ordinance prohibiting adult motion-picture theaters within 1,000 feet of residential neighborhoods, churches, parks, and schools. The ordinance was content neutral, the Court held, because its purpose was not to suppress pornographic speech *qua* speech but, rather, to mitigate the "secondary effects" of adult theaters—including by "prevent[ing] crime, protect[ing] the city's retail

trade, [and] maintain[ing] property values." 475 U. S., at 47, 48. The Court reasoned that if the city "'had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'" *Id.*, at 48 (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 82, n. 4 (1976) (Powell, J., concurring in part)). *Ward*, in turn, involved a New York City regulation requiring the use of the city's own sound equipment and technician for events at a bandshell in Central Park. The Court held the regulation content neutral because its "principal justification [was] the city's desire to control noise levels," a justification that "'ha[d] nothing to do with [the] content'" of respondent's rock concerts or of music more generally. 491 U. S., at 792. The regulation "ha[d] no material impact on any performer's ability to exercise complete artistic control over sound quality." *Id.*, at 802; see also *id.*, at 792–793.

Compare these cases' reasons for concluding that the regulations in question were "justified without reference to the content of the regulated speech" with the feeble reasons for the majority's adoption of that conclusion in the present case. The majority points only to the statute's stated purpose of increasing "'public safety'" at abortion clinics, *ante*, at 480 (quoting 2007 Mass. Acts p. 660), and to the additional aims articulated by respondents before this Court—namely, protecting "'patient access to healthcare . . . and the unobstructed use of public sidewalks and roadways,'" *ante*, at 480 (quoting Brief for Respondents 27). Really? Does a statute become "justified without reference to the content of the regulated speech" simply because the statute itself and those defending it in court *say* that it is? Every objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion.

I begin, as suggested above, with the fact that the Act burdens only the public spaces outside abortion clinics. One might have expected the majority to defend the statute's pe-

culiar targeting by arguing that those locations regularly face the safety and access problems that it says the Act was designed to solve. But the majority does not make that argument because it would be untrue. As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. See *ante*, at 493, 494–495. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently "tailored" to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the suppression of antiabortion speech. That is rather like invoking the eight missed human targets of a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*.

Whether the statute "restrict[s] more speech than necessary" in light of the problems that it allegedly addresses, *ante*, at 482, is, to be sure, relevant to the tailoring component of the First Amendment analysis (the shooter doubtless did have bad aim), but it is also relevant—powerfully relevant—to whether the law is really directed to safety and access concerns or rather to the suppression of a particular type of speech. Showing that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority distorts not only the First Amendment but also the ordinary logic of probative inferences.

The structure of the Act also indicates that it rests on content-based concerns. The goals of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," Brief for Respondents 27, are already achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for "[a]ny person who

knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." § 120E½(e). As the majority recognizes, that provision is easy to enforce. See *ante*, at 495. Thus, the speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion.

Further contradicting the Court's fanciful defense of the Act is the fact that subsection (b) was enacted as a more easily enforceable substitute for a prior provision. That provision did not exclude people entirely from the restricted areas around abortion clinics; rather, it forbade people in those areas to approach within six feet of another person *without that person's consent* "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." § 120E½(b) (West 2000). As the majority acknowledges, that provision was "modeled on a . . . Colorado law that this Court had upheld in *Hill*." *Ante*, at 470. And in that case, the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what *Hill* called "[t]he unwilling listener's interest in avoiding unwanted communication." 530 U. S., at 716. The Court held that interest to be content neutral. *Id.*, at 719–725.

The provision at issue here was indisputably meant to serve the same interest in protecting citizens' supposed right to avoid speech that they would rather not hear. For that reason, we granted a second question for review in this case (though one would not know that from the Court's opinion, which fails to mention it): whether *Hill* should be cut back or cast aside. See Pet. for Cert. i (stating second question presented as "If *Hill* . . . permits enforcement of this law, whether *Hill* should be limited or overruled"); 570 U. S. 916 (2013) (granting certiorari without reservation). The ma-

jority avoids that question by declaring the Act content neutral on other (entirely unpersuasive) grounds. In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents in that case, see 530 U. S., at 741–765 (SCALIA, J.); *id.*, at 765–790 (KENNEDY, J.), and in the abundance of scathing academic commentary describing how *Hill* stands in contradiction to our First Amendment jurisprudence.[4] Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

One final thought regarding *Hill*: It can be argued, and it should be argued in the next case, that by stating that "the Act would not be content neutral if it were concerned with undesirable effects that arise from . . . '[l]isteners' reactions to speech,'" *ante*, at 481 (quoting *Boos* v. *Barry*, 485 U. S. 312, 321 (1988) (brackets in original)), and then holding the Act unconstitutional for being insufficiently tailored to safety and access concerns, the Court itself has *sub silentio* (and perhaps inadvertently) overruled *Hill*. The unavoidable implication of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks.

B. Exemption for Abortion-Clinic Employees or Agents

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason

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[4] "*Hill* . . . is inexplicable on standard free-speech grounds[,] and . . . it is shameful the Supreme Court would have upheld this piece of legislation on the reasoning that it gave." Constitutional Law Symposium, Professor Michael W. McConnell's Response, 28 Pepperdine L. Rev. 747 (2001). "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong." *Id.*, at 750 (remarks of Laurence Tribe). The list could go on.

as well: It exempts "employees or agents" of an abortion clinic "acting within the scope of their employment," § 120E½(b)(2).

It goes without saying that "[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional." *Thomas* v. *Chicago Park Dist.*, 534 U. S. 316, 325 (2002). The majority opinion sets forth a two-part inquiry for assessing whether a regulation is content based, but when it comes to assessing the exemption for abortion-clinic employees or agents, the Court forgets its own teaching. Its opinion jumps right over the prong that asks whether the provision "draw[s] . . . distinctions on its face," *ante*, at 479, and instead proceeds directly to the purpose-related prong, see *ante*, at 480, asking whether the exemption "represent[s] a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people," *ante*, at 483 (internal quotation marks omitted). I disagree with the majority's negative answer to that question, but that is beside the point if the text of the statute—whatever its purposes might have been—"license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 392 (1992).

Is there any serious doubt that *abortion-clinic employees or agents* "acting within the scope of their employment" near clinic entrances may—indeed, often will—speak in favor of abortion ("You are doing the right thing")? Or speak in opposition to the message of abortion opponents—saying, for example, that "this is a safe facility" to rebut the statement that it is not? See Tr. of Oral Arg. 37–38. The Court's contrary assumption is simply incredible. And the majority makes no attempt to establish the further necessary proposition that abortion-clinic employees and agents do not engage in nonspeech activities directed to the suppression of antiabortion speech by hampering the efforts of counselors to speak to prospective clients. Are we to believe that a clinic

employee sent out to "escort" prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor's pleas.

The Court points out that the exemption may allow into the speech-free zones clinic employees other than escorts, such as "the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance." *Ante*, at 483. I doubt that Massachusetts legislators had those people in mind, but whether they did is in any event irrelevant. Whatever other activity is permitted, so long as the statute permits speech favorable to abortion rights while excluding antiabortion speech, it discriminates on the basis of viewpoint.

The Court takes the peculiar view that, so long as the clinics have not specifically authorized their employees to speak in favor of abortion (or, presumably, to impede antiabortion speech), there is no viewpoint discrimination. See *ante*, at 484. But it is axiomatic that "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country[,] they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 59 (1911). The phrase "scope of employment" is a well-known common-law concept that includes "[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer's business." Black's Law Dictionary 1465 (9th ed. 2009). The employer need not specifically direct or sanction each aspect of an employee's conduct for it to qualify. See Restatement (Second) of Agency §229 (1957); see also Restatement (Third) of Agency §7.07(2), and Comment *b* (2005). Indeed, employee conduct can qualify even if the employer specifically forbids it. See Restatement (Second) §230. In any case, it is implausible that clinics would bar escorts from engaging in the

sort of activity mentioned above. Moreover, a statute that forbids one side but not the other to convey its message does not become viewpoint neutral simply because the favored side chooses voluntarily to abstain from activity that the statute permits.

There is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners. See *post*, at 511 (ALITO, J., concurring in judgment). Indeed, as the majority acknowledges, the trial record includes testimony that escorts at the Boston clinic "expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways," including by calling them "'crazy.'" *Ante*, at 475, 484 (citing App. 165, 168–169, 177–178, 189–190). What a surprise! The Web site for the Planned Parenthood League of Massachusetts (which operates the three abortion facilities where petitioners attempt to counsel women) urges readers to "Become a Clinic Escort Volunteer" in order to "provide a safe space for patients by escorting them through protestors to the health center." Volunteer and Internship Opportunities, online at https://plannedparenthoodvolunteer.hire.com/viewjob.html?optlinkview=view28592&ERFormID=newjoblist&ERFormCode=any (as visited June 24, 2014, and available in Clerk of Court's case file). The dangers that the Web site attributes to "protestors" are related entirely to speech, not to safety or access. "Protestors," it reports, "hold signs, try to speak to patients entering the building, and distribute literature that can be misleading." *Ibid.* The "safe space" provided by escorts is protection from that speech.

Going from bad to worse, the majority's opinion contends that "the record before us contains insufficient evidence to show" that abortion-facility escorts have actually spoken in

favor of abortion (or, presumably, hindered antiabortion speech) while acting within the scope of their employment. *Ante*, at 485. Here is a brave new First Amendment test: Speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed. A city ordinance closing a park adjoining the Republican National Convention to all speakers except those whose remarks have been approved by the Republican National Committee is thus not subject to strict scrutiny unless it can be shown that someone has given committee-endorsed remarks. For this Court to suggest such a test is astonishing.[5]

C. Conclusion

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. That standard requires that a regulation represent "the least restrictive means" of furthering "a compelling Government interest." *United States* v. *Playboy Entertainment Group*,

[5] The Court states that I can make this assertion "only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges." *Ante*, at 509, n. 4. That is not so. The sentence in question appears in a paragraph immediately following rejection of the facial challenge, which begins: "It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones." *Ante*, at 484. And the prior discussion regarding the facial challenge points to the fact that "[t]here is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones." *Ibid.* To be sure, the paragraph in question then goes on to concede only that the statute's constitutionality *as applied* would depend upon explicit clinic authorization. Even that seems to me wrong. Saying that voluntary action by a third party can cause an otherwise valid statute to violate the First Amendment as applied seems to me little better than saying it can cause such a statute to violate the First Amendment facially. A statute that punishes me for speaking unless x chooses to speak is unconstitutional facially and as applied, without reference to x's action.

Inc., 529 U. S. 803, 813 (2000) (internal quotation marks omitted). Respondents do not even attempt to argue that subsection (b) survives this test. See *ante*, at 478. "Suffice it to say that if protecting people from unwelcome communications"—the actual purpose of the provision—"is a compelling state interest, the First Amendment is a dead letter." *Hill*, 530 U. S., at 748–749 (SCALIA, J., dissenting).

III. Narrow Tailoring

Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry conducted in Part IV of the Court's opinion—whether the statute is "'narrowly tailored to serve a significant governmental interest,'" *ante*, at 486 (quoting *Ward*, 491 U. S., at 796). I suppose I *could* do so, taking as a given the Court's erroneous contentneutrality conclusion in Part III; and if I did, I suspect I would agree with the majority that the legislation is not narrowly tailored to advance the interests asserted by respondents. But I prefer not to take part in the assembling of an apparent but specious unanimity. I leave both the plainly unnecessary and erroneous half and the arguably correct half of the Court's analysis to the majority.

* * *

The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to "protect" prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed. I concur only in the judgment that the statute is unconstitutional under the First Amendment.

Justice Alito, concurring in the judgment.

I agree that the Massachusetts statute at issue in this case, Mass. Gen. Laws, ch. 266, § 120E½(b) (West 2012), violates the First Amendment. As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, see *ante*, at 478, and I believe the law clearly discriminates on this ground.

The Massachusetts statute generally prohibits any person from entering a buffer zone around an abortion clinic during the clinic's business hours, § 120E½(c), but the law contains an exemption for "employees or agents of such facility acting within the scope of their employment." § 120E½(b)(2). Thus, during business hours, individuals who wish to counsel against abortion or to criticize the particular clinic may not do so within the buffer zone. If they engage in such conduct, they commit a crime. See § 120E½(d). By contrast, employees and agents of the clinic may enter the zone and engage in any conduct that falls within the scope of their employment. A clinic may direct or authorize an employee or agent, while within the zone, to express favorable views about abortion or the clinic, and if the employee exercises that authority, the employee's conduct is perfectly lawful. In short, petitioners and other critics of a clinic are silenced, while the clinic may authorize its employees to express speech in support of the clinic and its work.

Consider this entirely realistic situation. A woman enters a buffer zone and heads haltingly toward the entrance. A sidewalk counselor, such as petitioners, enters the buffer zone, approaches the woman and says, "If you have doubts about an abortion, let me try to answer any questions you may have. The clinic will not give you good information." At the same time, a clinic employee, as instructed by the management, approaches the same woman and says, "Come inside and we will give you honest answers to all your questions." The sidewalk counselor and the clinic employee expressed opposing viewpoints, but only the first violated the statute.

Or suppose that the issue is not abortion but the safety of a particular facility. Suppose that there was a recent report of a botched abortion at the clinic. A nonemployee may not enter the buffer zone to warn about the clinic's health record, but an employee may enter and tell prospective clients that the clinic is safe.

It is clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.

The Court holds not only that the Massachusetts law is viewpoint neutral but also that it does not discriminate based on content. See *ante*, at 479–485. The Court treats the Massachusetts law like one that bans all speech within the buffer zone. While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact. Suppose, for example, that a facially content-neutral law is enacted for the purpose of suppressing speech on a particular topic. Such a law would not be content neutral. See, *e. g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 645–646 (1994).

In this case, I do not think that it is possible to reach a judgment about the intent of the Massachusetts Legislature without taking into account the fact that the law that the legislature enacted blatantly discriminates based on viewpoint. In light of this feature, as well as the overbreadth that the Court identifies, see *ante*, at 490–494, it cannot be said, based on the present record, that the law would be content neutral even if the exemption for clinic employees and agents were excised. However, if the law were truly content neutral, I would agree with the Court that the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth's asserted interests.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* NOEL CANNING ET AL.

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

No. 12–1281. Argued January 13, 2014—Decided June 26, 2014

Respondent Noel Canning, a Pepsi-Cola distributor, asked the D. C. Circuit to set aside an order of the National Labor Relations Board, claiming that the Board lacked a quorum because three of the five Board members had been invalidly appointed. The nominations of the three members in question were pending in the Senate when it passed a December 17, 2011, resolution providing for a series of "*pro forma* session[s]," with "no business . . . transacted," every Tuesday and Friday through January 20, 2012. S. J., 112th Cong., 1st Sess., 923. Invoking the Recess Appointments Clause—which gives the President the power "to fill up all Vacancies that may happen during the Recess of the Senate," Art. II, § 2, cl. 3—the President appointed the three members in question between the January 3 and January 6 *pro forma* sessions. Noel Canning argued primarily that the appointments were invalid because the 3-day adjournment between those two sessions was not long enough to trigger the Recess Appointments Clause. The D. C. Circuit agreed that the appointments fell outside the scope of the Clause, but on different grounds. It held that the phrase "the recess," as used in the Clause, does not include intra-session recesses, and that the phrase "vacancies that may happen during the recess" applies only to vacancies that first come into existence during a recess.

Held:

1. The Recess Appointments Clause empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length. Pp. 522–549.

(a) Two background considerations are relevant to the questions here. First, the Recess Appointments Clause is a subsidiary method for appointing officers of the United States. The Founders intended the norm to be the method of appointment in Article II, § 2, cl. 2, which requires Senate approval of Presidential nominations, at least for principal officers. The Recess Appointments Clause reflects the tension between the President's continuous need for "the assistance of subordinates," *Myers* v. *United States*, 272 U. S. 52, 117, and the Senate's early practice of meeting for a single brief session each year. The Clause should be interpreted as granting the President the power to make ap-

pointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.

Second, in interpreting the Clause, the Court puts significant weight upon historical practice. The longstanding "practice of the government," *McCulloch* v. *Maryland*, 4 Wheat. 316, 401, can inform this Court's determination of "what the law is" in a separation-of-powers case, *Marbury* v. *Madison*, 1 Cranch 137, 176. See also, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 401; *The Pocket Veto Case*, 279 U. S. 655, 689–690. There is a great deal of history to consider here, for Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that such appointments can be both necessary and appropriate in certain circumstances. The Court, in interpreting the Clause for the first time, must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached. Pp. 522–526.

(b) The phrase "the recess of the Senate" applies to both inter-session recess (*i. e.*, breaks between formal sessions of the Senate) and intra-session recesses (*i. e.*, breaks in the midst of a formal session) of substantial length. The constitutional text is ambiguous. Founding-era dictionaries and usages show that the phrase "the recess" can encompass intra-session breaks. And this broader interpretation is demanded by the purpose of the Clause, which is to allow the President to make appointments so as to ensure the continued functioning of the Government while the Senate is away. The Senate is equally away and unavailable to participate in the appointments process during both an inter-session and an intra-session recess. History offers further support for this interpretation. From the founding until the Great Depression, every time the Senate took a substantial, nonholiday intra-session recess, the President made recess appointments. President Andrew Johnson made the first documented intra-session recess appointments in 1867 and 1868, and Presidents made similar appointments in 1921 and 1929. Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks and taken longer and more frequent intra-session breaks; Presidents accordingly have made more intra-session recess appointments. Meanwhile, the Senate has never taken any formal action to deny the validity of intra-session recess appointments. In 1905 the Senate Judiciary Committee defined "the recess" as "the period of time when the Senate" is absent and cannot "participate as a body in making appointments," S. Rep. No. 4389, 58th Cong., 3d Sess., 2, and that functional definition encompasses both intra-session and inter-session recesses. A 1940 law regulating the payment of recess appointees has also been interpreted functionally by the Comp-

troller General (an officer of the Legislative Branch). In sum, Presidents have made intra-session recess appointments for a century and a half, and the Senate has never taken formal action to oppose them. That practice is long enough to entitle it to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case*, *supra*, at 689.

The Clause does not say how long a recess must be in order to fall within the Clause, but even the Solicitor General concedes that a 3-day recess would be too short. The Adjournments Clause, Art. I, § 5, cl. 4, reflects the fact that a 3-day break is not a significant interruption of legislative business. A Senate recess that is so short that it does not require the consent of the House under that Clause is not long enough to trigger the President's recess-appointment power. Moreover, the Court has not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. There are a few examples of inter-session recess appointments made during recesses of less than 10 days, but these are anomalies. In light of historical practice, a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. The word "presumptively" leaves open the possibility that a very unusual circumstance could demand the exercise of the recess-appointment power during a shorter break. Pp. 526–538.

(c) The phrase "vacancies that may happen during the recess of the Senate," Art. II, § 2, cl. 3, applies both to vacancies that first come into existence during a recess and to vacancies that initially occur before a recess but continue to exist during the recess. Again, the text is ambiguous. As Thomas Jefferson observed, the Clause is "certainly susceptible of [two] constructions." Letter to Wilson Cary Nicholas (Jan. 26, 1802), in 36 Papers of Thomas Jefferson 433. It "may mean 'vacancies that may happen to be' or 'may happen to fall'" during a recess. *Ibid.* And, as Attorney General Wirt wrote in 1821, the broader reading is more consonant with the "reason and spirit" of the Clause. 1 Op. Atty. Gen. 632. The purpose of the Clause is to permit the President, who is always acting to execute the law, to obtain the assistance of subordinate officers while the Senate, which acts only in intervals, is unavailable to confirm them. If a vacancy arises too late in the session for the President and Senate to have an opportunity to select a replacement, the narrower reading could paralyze important functions of the Federal Government, particularly at the time of the founding. The broader interpretation ensures that offices needing to be filled can be filled. It does raise a danger that the President may attempt to use the recess-appointment power to circumvent the Senate's advice and consent role. But the narrower interpretation risks undermining con-

stitutionally conferred powers more seriously and more often. It would prevent a President from making any recess appointment to fill a vacancy that arose before a recess, no matter who the official, how dire the need, how uncontroversial the appointment, and how late in the session the office fell vacant.

Historical practice also strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President Madison. Nearly every Attorney General to consider the question has approved the practice, and every President since James Buchanan has made recess appointments to pre-existing vacancies. It is a fair inference from the historical data that a large proportion of recess appointments over our Nation's history have filled pre-recess vacancies. The Senate Judiciary Committee in 1863 did issue a Report disagreeing with the broader interpretation, and Congress passed a law known as the Pay Act prohibiting payment of recess appointments to pre-recess vacancies soon after. However, the Senate subsequently abandoned its hostility. In 1940 the Senate amended the Pay Act to permit payment of recess appointees in circumstances that would be unconstitutional under the narrower interpretation. In short, Presidents have made recess appointments to pre-existing vacancies for two centuries, and the Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. The Court is reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long. Pp. 538–549.

2. For purposes of the Recess Appointments Clause, the Senate is in session when it says that it is, provided that, under its own rules, it retains the capacity to transact Senate business.

This standard is consistent with the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its business, as recognized by this Court's precedents. See Art. I, § 5, cl. 2; *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 672; *United States* v. *Ballin*, 144 U. S. 1, 5, 9. Although the Senate's own determination of when it is and is not in session should be given great weight, the Court's deference cannot be absolute. When the Senate is without the capacity to act, under its own rules, it is not in session even if it so declares.

Under the standard set forth here, the Senate was in session during the *pro forma* sessions at issue. It said it was in session, and Senate rules make clear that the Senate retained the power to conduct business. The Senate could have conducted business simply by passing a unanimous consent agreement. In fact, it did so; it passed a bill by unanimous consent during its *pro forma* session on December 23, 2011. See 2011 S. J. 924; Pub. L. 112–78. The Court will not, as the Solicitor

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General urges, engage in an in-depth factual appraisal of what the Senate actually did during its *pro forma* sessions in order to determine whether it was in recess or in session for purposes of the Recess Appointments Clause.

Because the Senate was in session during its *pro forma* sessions, the President made the recess appointments at issue during a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause, so the President lacked the authority to make those appointments. Pp. 549–557.

705 F. 3d 490, affirmed.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 569.

Solicitor General Verrilli argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Brinkmann*, *Curtis E. Gannon*, *Douglas N. Letter*, *Melissa N. Patterson*, *Benjamin M. Shultz*, *Lafe E. Solomon*, *John H. Ferguson*, *Margery E. Lieber*, and *Linda Dreeben*. *James B. Coppess*, *Bradley T. Raymond*, and *Laurence Gold* filed briefs for International Brotherhood of Teamsters Local 760 in support of petitioner.

Noel J. Francisco argued the cause for respondent Noel Canning. With him on the brief were *G. Roger King*, *Gary E. Lofland*, *Lily Fu Claffee*, and *Rachel L. Brand*.

Miguel A. Estrada argued the cause and filed a brief for Senator Mitch McConnell et al. as *amici curiae* urging affirmance.*

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*Briefs of *amici curiae* urging reversal were filed for the Brennan Center for Justice by *Sidney S. Rosdeitcher*, *Burt Neuborne*, *Wendy Weiser*, and *Diana Kasdan*; for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; and for Victor Williams by *Mr. Williams*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Luther Strange*, Attorney General of Alabama, *John C. Neiman, Jr.*, Solicitor General, *Andrew L. Brasher*, Deputy Solicitor Gen-

JUSTICE BREYER delivered the opinion of the Court.

Ordinarily the President must obtain "the Advice and Consent of the Senate" before appointing an "Office[r] of the

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eral, and *Megan A. Kirkpatrick*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *Sam Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, A*lan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Greg Abbott* of Texas, *Kenneth T. Cuccinelli II* of Virginia, and *Patrick Morrisey* of West Virginia; for the American Civil Rights Union by *Peter J. Ferrara*; for the Atlantic Legal Foundation et al. by *William S. Consovoy*, *Thomas R. McCarthy*, and *Martin S. Kaufman*; for the Cato Institute by *Ilya Shapiro*; for Citizens United et al. by *William J. Olson*, *Herbert W. Titus*, *John S. Miles*, *Jeremiah L. Morgan*, *Michael Boos*, and *Michael Connelly*; for the Coalition for a Democratic Workplace et al. by *Mark T. Stancil*, *William J. Trunk*, and *Deborah R. White*; for Constitutional Law Scholars by *Michael W. McConnell*, *pro se*; for the Council of Labor Law Equality by *Arthur B. Smith, Jr.*, and *Christopher C. Murray*; for Daycon Products Co., Inc., by *Jay P. Krupin*, *Andrew M. Grossman*, and *Lee A. Casey*; for the Independence Institute by *Sean R. Gallagher*, *Bennett L. Cohen*, and *David B. Kopel*; for the International Longshore and Warehouse Union by *Robert Remar*; for Judicial Watch, Inc., et al. by *Paul J. Orfanedes* and *Ramona R. Cotca*; for the Landmark Legal Foundation by *Richard P. Hutchison*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the National Federation of Independent Business Small Business Legal Center by *Mark E. Solomons*, *Laura Metcoff Klaus*, *Justin F. Keith*, *Karen R. Harned*, and *Elizabeth Milito*; for the National Right to Work Legal Defense and Education Foundation, Inc., et al. by *Thomas H. Odom*, *Glenn M. Taubman*, and *John N. Raudabaugh*; for Originalist Scholars by *Michael D. Ramsey*; for Political Scientists et al. by *Allyson N. Ho*, *Nelson Lund*, and *Vanessa R. Brown*; for Speaker of the United States House of Representatives John Boehner by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Jordan A. Sekulow*, *Cecilia Noland-Heil*, and *Laura B. Hernandez*; for the Southeastern Legal Foundation by *Shannon Lee Goessling*, *Gregory B. Robertson*, *Michael R. Shebelskie*, and *Kurt G. Larkin*; for the State National Bank of Big Spring et al. by *C. Boyden Gray*, *Adam J. White*, *Kathryn E. Tarbert*, *Sam Kazman*, and *Hans Bader*; for Brian W. Bulger et al. by *Mr. Bulger*, *pro se*; for Robert B. Dove et al. by *D. John Sauer*; and for Tuan Samahon by *Mr. Samahon*, *pro se*.

United States." U. S. Const., Art. II, § 2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3. We here consider three questions about the application of this Clause.

The first concerns the scope of the words "recess of the Senate." Does that phrase refer only to an inter-session recess (*i. e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words "vacancies that may happen." Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a "recess." The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by "pro forma session[s]," with "no business . . . transacted," every Tuesday and Friday through January 20, 2012. S. J., 112th Cong., 1st Sess., 923 (2011) (hereinafter 2011 S. J.). In calculating the length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

I

The case before us arises out of a labor dispute. The National Labor Relations Board (NLRB or Board) found that a Pepsi-Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The Board ordered the distributor to execute the agreement and to make employees whole for any losses. *Noel Canning*, 358 N. L. R. B. No. 4 (2012).

The Pepsi-Cola distributor subsequently asked the Court of Appeals for the District of Columbia Circuit to set the Board's order aside. It claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act. See 29 U. S. C. § 160(f) (providing for judicial review); § 153(a) (providing for a five-member Board); § 153(b) (providing for a three-member quorum); *New Process Steel, L. P.* v. *NLRB*, 560 U. S. 674, 687–688 (2010) (in the absence of a lawfully appointed quorum, the Board cannot exercise its powers).

The three members in question were Sharon Block, Richard Griffin, and Terence Flynn. In 2011 the President had nominated each of them to the Board. As of January 2012, Flynn's nomination had been pending in the Senate awaiting confirmation for approximately a year. The nominations of each of the other two had been pending for a few weeks. On January 4, 2012, the President, invoking the Recess Appointments Clause, appointed all three to the Board.

The distributor argued that the Recess Appointments Clause did not authorize those appointments. It pointed out that on December 17, 2011, the Senate, by unanimous consent, had adopted a resolution providing that it would take a series of brief recesses beginning the following day. See 2011 S. J. 923. Pursuant to that resolution, the Senate held *pro forma* sessions every Tuesday and Friday until it re-

turned for ordinary business on January 23, 2012. *Ibid.*; 158 Cong. Rec. 1, 3, 9, 16, 26, 133 (2012). The President's January 4 appointments were made between the January 3 and January 6 *pro forma* sessions. In the distributor's view, each *pro forma* session terminated the immediately preceding recess. Accordingly, the appointments were made during a 3-day adjournment, which is not long enough to trigger the Recess Appointments Clause.

The Court of Appeals agreed that the appointments fell outside the scope of the Clause. But the court set forth different reasons. It held that the Clause's words "the recess of the Senate" do not include recesses that occur *within* a formal session of Congress, *i. e.*, intra-session recesses. Rather those words apply only to recesses *between* those formal sessions, *i. e.*, inter-session recesses. Since the second session of the 112th Congress began on January 3, 2012, the day before the President's appointments, those appointments occurred during an intra-session recess, and the appointments consequently fell outside the scope of the Clause. 705 F. 3d 490, 499–507 (CADC 2013).

The Court of Appeals added that, in any event, the phrase "vacancies that may happen during the recess" applies only to vacancies that come into existence during a recess. *Id.*, at 507–512. The vacancies that Members Block, Griffin, and Flynn were appointed to fill had arisen before the beginning of the recess during which they were appointed. For this reason too the President's appointments were invalid. And, because the Board lacked a quorum of validly appointed members when it issued its order, the order was invalid. 29 U. S. C. § 153(b); *New Process Steel*, *supra*.

We granted the Solicitor General's petition for certiorari. We asked the parties to address not only the Court of Appeals' interpretation of the Clause but also the distributor's initial argument, namely, "[w]hether the President's recess-appointment power may be exercised when the Senate is

convening every three days in *pro forma* sessions." 570 U. S. 916 (2013).

We shall answer all three questions presented. We recognize that the President has nominated others to fill the positions once occupied by Members Block, Griffin, and Flynn, and that the Senate has confirmed these successors. But, as the parties recognize, the fact that the Board now unquestionably has a quorum does not moot the controversy about the validity of the previously entered Board order. And there are pending before us petitions from decisions in other cases involving challenges to the appointment of Board Member Craig Becker. The President appointed Member Becker during an intra-session recess that was not punctuated by *pro forma* sessions, and the vacancy Becker filled had come into existence prior to the recess. See Congressional Research Service, H. Hogue, M. Carey, M. Greene, & M. Bearden, The *Noel Canning* Decision and Recess Appointments Made From 1981–2013, p. 28 (Feb. 4, 2013) (hereinafter The *Noel Canning* Decision); NLRB, Members of the NLRB Since 1935, online at http://www.nlrb.gov/who-we-are/board/members-nlrb-1935 (all Internet materials as visited June 24, 2014, and available in Clerk of Court's case file). Other cases involving similar challenges are also pending in the Courts of Appeals. *E. g.*, *NLRB* v. *New Vista Nursing & Rehabilitation*, No. 11–3440 etc. (CA3). Thus, we believe it is important to answer all three questions that this case presents.

II

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, *the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States.* The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that the President "shall nominate, *and by and with the Advice and Con-*

sent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." (Emphasis added.)

The Federalist Papers make clear that the Founders intended this method of appointment, requiring Senate approval, to be the norm (at least for principal officers). Alexander Hamilton wrote that the Constitution vests the power of *nomination* in the President alone because "one man of discernment is better fitted to analise and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment." The Federalist No. 76, p. 510 (J. Cooke ed. 1961). At the same time, the need to secure Senate approval provides "an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." *Id.*, at 513. Hamilton further explained that the

> "ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorise the President *singly* to make temporary appointments." *Id.*, No. 67, at 455.

Thus the Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for "the assistance of subordinates," *Myers* v. *United States*, 272 U. S. 52, 117 (1926), and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year, see Art. I, § 4, cl. 2; Amdt. 20, § 2 (requiring the Senate to "assemble" only "once

in every year"); 3 J. Story, Commentaries on the Constitution of the United States § 1551, p. 410 (1833) (hereinafter Story) (it would be "burthensome to the senate, and expensive to the public" to require the Senate to be "perpetually in session"). We seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.

Second, *in interpreting the Clause, we put significant weight upon historical practice.* For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government. Long ago Chief Justice Marshall wrote that

> "a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819).

And we later confirmed that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions" regulating the relationship between Congress and the President. *The Pocket Veto Case*, 279 U. S. 655, 689 (1929); see also *id.*, at 690 ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning'" (quoting *State* v. *South Norwalk*, 77 Conn. 257, 264, 58 A. 759, 761 (1904))).

We recognize, of course, that the separation of powers can serve to safeguard individual liberty, *Clinton* v. *City of New York*, 524 U. S. 417, 449–450 (1998) (KENNEDY, J., concurring), and that it is the "duty of the judicial department"—in a separation-of-powers case as in any other—"to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). But it is equally true that the longstanding "practice of the government," *McCulloch*, *supra*, at 401, can inform our determination of "what the law is," *Marbury*, *supra*, at 177.

That principle is neither new nor controversial. As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them." Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 447, 450 (G. Hunt ed. 1908). And our cases have continually confirmed Madison's view. *E. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 401 (1989); *Dames & Moore* v. *Regan*, 453 U. S. 654, 686 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, *supra*, at 689–690; *Ex parte Grossman*, 267 U. S. 87, 118–119 (1925); *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–474 (1915); *McPherson* v. *Blacker*, 146 U. S. 1, 27 (1892); *McCulloch*, *supra*; *Stuart* v. *Laird*, 1 Cranch 299 (1803).

These precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era. See *Mistretta*, *supra*, at 400–401 ("While these [practices] spawned spirited discussion and frequent criticism, . . . 'traditional ways of conducting government . . . give meaning' to the Constitution" (quoting *Youngstown*, *supra*, at 610 (Frankfurter, J., concurring))); *Regan*, *supra*,

at 684 ("[E]ven if the pre-1952 [practice] should be disregarded, congressional acquiescence in [a practice] since that time supports the President's power to act here"); *The Pocket Veto Case*, *supra*, at 689–690 (postfounding practice is entitled to "great weight"); *Grossman*, *supra*, at 118–119 (postfounding practice "strongly sustains" a "construction" of the Constitution).

There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

III

The first question concerns the scope of the phrase "*the recess* of the Senate." Art. II, § 2, cl. 3 (emphasis added). The Constitution provides for congressional elections every two years. And the 2-year life of each elected Congress typically consists of two formal 1-year sessions, each separated from the next by an "inter-session recess." Congressional Research Service, H. Hogue, Recess Appointments: Frequently Asked Questions 2 (2013). The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will "adjourn *sine die*," *i. e.*, without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin).

The Senate and the House also take breaks in the midst of a session. The Senate or the House announces any such "intra-session recess" by adopting a resolution stating that it will "adjourn" to a fixed date, a few days or weeks or even months later. All agree that the phrase "the recess

of the Senate" covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase "the recess" includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word "recess," much as we do today, simply as "a period of cessation from usual work." 13 Oxford English Dictionary 322–323 (2d ed. 1989) (hereinafter OED) (citing 18th- and 19th-century sources for that definition of "recess"); 2 N. Webster, An American Dictionary of the English Language (1828) ("[r]emission or suspension of business or procedure"); 2 S. Johnson, A Dictionary of the English Language 1602–1603 (4th ed. 1773) (hereinafter Johnson) (same). The Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks. See, *e. g.*, 3 Records of the Federal Convention of 1787, p. 76 (M. Farrand rev. 1966) (hereinafter Farrand) (letter from George Washington to John Jay using "the recess" to refer to an intra-session break of the Constitutional Convention); *id.*, at 191 (speech of Luther Martin with a similar usage); 1 T. Jefferson, A Manual of Parliamentary Practice § LI, p. 165 (2d ed. 1812) (describing a "recess by adjournment" which did *not* end a session).

We recognize that the word "the" in "*the* recess" might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word "the" frequently (but not always) indicates "a particular thing." 2 Johnson 2003. But the word can also refer "to a term used generically or universally." 17 OED 879. The Constitution, for example, directs the Senate to choose a President *pro tempore* "in *the* Absence of the Vice-President." Art. I, § 3, cl. 5 (emphasis added). And the Federalist Papers refer to the chief magistrate of an ancient Achaean league who "administered the government in *the* recess of the Senate." The Federalist No. 18, at 113 (J. Madison) (emphasis added). Reading "the" generically in this

way, there is no linguistic problem applying the Clause's phrase to both kinds of recess. And, in fact, the phrase "the recess" was used to refer to intra-session recesses at the time of the founding. See, *e. g.*, 3 Farrand 76 (letter from Washington to Jay); New Jersey Legislative-Council Journal, 5th Sess., 1st Sitting 70, 2d Sitting 9 (1781) (twice referring to a 4-month, intra-session break as "the Recess"); see also Brief for Petitioner 14–16 (listing examples).

The constitutional text is thus ambiguous. And we believe the Clause's purpose demands the broader interpretation. The Clause gives the President authority to make appointments during "the recess of the Senate" so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

History also offers strong support for the broad interpretation. We concede that pre-Civil War history is not helpful. But it shows only that Congress generally took long breaks between sessions, while taking no significant intra-session breaks at all (five times it took a break of a week or so at Christmas). See Appendix A, *infra*. Obviously, if there are no significant intra-session recesses, there will be no intra-session recess appointments. In 1867 and 1868, Congress for the first time took substantial, nonholiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments. The Federal Court of Claims upheld one of those specific appointments, writing "[w]e have *no doubt* that a vacancy occurring while the Senate was thus temporarily adjourned" during the "first session of the Fortieth Congress" was "legally filled by appointment of the President alone." *Gould* v. *United States*, 19 Ct. Cl. 593, 595–596 (1884) (emphasis added). Attorney General Evarts also issued three opinions concerning the constitutionality of

President Johnson's appointments, and it apparently did not occur to him that the distinction between intra-session and inter-session recesses was significant. See 12 Op. Atty. Gen. 449 (1868); 12 Op. Atty. Gen. 455 (1868); 12 Op. Atty. Gen. 469 (1868). Similarly, though the 40th Congress impeached President Johnson on charges relating to his appointment power, he was not accused of violating the Constitution by making intra-session recess appointments. Hartnett, Recess Appointments of Article III Judges: Three Constitutional Questions, 26 Cardozo L. Rev. 377, 409 (2005).

In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. Appendix A, *infra*. And in each of those years the President made intra-session recess appointments. See App. to Brief for Petitioner 1a–11a.

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments. *Id.*, at 11a–64a. President Franklin Roosevelt, for example, commissioned Dwight Eisenhower as a permanent Major General during an intra-session recess; President Truman made Dean Acheson Under Secretary of State; and President George H. W. Bush reappointed Alan Greenspan as Chairman of the Federal Reserve Board. *Id.*, at 11a, 12a, 40a. JUSTICE SCALIA does not dispute any of these facts.

Not surprisingly, the publicly available opinions of Presidential legal advisers that we have found are nearly unanimous in determining that the Clause authorizes these appointments. In 1921, for example, Attorney General Daugherty advised President Harding that he could make intra-session recess appointments. He reasoned:

> "If the President's power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions. I can not bring myself to believe that the framers of the Constitution ever intended such a catastrophe to happen." 33 Op. Atty. Gen. 20, 23.

We have found memoranda offering similar advice to President Eisenhower and to every President from Carter to the present. See 36 Opinions of Office of Legal Counsel (Op. OLC) ——, —— (2012), online at www.justice.gov/file/18326/download; 25 Op. OLC 182 (2001); 20 Op. OLC 124, 161 (1996); 16 Op. OLC 15 (1992); 13 Op. OLC 271 (1989); 6 Op. OLC 585, 586 (1982); 3 Op. OLC 314, 316 (1979); 41 Op. Atty. Gen. 463, 466 (1960).

We must note one contrary opinion authored by President Theodore Roosevelt's Attorney General Philander Knox. Knox advised the President that the Clause did not cover a 19-day intra-session Christmas recess. 23 Op. Atty. Gen. 599 (1901). But in doing so he relied heavily upon the use of the word "the," a linguistic point that we do not find determinative. See *supra*, at 527–528. And Knox all but confessed that his interpretation ran contrary to the basic purpose of the Clause. For it would permit the Senate to adjourn for "several months," to a fixed date, and thereby "seriously curtail the President's power of making recess appointments." 23 Op. Atty. Gen., at 603. Moreover, only three days before Knox gave his opinion, the Solicitor of the Treasury came to the opposite conclusion. Reply Brief 7, n. 5. We therefore do not think Knox's isolated opinion can disturb the consensus advice within the Executive Branch taking the opposite position.

What about the Senate? Since Presidents began making intra-session recess appointments, individual Senators have taken differing views about the proper definition of "the recess." See, *e. g.*, 130 Cong. Rec. 23234 (1984) (resolution in-

troduced by Senator Byrd urging limits on the *length* of applicable intra-session recesses); Brief for Sen. Mitch McConnell et al. as *Amici Curiae* 26 (an intra-session adjournment does not count as "the recess"); Brief for Sen. Edward M. Kennedy as *Amicus Curiae* in *Franklin* v. *United States*, O. T. 2004, No. 04–5858, p. 5 (same). But neither the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, have done so. Rather, to the extent that the Senate or a Senate committee has expressed a view, that view has favored a functional definition of "recess," and a functional definition encompasses intra-session recesses.

Most notably, in 1905 the Senate Committee on the Judiciary objected strongly to President Theodore Roosevelt's use of the Clause to make more than 160 recess appointments during a "fictitious" inter-session recess. S. Rep. No. 4389, 58th Cong., 3d Sess., 2 (hereinafter 1905 Senate Report). At noon on December 7, 1903, the Senate President *pro tempore* had "declare[d]" a formal, "extraordinary session" of the Senate "adjourned without day," and the next formal Senate session began immediately afterwards. 37 Cong. Rec. 544 (1903). President Roosevelt made over 160 recess appointments during the instantaneous inter-session interval. The Judiciary Committee, when stating its strong objection, defined "recess" in functional terms as

> "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress . . . ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." 1905 Senate Report, at 2 (emphasis deleted).

That functional definition encompasses intra-session, as well as inter-session, recesses. JUSTICE SCALIA is right that

the 1905 Report did not specifically address the distinction between inter-session and intra-session recesses. But the animating principle of the Report—that "recess" should be practically construed to mean a time when the Senate is unavailable to participate in the appointments process—is inconsistent with the formalistic approach that JUSTICE SCALIA endorses.

Similarly, in 1940 the Senate helped to enact a law regulating the payment of recess appointees, and the Comptroller General of the United States has interpreted that law functionally. An earlier 1863 statute had denied pay to individuals appointed to fill up vacancies first arising prior to the beginning of a recess. The Senate Judiciary Committee then believed that those vacancies fell outside the scope of the Clause. See *infra,* at 548–549. In 1940, however, the Senate amended the law to permit many of those recess appointees to be paid. Act of July 11, 54 Stat. 751. Interpreting the amendments in 1948, the Comptroller General—who, unlike the Attorney General, is an "officer of the Legislative Branch," *Bowsher* v. *Synar*, 478 U. S. 714, 731 (1986)—wrote:

> "I think it is clear that [the Pay Act amendments'] primary purpose was to relieve 'recess appointees' of the burden of serving without compensation during periods when the Senate is not actually sitting and is not available to give its advice and consent in respect to the appointment, irrespective of whether the recess of the Senate is attributable to a final adjournment *sine die* or to an adjournment to a specified date." 28 Comp. Gen. 30, 37.

We recognize that the Senate cannot easily register opposition as a body to every governmental action that many, perhaps most, Senators oppose. But the Senate has not been silent or passive regarding the meaning of the Clause: A Senate committee did register opposition to President Theodore Roosevelt's use of the Clause, and the Senate as a

whole has legislated in an effort to discourage certain kinds of recess appointments. And yet we are not aware of any formal action it has taken to call into question the broad and functional definition of "recess" first set out in the 1905 Senate Report and followed by the Executive Branch since at least 1921. Nor has JUSTICE SCALIA identified any. All the while, the President has made countless recess appointments during intra-session recesses.

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President's recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word "recess" to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case*, 279 U. S., at 689.

We are aware of, but we are not persuaded by, three important arguments to the contrary. First, some argue that the Founders would likely have intended the Clause to apply only to inter-session recesses, for they hardly knew any other. See, *e. g.*, Brief for Originalist Scholars as *Amici Curiae* 27–29. Indeed, from the founding until the Civil War inter-session recesses were the only kind of significant recesses that Congress took. The problem with this argument, however, is that it does not fully describe the relevant founding intent. The question is not: Did the Founders at the time think about intra-session recesses? Perhaps they did not. The question is: Did the Founders intend to restrict the scope of the Clause to the form of congressional recess then prevalent, or did they intend a broader scope permitting the Clause to apply, where appropriate, to somewhat changed circumstances? The Founders knew they

were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is "intended to endure for ages to come," and must adapt itself to a future that can only be "seen dimly," if at all. *McCulloch*, 4 Wheat., at 415. We therefore think the Framers likely did intend the Clause to apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause's language.

Second, some argue that the intra-session interpretation permits the President to make "illogic[ally]" long recess appointments. Brief for Respondent Noel Canning 13; *post*, at 577–578 (SCALIA, J., concurring in judgment). A recess appointment made between Congress' annual sessions would permit the appointee to serve for about a year, *i. e.*, until the "end" of the "next" Senate "session." Art. II, § 2, cl. 3. But an intra-session appointment made at the beginning or in the middle of a formal session could permit the appointee to serve for 1½ or almost 2 years (until the end of the following formal session).

We agree that the intra-session interpretation permits somewhat longer recess appointments, but we do not agree that this consequence is "illogical." A President who makes a recess appointment will often also seek to make a regular appointment, nominating the appointee and securing ordinary Senate confirmation. And the Clause ensures that the President and Senate always have at least a full session to go through the nomination and confirmation process. That process may take several months. See O'Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. Cal. L. Rev. 913, 967 (2009) (from 1987 to 2005 the nomination and confirmation process took an average of 236 days for noncabinet agency heads). A recess appointment that lasts somewhat longer than a year will ensure the President the continued assistance of subordinates that the Clause permits him to obtain while he and the Senate select a regular appointee. An appointment should last until the Senate has "an opportu-

nity to act on the subject," 3 Story § 1551, at 410, and the Clause embodies a determination that a full session is needed to select and vet a replacement.

Third, the Court of Appeals believed that application of the Clause to intra-session recesses would introduce "vagueness" into a Clause that was otherwise clear. 705 F. 3d, at 504. One can find problems of uncertainty, however, either way. In 1867, for example, President Andrew Johnson called a special session of Congress, which took place during a lengthy intra-session recess. Consider the period of time that fell just after the conclusion of that special session. Did that period remain an intra-session recess, or did it become an inter-session recess? Historians disagree about the answer. Compare Hartnett, 26 Cardozo L. Rev., at 408–409, with Brief for Constitutional Law Scholars as *Amici Curiae* 23–24.

Or suppose that Congress adjourns *sine die*, but it does so conditionally, so that the leadership can call the members back into session when "the public interest shall warrant it." *E. g.*, 155 Cong. Rec. 33429 (2009); 152 Cong. Rec. 23731–23732 (2006); 150 Cong. Rec. 25925–25926 (2004). If the Senate majority leader were to reconvene the Senate, how would we characterize the preceding recess? Is it still inter-session? On the narrower interpretation the label matters; on the broader it does not.

The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a "recess"? The Clause itself does not say. And JUSTICE SCALIA claims that this silence itself shows that the Framers intended the Clause to apply only to an inter-session recess. *Post*, at 580.

We disagree. For one thing, the most likely reason the Framers did not place a textual floor underneath the word "recess" is that they did not foresee the *need* for one. They might have expected that the Senate would meet for a single

session lasting at most half a year. The Federalist No. 84, at 586 (A. Hamilton). And they might not have anticipated that intra-session recesses would become lengthier and more significant than inter-session ones. The Framers' lack of clairvoyance on that point is not dispositive. Unlike JUSTICE SCALIA, we think it most consistent with our constitutional structure to presume that the Framers would have allowed intra-session recess appointments where there was a long history of such practice.

Moreover, the lack of a textual floor raises a problem that plagues *both* interpretations—JUSTICE SCALIA's and ours. Today a brief inter-session recess is just as possible as a brief intra-session recess. And though JUSTICE SCALIA says that the "notion that the Constitution empowers the President to make unilateral appointments every time the Senate takes a half-hour lunch break is *so absurd as to be self-refuting*," he must immediately concede (in a footnote) that the President "can make recess appointments during any break *between* sessions, *no matter how short*." *Post*, at 578, 583, n. 4 (emphasis added).

Even the Solicitor General, arguing for a broader interpretation, acknowledges that there is a lower limit applicable to both kinds of recess. He argues that the lower limit should be three days by analogy to the Adjournments Clause of the Constitution. Tr. of Oral Arg. 11. That Clause says: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Art. I, § 5, cl. 4.

We agree with the Solicitor General that a 3-day recess would be too short. (Under Senate practice, "Sunday is generally not considered a day," and so is not counted for purposes of the Adjournments Clause. S. Doc. No. 101–28, F. Riddick & A. Frumin, Riddick's Senate Procedure: Precedents and Practices 1265 (hereinafter Riddick's).) The Adjournments Clause reflects the fact that a 3-day break is not a significant interruption of legislative business. As the So-

licitor General says, it is constitutionally *de minimis*. Brief for Petitioner 18. A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power.

That is not to say that the President may make recess appointments during any recess that is "more than three days." Art. I, § 5, cl. 4. The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. Nor has the Solicitor General. Reply Brief 23. Indeed, the Office of Legal Counsel once informally advised against making a recess appointment during a 6-day intra-session recess. 3 Op. OLC, at 315–316. The lack of examples suggests that the recess-appointment power is not needed in that context. (The length of a recess is "'ordinarily calculated by counting the calendar days running from the day after the recess begins and including the day the recess ends.'" 36 Op. OLC, at ——, n. 1.)

There are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days. We have already discussed President Theodore Roosevelt's appointments during the instantaneous, "fictitious" recess. President Truman also made a recess appointment to the Civil Aeronautics Board during a 3-day inter-session recess. Hogue, Recess Appointments: Frequently Asked Questions, at 5–6. President Taft made a few appointments during a 9-day recess following his inauguration, and President Lyndon Johnson made several appointments during an 8-day recess several weeks after assuming office. Hogue, *The Law*: Recess Appointments to Article III Courts, 34 Presidential Studies Q. 656, 671 (2004); 106 S. Exec. J. 2 (1964); 40 S. Exec. J. 12 (1909). There may be others of

which we are unaware. But when considered against 200 years of settled practice, we regard these few scattered examples as anomalies. We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word "presumptively" to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break. (It should go without saying—except that JUSTICE SCALIA compels us to say it—that political opposition in the Senate would not qualify as an unusual circumstance.)

In sum, we conclude that the phrase "the recess" applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, § 5, cl. 4. And a recess lasting less than 10 days is presumptively too short as well.

IV

The second question concerns the scope of the phrase "vacancies *that may happen* during the recess of the Senate." Art. II, § 2, cl. 3 (emphasis added). All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

We believe that the Clause's language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural meaning of "happens" as applied to a "vacancy" (at least to a modern ear) is that the vacancy "happens" when it initially occurs. See 1 Johnson 913 (defining "happen" in relevant part as meaning "[t]o fall out; to chance; to come to pass"). But that is not the only possible way to use the word.

Thomas Jefferson wrote that the Clause is "certainly susceptible of [two] constructions." Letter to Wilson Cary Nicholas (Jan. 26, 1802), in 36 Papers of Thomas Jefferson 433 (B. Oberg ed. 2009). It "may mean 'vacancies that may happen to be' or 'may happen to fall'" during a recess. *Ibid.* Jefferson used the phrase in the first sense when he wrote to a job seeker that a particular position was unavailable, but that he (Jefferson) was "happy that *another vacancy happens* wherein I can . . . avail the public of your integrity & talents," for "the office of Treasurer of the US. *is vacant* by the resignation of mr Meredith." Letter to Thomas Tudor Tucker (Oct. 31, 1801), in 35 *id.*, at 530 (B. Oberg ed. 2008) (emphasis added). See also Laws Passed by the Legislature of Florida, No. 31, An Act to Organize and Regulate the Militia of the Territory of Florida § 13, H. R. Exec. Doc. No. 72, 27th Cong., 3d Sess., 22 (1842) ("[W]hen any vacancy shall take place in the office of any lieutenant colonel, it shall be the duty of the colonel of the regiment in which such vacancy may happen to order an election to be held at the several precincts in the battalion in which such vacancy *may happen*" (emphasis added)).

Similarly, when Attorney General William Wirt advised President Monroe to follow the broader interpretation, he wrote that the "expression seems not perfectly clear. It may mean 'happen to take place:' that is, '*to originate*,'" or it "may mean, also, without violence to the sense, 'happen to exist.'" 1 Op. Atty. Gen. 631, 631–632 (1823). The broader interpretation, he added, is "most accordant with" the Constitution's "reason and spirit." *Id.*, at 632.

We can still understand this earlier use of "happen" if we think of it used together with another word that, like "vacancy," can refer to a continuing state, say, a financial crisis. A statute that gives the President authority to act in respect to "any financial crisis that may happen during his term" can easily be interpreted to include crises that arise before, and continue during, that term. Perhaps that

is why the Oxford English Dictionary defines "happen" in part as "chance *to be*," rather than "chance to occur." 6 OED 1096 (emphasis added); see also 19 *id.*, at 383 (defining "vacancy" as the "condition of an office or post being . . . vacant").

In any event, the linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. *The Pocket Veto Case*, 279 U. S., at 690. And the broader reading, we believe, is at least a permissible reading of a "'doubtful'" phrase. *Ibid.* We consequently go on to consider the Clause's purpose and historical practice.

The Clause's purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them. Attorney General Wirt clearly described how the narrower interpretation would undermine this purpose:

> "Put the case of a vacancy occurring in an office, held in a distant part of the country, on the last day of the Senate's session. Before the vacancy is made known to the President, the Senate rises. The office may be an important one; the vacancy may paralyze a whole line of action in some essential branch of our internal police; the public interests may imperiously demand that it shall be immediately filled. But the vacancy happened to occur during the session of the Senate; and if the President's power is to be limited to such vacancies only as happen to occur during the recess of the Senate, the vacancy in the case put must continue, however ruinous the consequences may be to the public." 1 Op. Atty. Gen., at 632.

Examples are not difficult to imagine: An ambassadorial post falls vacant too soon before the recess begins for the President to appoint a replacement; the Senate rejects a Presi-

dent's nominee just before a recess, too late to select another. Wirt explained that the "substantial purpose of the constitution was to keep these offices filled," and "if the President shall not have the power to fill a vacancy thus circumstanced, . . . the substance of the constitution will be sacrificed to a dubious construction of its letter." *Ibid.* Thus the broader construction, encompassing vacancies that initially occur before the beginning of a recess, is the "only construction of the constitution which is compatible with its spirit, reason, and purposes; while, at the same time, it offers no violence to its language." *Id.*, at 633.

We do not agree with JUSTICE SCALIA's suggestion that the Framers would have accepted the catastrophe envisioned by Wirt because Congress can always provide for acting officers, see 5 U. S. C. § 3345, and the President can always convene a special session of Congress, see U. S. Const., Art. II, § 3. Acting officers may have less authority than Presidential appointments. 6 Op. OLC 119, 121 (1982). Moreover, to rely on acting officers would lessen the President's ability to staff the Executive Branch with people of his own choosing, and thereby limit the President's control and political accountability. Cf. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 497–498 (2010). Special sessions are burdensome (and would have been especially so at the time of the founding). The point of the Recess Appointments Clause was to *avoid* reliance on these inadequate expedients.

At the same time, we recognize one important purpose-related consideration that argues in the opposite direction. A broad interpretation might permit a President to avoid Senate confirmations as a matter of course. If the Clause gives the President the power to "fill up all vacancies" that occur before, and continue to exist during, the Senate's recess, a President might not submit any nominations to the Senate. He might simply wait for a recess and then provide all potential nominees with recess appointments. He might

thereby routinely avoid the constitutional need to obtain the Senate's "advice and consent."

Wirt thought considerations of character and politics would prevent Presidents from abusing the Clause in this way. 1 Op. Atty. Gen., at 634. He might have added that such temptations should not often arise. It is often less desirable for a President to make a recess appointment. A recess appointee only serves a limited term. That, combined with the lack of Senate approval, may diminish the recess appointee's ability, as a practical matter, to get a controversial job done. And even where the President and Senate are at odds over politically sensitive appointments, compromise is normally possible. Indeed, the 1940 Pay Act amendments represent a general compromise, for they foresee payment of salaries to recess appointees where vacancies occur *before* the recess began but not *too long* before (namely, within 30 days before). 5 U. S. C. § 5503(a)(1); see *infra*, at 549. Moreover, the Senate, like the President, has institutional "resources," including political resources, "available to protect and assert its interests." *Goldwater* v. *Carter*, 444 U. S. 996, 1004 (1979) (Rehnquist, J., concurring in judgment to grant certiorari, vacate judgment, and remand). In an unusual instance, where a matter is important enough to the Senate, that body can remain in session, preventing recess appointments by refusing to take a recess. See Part V, *infra*. In any event, the Executive Branch has adhered to the broader interpretation for two centuries, and Senate confirmation has always remained the norm for officers that require it.

While we concede that both interpretations carry with them some risk of undesirable consequences, we believe the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the

appointment, and no matter how late in the session the office fell vacant. Overall, like Attorney General Wirt, we believe the broader interpretation more consistent with the Constitution's "reason and spirit." 1 Op. Atty. Gen., at 632.

Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison. There is no undisputed record of Presidents George Washington, John Adams, or Thomas Jefferson making such an appointment, though the Solicitor General believes he has found records showing that Presidents Washington and Jefferson did so. We know that Edmund Randolph, Washington's Attorney General, favored a narrow reading of the Clause. Randolph believed that the "Spirit of the Constitution favors the participation of the Senate in all appointments," though he did not address—let alone answer—the powerful purposive and structural arguments subsequently made by Attorney General Wirt. See Edmund Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 Papers of Thomas Jefferson 165, 166 (J. Catanzariti ed. 1990).

President Adams seemed to endorse the broader view of the Clause in writing, though we are not aware of any appointments he made in keeping with that view. See Letter to J. McHenry (Apr. 16, 1799), in 8 Works of John Adams 632–633 (C. Adams ed. 1853). His Attorney General, Charles Lee, later informed Jefferson that, in the Adams administration, "whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of enquiring for a proper character, they let it lie always till recess." 36 Papers of Thomas Jefferson 433. We know that President Jefferson thought that the broad interpretation was linguistically supportable, though his actual practice is not clear. But the evidence suggests that James Madison—as familiar as anyone with the workings of the Constitutional Convention—appointed Theodore Gaillard to replace a dis-

trict judge who had left office before a recess began. Hartnett, 26 Cardozo L. Rev., at 400–401. It also appears that in 1815 Madison signed a bill that created two new offices prior to a recess which he then filled later during the recess. See Act of Mar. 3, ch. 95, 3 Stat. 235; S. J. 13th Cong., 3d Sess., 689–690 (1815); 3 S. Exec. J. 19 (1828) (for Monday, Jan. 8, 1816). He also made recess appointments to "territorial" United States attorney and marshal positions, both of which had been created when the Senate was in session more than two years before. Act of Feb. 27, 1813, ch. 35, 2 Stat. 806; 3 S. Exec. J. 19. JUSTICE SCALIA refers to "written evidence of Madison's own beliefs," *post,* at 604, but in fact we have no direct evidence of what President Madison believed. We only know that he declined to make one appointment to a pre-recess vacancy after his Secretary of War advised him that he lacked the power. On the other hand, he *did* apparently make at least five other appointments to pre-recess vacancies, as JUSTICE SCALIA does not dispute.

The next President, James Monroe, received and presumably acted upon Attorney General Wirt's advice, namely, that "all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President." 1 Op. Atty. Gen., at 633. Nearly every subsequent Attorney General to consider the question throughout the Nation's history has thought the same. *E. g.,* 2 Op. Atty. Gen. 525, 528 (1832); 7 Op. Atty. Gen. 186, 223 (1855); 10 Op. Atty. Gen. 356, 356–357 (1862); 12 Op. Atty. Gen. 32, 33 (1866); 12 Op. Atty. Gen., at 452; 14 Op. Atty. Gen. 562, 564 (1875); 15 Op. Atty. Gen. 207 (1877); 16 Op. Atty. Gen. 522, 524 (1880); 17 Op. Atty. Gen. 521 (1883); 18 Op. Atty. Gen. 29, 29–30 (1884); 19 Op. Atty. Gen. 261, 262 (1889); 26 Op. Atty. Gen. 234, 235–236 (1907); 30 Op. Atty. Gen. 314, 315 (1914); 41 Op. Atty. Gen., at 465; 3 Op. OLC 314; 6 Op. OLC, at 586; 20 Op. OLC, at 161; 36 Op. OLC ——. Indeed, as early as 1862, Attorney

General Bates advised President Lincoln that his power to fill pre-recess vacancies was "settled . . . as far . . . as a constitutional question can be settled," 10 Op. Atty. Gen., at 356, and a century later Acting Attorney General Walsh gave President Eisenhower the same advice "without any doubt," 41 Op. Atty. Gen., at 466.

This power is important. The Congressional Research Service is "unaware of any official source of information tracking the dates of vacancies in federal offices." The *Noel Canning* Decision 3, n. 6. Nonetheless, we have enough information to believe that the Presidents since Madison have made many recess appointments filling vacancies that initially occurred prior to a recess. As we have just said, nearly every 19th- and 20th-century Attorney General expressing a view on the matter has agreed with William Wirt, and Presidents tend to follow the legal advice of their chief legal officers. Moreover, the Solicitor General has compiled a list of 102 (mostly uncontested) recess appointments made by Presidents going back to the founding. App. to Brief for Petitioner 65a–89a. Given the difficulty of finding accurate information about vacancy dates, that list is undoubtedly far smaller than the actual number. No one disputes that every President since James Buchanan has made recess appointments to pre-existing vacancies.

Common sense also suggests that many recess appointees filled vacancies that arose before the recess began. We have compared the list of *intra*-session recess appointments in the Solicitor General's brief with the chart of congressional recesses. Where a specific date of appointment can be ascertained, more than half of those intra-session appointments were made within two weeks of the beginning of a recess. That short window strongly suggests that many of the vacancies initially arose prior to the recess. See App. to Brief for Petitioner 1a–64a; Appendix A, *infra*. Thus, it is not surprising that the Congressional Research Service, after examining the vacancy dates associated with a random sam-

ple of 24 inter-session recess appointments since 1981, concluded that "[i]n most of the 24 cases, the preponderance of evidence indicated that the vacancy arose prior to the recess during which the appointment was made." The *Noel Canning* Decision 3. Further, with research assistance from the Supreme Court Library, we have examined a random sample of the recess appointments made by our two most recent Presidents, and have found that almost all of those appointments filled pre-recess vacancies: Of a sample of 21 recess appointments, 18 filled pre-recess vacancies and only 1 filled a vacancy that arose during the recess in which he was appointed. The precise date on which two of the vacancies arose could not be determined. See Appendix B, *infra*. Taken together, we think it is a fair inference that a large proportion of the recess appointments in the history of the Nation have filled pre-existing vacancies.

Did the Senate object? Early on, there was some sporadic disagreement with the broad interpretation. In 1814 Senator Gore said that if "the vacancy happen at another time, it is not the case described by the Constitution." 26 Annals of Cong. 653. In 1822 a Senate committee, while focusing on the President's power to fill a new vacancy created by statute, used language to the same effect. 38 *id.*, at 489, 500. And early Congresses enacted statutes authorizing certain recess appointments, see *post*, at 598, a fact that may or may not suggest they accepted the narrower interpretation of the Clause. Most of those statutes—including the one passed by the First Congress—authorized appointments to newly created offices, and may have been addressed to the separate question of whether new offices are vacancies within the meaning of the Clause. See Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 Papers of Alexander Hamilton 94 (H. Syrett ed. 1976) ("*Vacancy* is a relative term, and presupposes that the Office has been once filled"); Reply Brief 17. In any event, by 1862 Attorney General Bates could still refer to "the unbroken acquies-

cence of the Senate" in support of the broad interpretation. 10 Op. Atty. Gen., at 356.

Then in 1863 the Senate Judiciary Committee disagreed with the broad interpretation. It issued a report concluding that a vacancy "must have its inceptive point after one session has closed and before another session has begun." S. Rep. No. 80, 37th Cong., 3d Sess., 3. And the Senate then passed the Pay Act, which provided that "no money shall be paid . . . as a salary, to any person appointed during the recess of the Senate, to fill a vacancy . . . which . . . existed while the Senate was in session." Act of Feb. 9, 1863, § 2, 12 Stat. 646. Relying upon the floor statement of a single Senator, JUSTICE SCALIA suggests that the passage of the Pay Act indicates that the Senate as a whole endorsed the position in the 1863 Report. But the circumstances are more equivocal. During the floor debate on the bill, not a single Senator referred to the Report. Cong. Globe, 37th Cong., 3d Sess., 564–565 (1863). Indeed, Senator Trumbull, who introduced the Pay Act, acknowledged that there was disagreement about the underlying constitutional question. *Id.*, at 565 ("[S]ome other persons think he has that power"). Further, if a majority of the Senate had believed appointments to pre-recess vacancies were unconstitutional, it could have attempted to do far more than temporarily dock the appointees' pay. Cf. Tenure of Office Act of 1867, § 5, 14 Stat. 431 (making it a federal crime for "any person" to "accept any appointment" in certain circumstances).

In any event, the Senate subsequently abandoned its hostility. In the debate preceding the 1905 Senate Report regarding President Roosevelt's "constructive" recess appointments, Senator Tillman—who chaired the Committee that authored the 1905 Report—brought up the 1863 Report, and another Senator responded: "Whatever that report may have said in 1863, I do not think that has been the view the Senate has taken" of the issue. 38 Cong. Rec. 1606 (1904) (Sen. Platt). Senator Tillman then agreed that "the Senate

has acquiesced" in the President's "power to fill" pre-recess vacancies. *Ibid.* And Senator Tillman's 1905 Report described the Clause's purpose in terms closely echoing Attorney General Wirt. 1905 Senate Report, at 2 ("Its sole purpose was to render it *certain* that at all times there should be, whether the Senate was in session or not, an officer for every office" (emphasis added)).

In 1916 the Senate debated whether to pay a recess appointee who had filled a pre-recess vacancy and had not subsequently been confirmed. Both Senators to address the question—one on each side of the payment debate—agreed that the President had the constitutional power to make the appointment, and the Senate voted to pay the appointee for his service. 53 Cong. Rec. 4291–4299; 39 Stat. 818–819. In 1927 the Comptroller General, a legislative officer, wrote that "there is *no question* but that the President has authority to make a recess appointment to fill *any* vacancy," including those that "existed while the Senate was in session." 7 Comp. Gen. 10, 11 (emphasis added). Meanwhile, Presidents continued to make appointments to pre-recess vacancies. The Solicitor General has identified 40 between 1863 and 1940, but that number is clearly not comprehensive. See, *e. g.*, 32 Op. Atty. Gen. 271, 271–272 (1920) (listing five appointments that are not in the Solicitor General's appendix); Recess Appointments, Washington Post, July 7, 1880, p. 1 (noting that President Hayes had made "quite a number of appointments" to pre-recess vacancies).

Then in 1940 Congress amended the Pay Act to authorize salary payments (with some exceptions) where (1) the "vacancy arose within thirty days prior to the termination of the session," (2) "at the termination of the session" a nomination was "pending," or (3) a nominee was "rejected by the Senate within thirty days prior to the termination of the session." Act of July 11, 54 Stat. 751 (codified, as amended, at 5 U. S. C. § 5503). All three circumstances concern a vacancy that did not initially occur during a recess but hap-

pened to exist during that recess. By paying salaries to this kind of recess appointee, the 1940 Senate (and later Senates) in effect supported the President's interpretation of the Clause.

The upshot is that the President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. See A. Amar, America's Unwritten Constitution 576–577, n. 16 (2012) (for nearly 200 years "the overwhelming mass of actual practice" supports the President's interpretation); *Mistretta*, 488 U. S., at 401 (a "200-year tradition" can "'give meaning' to the Constitution" (quoting *Youngstown*, 343 U. S., at 610 (Frankfurter, J., concurring))). The tradition is long enough to entitle the practice "to great regard in determining the true construction" of the constitutional provision. *The Pocket Veto Case*, 279 U. S., at 690. And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.

In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase "all vacancies" includes vacancies that come into existence while the Senate is in session.

V

The third question concerns the calculation of the length of the Senate's "recess." On December 17, 2011, the Senate by unanimous consent adopted a resolution to convene "*pro forma* session[s]" only, with "no business . . . transacted," on every Tuesday and Friday from December 20, 2011, through January 20, 2012. 2011 S. J. 923. At the end of each *pro forma* session, the Senate would "adjourn until" the following *pro forma* session. *Ibid.* During that period,

the Senate convened and adjourned as agreed. It held *pro forma* sessions on December 20, 23, 27, and 30, and on January 3, 6, 10, 13, 17, and 20; and at the end of each *pro forma* session, it adjourned until the time and date of the next. *Id.*, at 923–924; 158 Cong. Rec. 1, 3, 9, 16, 26, 133.

The President made the recess appointments before us on January 4, 2012, in between the January 3 and the January 6 *pro forma* sessions. We must determine the significance of these sessions—that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess. If the former, the period between January 3 and January 6 was a 3-day recess, which is too short to trigger the President's recess-appointment power, see *supra*, at 536–538. If the latter, however, then the 3-day period was part of a much longer recess during which the President did have the power to make recess appointments, see *ibid.*

The Solicitor General argues that we must treat the *pro forma* sessions as periods of recess. He says that these "sessions" were sessions in name only because the Senate was in recess as a *functional* matter. The Senate, he contends, remained in a single, unbroken recess from January 3, when the second session of the 112th Congress began by operation of the Twentieth Amendment, until January 23, when the Senate reconvened to do regular business.

In our view, however, the *pro forma* sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

The standard we apply is consistent with the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers the Senate to "determine the Rules of its Proceedings." Art. I, § 5, cl. 2. And we have

held that "all matters of method are open to the determination" of the Senate, as long as there is "a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained" and the rule does not "ignore constitutional restraints or violate fundamental rights." *United States* v. *Ballin*, 144 U. S. 1, 5 (1892).

In addition, the Constitution provides the Senate with extensive control over its schedule. There are only limited exceptions. See Amdt. 20, § 2 (Congress must meet once a year on January 3, unless it specifies another day by law); Art. II, § 3 (Senate must meet if the President calls it into special session); Art. I, § 5, cl. 4 (neither House may adjourn for more than three days without consent of the other). See also Art. II, § 3 ("[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper"). The Constitution thus gives the Senate wide latitude to determine whether and when to have a session, as well as how to conduct the session. This suggests that the Senate's determination about what constitutes a session should merit great respect.

Furthermore, this Court's precedents reflect the breadth of the power constitutionally delegated to the Senate. We generally take at face value the Senate's own report of its actions. When, for example, "the presiding officers" of the House and Senate sign an enrolled bill (and the President "approve[s]" it), "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 672 (1892). By the same principle, when the Journal of the Senate indicates that a quorum was present, under a valid Senate rule, at the time the Senate passed a bill, we will not consider an argument that a quorum was not, in fact, present. *Ballin*, *supra*, at 9. The Constitution requires the Senate to keep its Journal, Art. I, § 5, cl. 3 ("Each House shall keep a Journal

of its proceedings . . . "), and "if reference may be had to" it, "it must be assumed to speak the truth," *Ballin*, *supra*, at 4.

For these reasons, we conclude that we must give great weight to the Senate's own determination of when it is and when it is not in session. But our deference to the Senate cannot be absolute. When the Senate is without the *capacity* to act, under its own rules, it is not in session even if it so declares. See Tr. of Oral Arg. 69 (acknowledgment by counsel for *amici* Senators that if the Senate had left the Capitol and "effectively given up . . . the business of legislating" then it might be in recess, even if it said it was not). In that circumstance, the Senate is not simply unlikely or unwilling to act upon nominations of the President. It is *unable* to do so. The purpose of the Clause is to ensure the continued functioning of the Federal Government while the Senate is unavailable. See *supra*, at 522–524. This purpose would count for little were we to treat the Senate as though it were in session even when it lacks the ability to provide its "Advice and Consent." Art. II, § 2, cl. 2. Accordingly, we conclude that when the Senate declares that it is in session and possesses the capacity, under its own rules, to conduct business, it is in session for purposes of the Clause.

Applying this standard, we find that the *pro forma* sessions were sessions for purposes of the Clause. First, the Senate said it was in session. The Journal of the Senate and the Congressional Record indicate that the Senate convened for a series of twice-weekly "sessions" from December 20 through January 20. 2011 S. J. 923–924; 158 Cong. Rec. 1, 3, 9, 16, 26, 133. (The Journal of the Senate for 2012 has not yet been published.) And these reports of the Senate "must be assumed to speak the truth." *Ballin*, *supra*, at 4.

Second, the Senate's rules make clear that during its *pro forma* sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business. During any *pro forma* session, the Senate could have conducted business simply by passing a unanimous consent

agreement. See Riddick's 1313. The Senate in fact conducts much of its business through unanimous consent. *Id.*, at 1311–1312. Senate rules presume that a quorum is present unless a present Senator questions it. *Id.*, at 1041–1042. And when the Senate has a quorum, an agreement is unanimously passed if, upon its proposal, no present Senator objects. *Id.*, at 1329–1330. It is consequently unsurprising that the Senate *has* enacted legislation during *pro forma* sessions even when it has said that no business will be transacted. Indeed, the Senate passed a bill by unanimous consent during the second *pro forma* session after its December 17 adjournment. 2011 S. J. 924. And that bill quickly became law. Pub. L. 112–78, 125 Stat. 1280.

By way of contrast, we do not see how the Senate could conduct business during a recess. It could terminate the recess and then, when in session, pass a bill. But in that case, of course, the Senate would no longer be in recess. It would be in session. And that is the crucial point. Senate rules make clear that, once in session, the Senate can act even if it has earlier said that it would not.

The Solicitor General argues that more is required. He contends that what counts is not the Senate's *capacity* to conduct business but what the Senate actually does (or here, *did*) during its *pro forma* sessions. And he looks for support to the functional definition of "recess" set forth in the 1905 Report discussed above. See *supra*, at 531–532. That Report describes a "recess" of the Senate as

> "the period of time . . . when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." 1905 Senate Report, at 2.

Even were we, for argument's sake, to accept all of these criteria as authoritative, they would here be met. Taking the last criterion first, could the Senate, during its *pro forma*

sessions, "participate as a body in making appointments"? It could. It could confirm nominees by unanimous consent, just as it passed the bill mentioned above. See Riddick's 1313.

Could the Senate "receive communications from the President"? It could. The Congressional Record indicates that the Senate "received" a message from the President on January 12, during a 3-day adjournment between two *pro forma* sessions. See 158 Cong. Rec. 159. If the Senate could receive Presidential messages between two *pro forma* sessions, it could receive them during a *pro forma* session.

Was the Senate's Chamber "empty"? It was not. By its official rules, the Senate operates under the presumption that a quorum is present until a present Senator suggests the absence of a quorum, Riddick's 1041–1042, and nothing in the Journal of the Senate or the Congressional Record reflects any such suggestion.

Did Senators "owe [a] duty of attendance"? They did. The Senate's rules dictate that Senators are under a duty to attend every session. See *id.*, at 214; Standing Rule of the Senate VI(2), S. Doc. No. 112–1, p. 5 (2011) ("No Senator shall absent himself from the service of the Senate without leave"). Nothing excused the Senators from this duty during the Senate's *pro forma* sessions. If any present Senator had raised a question as to the presence of a quorum, and by roll call it had become clear that a quorum was missing, the Senators in attendance could have directed the Sergeant at Arms to bring in the missing Senators. Rule VI(4).

The Solicitor General asks us to engage in a more realistic appraisal of what the Senate actually did. He argues that, during the relevant *pro forma* sessions, business was not in fact conducted; messages from the President could not be received in any meaningful way because they could not be placed before the Senate; the Senate Chamber was, according to C–SPAN coverage, almost empty; and in practice attendance was not required. See Brief for Petitioner 48–49, 54–55.

We do not believe, however, that engaging in the kind of factual appraisal that the Solicitor General suggests is either legally or practically appropriate. From a legal perspective, this approach would run contrary to precedent instructing us to "respect . . . coequal and independent departments" by, for example, taking the Senate's report of its official action at its word. *Marshall Field*, 143 U. S., at 672; see *Ballin*, 144 U. S., at 4. From a practical perspective, judges cannot easily determine such matters as who is, and who is not, in fact present on the floor during a particular Senate session. Judicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.

Finally, the Solicitor General warns that our holding may "'disrup[t] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.'" Brief for Petitioner 64 (quoting *Morrison* v. *Olson*, 487 U. S. 654, 695 (1988); alteration in original). We do not see, however, how our holding could significantly alter the constitutional balance. Most appointments are not controversial and do not produce friction between the branches. Where political controversy is serious, the Senate unquestionably has other methods of preventing recess appointments. As the Solicitor General concedes, the Senate could preclude the President from making recess appointments by holding a series of twice-a-week *ordinary* (not *pro forma*) sessions. And the nature of the business conducted at those ordinary sessions—whether, for example, Senators must vote on nominations, or may return to their home States to meet with their constituents—is a matter for the Senate to decide. The Constitution also gives the President (if he has enough allies in Congress) a way to force a recess. Art. II, § 3 ("[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper"). Moreover, the Presi-

dent and Senators engage with each other in many different ways and have a variety of methods of encouraging each other to accept their points of view.

Regardless, the Recess Appointments Clause is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess. Here, as in other contexts, friction between the branches is an inevitable consequence of our constitutional structure. See *Myers*, 272 U. S., at 293 (Brandeis, J., dissenting). That structure foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box.

VI

The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause's text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill prerecess vacancies. But the broader reading better serves the Clause's structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length.

JUSTICE SCALIA would render illegitimate thousands of recess appointments reaching all the way back to the founding era. More than that: Calling the Clause an "anachronism," he would basically read it out of the Constitution. *Post*, at 579. He performs this act of judicial excision in the name of liberty. We fail to see how excising the Recess Appointments Clause preserves freedom. In fact, Alexander Hamil-

ton observed in the very first Federalist Paper that "the vigour of government is essential to the security of liberty." The Federalist No. 1, at 5. And the Framers included the Recess Appointments Clause to preserve the "vigour of government" at times when an important organ of Government, the United States Senate, is in recess. JUSTICE SCALIA's interpretation of the Clause would defeat the power of the Clause to achieve that objective.

The foregoing discussion should refute JUSTICE SCALIA's claim that we have "embrace[d]" an "adverse-possession theory of executive power." *Post*, at 615. Instead, as in all cases, we interpret the Constitution in light of its text, purposes, and "our whole experience" as a Nation. *Missouri* v. *Holland*, 252 U. S. 416, 433 (1920). And we look to the actual practice of Government to inform our interpretation.

Given our answer to the last question before us, we conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue. Because the Court of Appeals reached the same ultimate conclusion (though for reasons we reject), its judgment is affirmed.

It is so ordered.

APPENDIXES

A

The following table contains the dates of all the intrasession and inter-session recesses that Congress has taken since the founding. The information (including the endnotes) is taken from 2011–2012 Official Congressional Directory, 112th Cong., 522–539.

SESSIONS OF CONGRESS, 1st–112th CONGRESSES, 1789–2011

Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
1st	1	Mar. 4, 1789	Sept. 29, 1789	210		
	2	Jan. 4, 1790	Aug. 12, 1790	221		
	3	Dec. 6, 1790	Mar. 3, 1791	88		

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
2d	S	Mar. 4, 1791	Mar. 4, 1791	1		
	1	Oct. 24, 1791	May 8, 1792	197		
	2	Nov. 5, 1792	Mar. 2, 1793	119		
3d	S	Mar. 4, 1793	Mar. 4, 1793	1		
	1	Dec. 2, 1793	June 9, 1794	190		
	2	Nov. 3, 1794	Mar. 3, 1795	121		
4th	S	June 8, 1795	June 26, 1795	19		
	1	Dec. 7, 1795	June 1, 1796	177		
	2	Dec. 5, 1796	Mar. 3, 1797	89		
5th	S	Mar. 4, 1797	Mar. 4, 1797	1		
	1–E	May 15, 1797	July 10, 1797	57		
	S	July 17, 1798	July 19, 1798	3		
	2	Nov. 13, 1797	July 16, 1798	246		
	3	Dec. 3, 1798	Mar. 3, 1799	91		
6th	1	Dec. 2, 1799	May 14, 1800	164		
	2	Nov. 17, 1800	Mar. 3, 1801	107	Dec. 23–Dec. 30, 1800	Dec. 23–Dec. 30, 1800
7th	S	Mar. 4, 1801	Mar. 5, 1801	2		
	1	Dec. 7, 1801	May 3, 1802	148		
	2	Dec. 6, 1802	Mar. 3, 1803	88		
8th	1–E	Oct. 17, 1803	Mar. 27, 1804	163		
	2	Nov. 5, 1804	Mar. 3, 1805	119		
9th	1	Dec. 2, 1805	Apr. 21, 1806	141		
	2	Dec. 1, 1806	Mar. 3, 1807	93		
10th	1–E	Oct. 26, 1807	Apr. 25, 1808	182		
	2	Nov. 7, 1808	Mar. 3, 1809	117		
11th	S	Mar. 4, 1809	Mar. 7, 1809	4		
	1	May 22, 1809	June 28, 1809	38		
	2	Nov. 27, 1809	May 1, 1810	156		
	3	Dec. 3, 1810	Mar. 3, 1811	91		
12th	1–E	Nov. 4, 1811	July 6, 1812	245		
	2	Nov. 2, 1812	Mar. 3, 1813	122		
13th	1	May 24, 1813	Aug. 2, 1813	71		
	2	Dec. 6, 1813	Apr. 18, 1814	134		
	3–E	Sept. 19, 1814	Mar. 3, 1815	166		
14th	1	Dec. 4, 1815	Apr. 30, 1816	148		
	2	Dec. 2, 1816	Mar. 3, 1817	92		
15th	S	Mar. 4, 1817	Mar. 6, 1817	3		
	1	Dec. 1, 1817	Apr. 20, 1818	141	Dec. 24–Dec. 29, 1817	Dec. 24–Dec. 29, 1817
	2	Nov. 16, 1818	Mar. 3, 1819	108		
16th	1	Dec. 6, 1819	May 15, 1820	162		
	2	Nov. 13, 1820	Mar. 3, 1821	111		
17th	1	Dec. 3, 1821	May 8, 1822	157		
	2	Dec. 2, 1822	Mar. 3, 1823	92		
18th	1	Dec. 1, 1823	May 27, 1824	178		
	2	Dec. 6, 1824	Mar. 3, 1825	88		
19th	S	Mar. 4, 1825	Mar. 9, 1825	6		
	1	Dec. 5, 1825	May 22, 1826	169		
	2	Dec. 4, 1826	Mar. 3, 1827	90		
20th	1	Dec. 3, 1827	May 26, 1828	175		
	2	Dec. 1, 1828	Mar. 3, 1829	93	Dec. 24–Dec. 29, 1828	Dec. 24–Dec. 29, 1828
21st	S	Mar. 4, 1829	Mar. 17, 1829	14		
	1	Dec. 7, 1829	May 31, 1830	176		
	2	Dec. 6, 1830	Mar. 3, 1831	88		
22d	1	Dec. 5, 1831	July 16, 1832	225		
	2	Dec. 3, 1832	Mar. 2, 1833	91		
23d	1	Dec. 2, 1833	June 30, 1834	211		
	2	Dec. 1, 1834	Mar. 3, 1835	93		
24th	1	Dec. 7, 1835	July 4, 1836	211		
	2	Dec. 5, 1836	Mar. 3, 1837	89		
25th	S	Mar. 4, 1837	Mar. 10, 1837	7		
	1–E	Sept. 4, 1837	Oct. 16, 1837	43		
	2	Dec. 4, 1837	July 9, 1838	218		
	3	Dec. 3, 1838	Mar. 3, 1839	91		
26th	1	Dec. 2, 1839	July 21, 1840	233		
	2	Dec. 7, 1840	Mar. 3, 1841	87		
27th	S	Mar. 4, 1841	Mar. 15, 1841	12		
	1–E	May 31, 1841	Sept. 13, 1841	106		
	2	Dec. 6, 1841	Aug. 31, 1842	269		
	3	Dec. 5, 1842	Mar. 3, 1843	89		
28th	1	Dec. 4, 1843	June 17, 1844	196		
	2	Dec. 2, 1844	Mar. 3, 1845	92		
29th	S	Mar. 4, 1845	Mar. 20, 1845	17		
	1	Dec. 1, 1845	Aug. 10, 1846	253		
	2	Dec. 7, 1846	Mar. 3, 1847	87		
30th	1	Dec. 6, 1847	Aug. 14, 1848	254		
	2	Dec. 4, 1848	Mar. 3, 1849	90		
31st	S	Mar. 5, 1849	Mar. 23, 1849	19		

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
	1	Dec. 3, 1849	Sept. 30, 1850	302		
	2	Dec. 2, 1850	Mar. 3, 1851	92		
32d	S	Mar. 4, 1851	Mar. 13, 1851	10		
	1	Dec. 1, 1851	Aug. 31, 1852	275		
	2	Dec. 6, 1852	Mar. 3, 1853	88		
33d	S	Mar. 4, 1853	Apr. 11, 1853	39		
	1	Dec. 5, 1853	Aug. 7, 1854	246		
	2	Dec. 4, 1854	Mar. 3, 1855	90		
34th	1	Dec. 3, 1855	Aug. 18, 1856	260		
	2–E	Aug. 21, 1856	Aug. 30, 1856	10		
	3	Dec. 1, 1856	Mar. 3, 1857	93		
35th	S	Mar. 4, 1857	Mar. 14, 1857	11		
	1	Dec. 7, 1857	June 14, 1858	189	Dec. 23, 1857–Jan. 4, 1858	Dec. 23, 1857–Jan. 4, 1858
	S	June 15, 1858	June 16, 1858	2		
	2	Dec. 6, 1858	Mar. 3, 1859	88	Dec. 23, 1858–Jan. 4, 1859	Dec. 23, 1858–Jan. 4, 1859
36th	S	Mar. 4, 1859	Mar. 10, 1859	7		
	1	Dec. 5, 1859	June 25, 1860	202		
	S	June 26, 1860	June 28, 1860	3		
	2	Dec. 3, 1860	Mar. 3, 1861	93		
37th	S	Mar. 4, 1861	Mar. 28, 1861	25		
	1–E	July 4, 1861	Aug. 6, 1861	34		
	2	Dec. 2, 1861	July 17, 1862	228		
	3	Dec. 1, 1862	Mar. 3, 1863	93	Dec. 23, 1862–Jan. 5, 1863	Dec. 23, 1862–Jan. 5, 1863
38th	S	Mar. 4, 1863	Mar. 14, 1863	11		
	1	Dec. 7, 1863	July 4, 1864	209	Dec. 23, 1863–Jan. 5, 1864	Dec. 23, 1863–Jan. 5, 1864
	2	Dec. 5, 1864	Mar. 3, 1865	89	Dec. 22, 1864–Jan. 5, 1865	Dec. 22, 1864–Jan. 5, 1865
39th	S	Mar. 4, 1865	Mar. 11, 1865	8		
	1	Dec. 4, 1865	July 28, 1866	237	Dec. 6–Dec. 11, 1865 Dec. 21, 1865–Jan. 5, 1866	Dec. 6–Dec. 11, 1865 Dec. 21, 1865–Jan. 5, 1866
	2	Dec. 3, 1866	Mar. 3, 1867	91	Dec. 20, 1866–Jan. 3, 1867	Dec. 20, 1866–Jan. 3, 1867
40th	1	Mar. 4, 1867	Dec. 1, 1867	273	Mar. 30–July 3, 1867 July 20–Nov. 21, 1867	Mar. 30–July 3, 1867 July 20–Nov. 21, 1867
	S	Apr. 1, 1867	Apr. 20, 1867	20		
	2	Dec. 2, 1867	Nov. 10, 1868	345	Dec. 20, 1867–Jan. 6, 1868 July 27–Sept. 21, 1868 Sept. 21–Oct. 16, 1868 Oct. 16–Nov. 10, 1868	Dec. 20, 1867–Jan. 6, 1868 July 27–Sept. 21, 1868 Sept. 21–Oct. 16, 1868 Oct. 16–Nov. 10, 1868
	3	Dec. 7, 1868	Mar. 3, 1869	87	Dec. 21, 1868–Jan. 5, 1869	Dec. 21, 1868–Jan. 5, 1869
41st	1	Mar. 4, 1869	Apr. 10, 1869	38		
	S	Apr. 12, 1869	Apr. 22, 1869	11		
	2	Dec. 6, 1869	July 15, 1870	222	Dec. 22, 1869–Jan. 10, 1870	Dec. 22, 1869–Jan. 10, 1870
	3	Dec. 5, 1870	Mar. 3, 1871	89	Dec. 23, 1870–Jan. 4, 1871	Dec. 22, 1870–Jan. 4, 1871
42d	1	Mar. 4, 1871	Apr. 20, 1871	48		
	S	May 10, 1871	May 27, 1871	18		
	2	Dec. 4, 1871	June 10, 1872	190	Dec. 21, 1871–Jan. 8, 1872	Dec. 21, 1871–Jan. 8, 1872
	3	Dec. 2, 1872	Mar. 3, 1873	92	Dec. 20, 1872–Jan. 6, 1873	Dec. 20, 1872–Jan. 6, 1873
43d	S	Mar. 4, 1873	Mar. 26, 1873	23		
	1	Dec. 1, 1873	June 23, 1874	204	Dec. 19, 1873–Jan. 5, 1874	Dec. 19, 1873–Jan. 5, 1874
	2	Dec. 7, 1874	Mar. 3, 1875	87	Dec. 23, 1874–Jan. 5, 1875	Dec. 23, 1874–Jan. 5, 1875
44th	S	Mar. 5, 1875	Mar. 24, 1875	20		
	1	Dec. 6, 1875	Aug. 15, 1876	254	Dec. 20, 1875–Jan. 5, 1876	Dec. 21, 1875–Jan. 5, 1876
	2	Dec. 4, 1876	Mar. 3, 1877	90		
45th	S	Mar. 5, 1877	Mar. 17, 1877	13		
	1–E	Oct. 15, 1877	Dec. 3, 1877	50		
	2	Dec. 3, 1877	June 20, 1878	200	Dec. 15, 1877–Jan. 10, 1878	Dec. 15, 1877–Jan. 10, 1878
	3	Dec. 2, 1878	Mar. 3, 1879	92	Dec. 20, 1878–Jan. 7, 1879	Dec. 20, 1878–Jan. 7, 1879
46th	1–E	Mar. 18, 1879	July 1, 1879	106		
	2	Dec. 1, 1879	June 16, 1880	199	Dec. 19, 1879–Jan. 6, 1880	Dec. 19, 1879–Jan. 6, 1880
	3	Dec. 6, 1880	Mar. 3, 1881	88	Dec. 23, 1880–Jan. 5,	Dec. 23, 1880–Jan. 5,

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
					1881	1881
47th	S	Mar. 4, 1881	May 20, 1881	78		
	S	Oct. 10, 1881	Oct. 29, 1881	20		
	1	Dec. 5, 1881	Aug. 8, 1882	247	Dec. 22, 1881–Jan. 5, 1882	Dec. 22, 1881–Jan. 5, 1882
	2	Dec. 4, 1882	Mar. 3, 1883	90		
48th	1	Dec. 3, 1883	July 7, 1884	218	Dec. 24, 1883–Jan. 7, 1884	Dec. 24, 1883–Jan. 7, 1884
	2	Dec. 1, 1884	Mar. 3, 1885	93	Dec. 24, 1884–Jan. 5, 1885	Dec. 24, 1884–Jan. 5, 1885
49th	S	Mar. 4, 1885	Apr. 2, 1885	30		
	1	Dec. 7, 1885	Aug. 5, 1886	242	Dec. 21, 1885–Jan. 5, 1886	Dec. 21, 1885–Jan. 5, 1886
	2	Dec. 6, 1886	Mar. 3, 1887	88	Dec. 22, 1886–Jan. 4, 1887	Dec. 22, 1886–Jan. 4, 1887
50th	1	Dec. 5, 1887	Oct. 20, 1888	321	Dec. 22, 1887–Jan. 4, 1888	Dec. 22, 1887–Jan. 4, 1888
	2	Dec. 3, 1888	Mar. 3, 1889	91	Dec. 21, 1888–Jan. 2, 1889	Dec. 21, 1888–Jan. 2, 1889
51st	S	Mar. 4, 1889	Apr. 2, 1889	30		
	1	Dec. 2, 1889	Oct. 1, 1890	304	Dec. 21, 1889–Jan. 6, 1890	Dec. 21, 1889–Jan. 6, 1890
	2	Dec. 1, 1890	Mar. 3, 1891	93		
52d	1	Dec. 7, 1891	Aug. 5, 1892	251		
	2	Dec. 5, 1892	Mar. 3, 1893	89	Dec. 22, 1892–Jan. 4, 1893	Dec. 22, 1892–Jan. 4, 1893
53d	S	Mar. 4, 1893	Apr. 15, 1893	43		
	1–E	Aug. 7, 1893	Nov. 3, 1893	89		
	2	Dec. 4, 1893	Aug. 28, 1894	268		Dec. 21, 1893–Jan. 3, 1894
	3	Dec. 3, 1894	Mar. 3, 1895	97		Dec. 23, 1894–Jan. 3, 1895
54th	1	Dec. 2, 1895	June 11, 1896	193		
	2	Dec. 7, 1896	Mar. 3, 1897	87	Dec. 22, 1896–Jan. 5, 1897	Dec. 22, 1896–Jan. 5, 1897
55th	S	Mar. 4, 1897	Mar. 10, 1897	11		
	1–E	Mar. 15, 1897	July 24, 1897	131		
	2	Dec. 6, 1897	July 8, 1898	215	Dec. 18, 1897–Jan. 5, 1898	Dec. 18, 1897–Jan. 5, 1898
	3	Dec. 5, 1898	Mar. 3, 1899	89	Dec. 21, 1898–Jan. 4, 1899	Dec. 21, 1898–Jan. 4, 1899
56th	1	Dec. 4, 1899	June 7, 1900	186	Dec. 20, 1899–Jan. 3, 1900	Dec. 20, 1899–Jan. 3, 1900
	2	Dec. 3, 1900	Mar. 3, 1901	91	Dec. 20, 1900–Jan. 3, 1901	Dec. 21, 1900–Jan. 3, 1901
57th	S	Mar. 4, 1901	Mar. 9, 1901	6		
	1	Dec. 2, 1901	July 1, 1902	212	Dec. 19, 1901–Jan. 6, 1902	Dec. 19, 1901–Jan. 6, 1902
	2	Dec. 1, 1902	Mar. 3, 1903	93	Dec. 20, 1902–Jan. 5, 1903	Dec. 20, 1902–Jan. 5, 1903
58th	S	Mar. 5, 1903	Mar. 19, 1903	15		
	1–E	Nov. 9, 1903	Dec. 7, 1903	29		
	2	Dec. 7, 1903	Apr. 28, 1904	144	Dec. 19, 1903–Jan. 4, 1904	Dec. 19, 1903–Jan. 4, 1904
	3	Dec. 5, 1904	Mar. 3, 1905	89	Dec. 21, 1904–Jan. 4, 1905	Dec. 21, 1904–Jan. 4, 1905
59th	S	Mar. 4, 1905	Mar. 18, 1905	15		
	1	Dec. 4, 1905	June 30, 1906	209	Dec. 21, 1905–Jan. 4, 1906	Dec. 21, 1905–Jan. 4, 1906
	2	Dec. 3, 1906	Mar. 3, 1907	91	Dec. 20, 1906–Jan. 3, 1907	Dec. 20, 1906–Jan. 3, 1907
60th	1	Dec. 2, 1907	May 30, 1908	181	Dec. 21, 1907–Jan. 6, 1908	Dec. 21, 1907–Jan. 6, 1908
	2	Dec. 7, 1908	Mar. 3, 1909	87	Dec. 19, 1908–Jan. 4, 1909	Dec. 19, 1908–Jan. 4, 1909
61st	S	Mar. 4, 1909	Mar. 6, 1909	3		
	1–E	Mar. 15, 1909	Aug. 5, 1909	144		
	2	Dec. 6, 1909	June 25, 1910	202	Dec. 21, 1909–Jan. 4, 1910	Dec. 21, 1909–Jan. 4, 1910
	3	Dec. 5, 1910	Mar. 3, 1911	89	Dec. 21, 1910–Jan. 5, 1911	Dec. 21, 1910–Jan. 5, 1911
62d	1–E	Apr. 4, 1911 .	Aug. 22, 1911	141		
	2	Dec. 4, 1911	Aug. 26, 1912	267	Dec. 21, 1911–Jan. 3, 1912	Dec. 21, 1911–Jan. 3, 1912
	3	Dec. 2, 1912	Mar. 3, 1913	92	Dec. 19, 1912–Jan. 2, 1913	Dec. 19, 1912–Jan. 2, 1913
63d	S	Mar. 4, 1913	Mar. 17, 1913	14		
	1–E	Apr. 7, 1913	Dec. 1, 1913	239		

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
	2	Dec. 1, 1913	Oct. 24, 1914	328	Dec. 23, 1913–Jan. 12, 1914	Dec. 23, 1913–Jan. 12, 1914
	3	Dec. 7, 1914	Mar. 3, 1915	87	Dec. 23–Dec. 28, 1914	Dec. 23–Dec. 28, 1914
64th	1	Dec. 6, 1915	Sept. 8, 1916	278	Dec. 17, 1915–Jan. 4, 1916	Dec. 17, 1915–Jan. 4, 1916
	2	Dec. 4, 1916	Mar. 3, 1917	90	Dec. 22, 1916–Jan. 2, 1917	Dec. 22, 1916–Jan. 2, 1917
65th	S	Mar. 5, 1917	Mar. 16, 1917	12		
	1–E	Apr. 2, 1917	Oct. 6, 1917	188		
	2	Dec. 3, 1917	Nov. 21, 1918	354	Dec. 18, 1917–Jan. 3, 1918	Dec. 18, 1917–Jan. 3, 1918
	3	Dec. 2, 1918	Mar. 3, 1919	92		
66th	1–E	May 19, 1919	Nov. 19, 1919	185	July 1–July 8, 1919	July 1–July 8, 1919
	2	Dec. 1, 1919	June 5, 1920	188	Dec. 20, 1919–Jan. 5, 1920	Dec. 20, 1919–Jan. 5, 1920
	3	Dec. 6, 1920	Mar. 3, 1921	88		
67th	S	Mar. 4, 1921	Mar. 15, 1921	12		
	1–E	Apr. 11, 1921	Nov. 23, 1921	227	Aug. 24–Sept. 21, 1921	Aug. 24–Sept. 21, 1921
	2	Dec. 5, 1921	Sept. 22, 1922	292	Dec. 22, 1921–Jan. 3, 1922	Dec. 22, 1921–Jan. 3, 1922
	3–E	Nov. 20, 1922	Dec. 4, 1922	15		
	4	Dec. 4, 1922	Mar. 3, 1923	90		
68th	1	Dec. 3, 1923	June 7, 1924	188	Dec. 20, 1923–Jan. 3, 1924	Dec. 20, 1923–Jan. 3, 1924
	2	Dec. 1, 1924	Mar. 3, 1925	93	Dec. 20–Dec. 29, 1924	Dec. 20–Dec. 29, 1924
69th	S	Mar. 4, 1925	Mar. 18, 1925	15		
	1	Dec. 7, 1925	July 3, 1926	209	Dec. 22, 1925–Jan. 4, 1926	Dec. 22, 1925–Jan. 4, 1926
	2	Dec. 6, 1926	Mar. 4, 1927	88	Dec. 22, 1926–Jan. 3, 1927	Dec. 22, 1926–Jan. 3, 1927
70th	1	Dec. 5, 1927	May 29, 1928	177	Dec. 21, 1927–Jan. 4, 1928	Dec. 21, 1927–Jan. 4, 1928
	2	Dec. 3, 1928	Mar. 3, 1929	91	Dec. 22, 1928–Jan. 3, 1929	Dec. 22, 1928–Jan. 3, 1929
71st	S	Mar. 4, 1929	Mar. 5, 1929	2		
	1–E	Apr. 15, 1929	Nov. 22, 1929	222	June 19–Aug. 19, 1929	June 19–Sept. 23, 1929
	2	Dec. 2, 1929	July 3, 1930	214	Dec. 21, 1929–Jan. 6, 1930	Dec. 21, 1929–Jan. 6, 1930
	S	July 7, 1930	July 21, 1930	15		
	3	Dec. 1, 1930	Mar. 3, 1931	93	Dec. 20, 1930–Jan. 5, 1931	Dec. 20, 1930–Jan. 5, 1931
72d	1	Dec. 7, 1931	July 16, 1932	223	Dec. 22, 1931–Jan. 4, 1932	Dec. 22, 1931–Jan. 4, 1932
	2	Dec. 5, 1932	Mar. 3, 1933	89		
73d	S	Mar. 4, 1933	Mar. 6, 1933	3		
	1–E	Mar. 9, 1933	June 15, 1933	99		
	2	Jan. 3, 1934	June 18, 1934	167		
74th	1	Jan. 3, 1935	Aug. 26, 1935	236		
	2	Jan. 3, 1936	June 20, 1936	170	June 8–June 15, 1936	June 8–June 15, 1936
75th	1	Jan. 5, 1937	Aug. 21, 1937	229		
	2–E	Nov. 15, 1937	Dec. 21, 1937	37		
	3	Jan. 3, 1938	June 16, 1938	165		
76th	1	Jan. 3, 1939	Aug. 5, 1939	215		
	2–E	Sept. 21, 1939	Nov. 3, 1939	44		
	3	Jan. 3, 1940	Jan. 3, 1941	366	July 11–July 22, 1940	July 11–July 22, 1940
77th	1	Jan. 3, 1941	Jan. 2, 1942	365		
	2	Jan. 5, 1942	Dec. 16, 1942	346		
78th	1	Jan. 6, 1943	Dec. 21, 1943	350	July 8–Sept. 14, 1943	July 8–Sept. 14, 1943
	2	Jan. 10, 1944	Dec. 19, 1944	345	Apr. 1–Apr. 12, 1944 June 23–Aug. 1, 1944 Sept. 21–Nov. 14, 1944	Apr. 1–Apr. 12, 1944 June 23–Aug. 1, 1944 Sept. 21–Nov. 14, 1944
79th	1	Jan. 3, 1945	Dec. 21, 1945	353	Aug. 1–Sept. 5, 1945	July 21–Sept. 5, 1945
	2	Jan. 14, 1946	Aug. 2, 1946	201		Apr. 18–Apr. 30, 1946
80th	1	Jan. 3, 1947	Dec. 19, 1947	351	July 27–Nov. 17, 1947	July 27–Nov. 17, 1947
	2	Jan. 6, 1948	Dec. 31, 1948	361	June 20–July 26, 1948 Aug. 7–Dec. 31, 1948	June 20–July 26, 1948 Aug. 7–Dec. 31, 1948
81st	1	Jan. 3, 1949	Oct. 19, 1949	290		
	2	Jan. 3, 1950	Jan. 2, 1951	365	Sept. 23–Nov. 27, 1950 p	Apr. 6–Apr. 18, 1950 Sept. 23–Nov. 27, 1950
82d	1	Jan. 3, 1951	Oct. 20, 1951	291		Mar. 22–Apr. 2, 1951 Aug. 23–Sept. 12, 1951
	2	Jan. 8, 1952	July 7, 1952	182		Apr. 10–Apr. 22, 1952
83d	1	Jan. 3, 1953	Aug. 3, 1953	213		Apr. 2–Apr. 13, 1953
	2	Jan. 6, 1954	Dec. 2, 1954	331	Aug. 20–Nov. 8, 1954 Nov. 18–Nov. 29, 1954	Apr. 15–Apr. 22, 1954 Adjourned sine die Aug. 20, 1954
84th	1	Jan. 5, 1955	Aug. 2, 1955	210	Apr. 4–Apr. 13, 1955	Apr. 4–Apr. 13, 1955
	2	Jan. 3, 1956	July 27, 1956	207	Mar. 29–Apr. 9, 1956	Mar. 29–Apr. 9, 1956

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
85th	1	Jan. 3, 1957	Aug. 30, 1957	239	Apr. 18–Apr. 29, 1957	Apr. 18–Apr. 29, 1957
	2	Jan. 7, 1958	Aug. 24, 1958	230	Apr. 3–Apr. 14, 1958	Apr. 3–Apr. 14, 1958
86th	1	Jan. 7, 1959	Sept. 15, 1959	252	Mar. 26–Apr. 7, 1959	Mar. 26–Apr. 7, 1959
	2	Jan. 6, 1960	Sept. 1, 1960	240	Apr. 14–Apr. 18, 1960	Apr. 14–Apr. 18, 1960
					May 27–May 31, 1960	May 27–May 31, 1960
					July 3–Aug. 8, 1960	July 3–Aug. 15, 1960
87th	1	Jan. 3, 1961	Sept. 27, 1961	268		Mar. 30–Apr. 10, 1961
	2	Jan. 10, 1962	Oct. 13, 1962	277		Apr. 19–Apr. 30, 1962
88th	1	Jan. 9, 1963	Dec. 30, 1963	356		Apr. 11–Apr. 22, 1963
	2	Jan. 7, 1964	Oct. 3, 1964	270	July 10–July 20, 1964	Mar. 26–Apr. 6, 1964
					Aug. 21–Aug. 31, 1964	July 2–July 20, 1964
						Aug. 21–Aug. 31, 1964
89th	1	Jan. 4, 1965	Oct. 23, 1965	293		
	2	Jan. 10, 1966	Oct. 22, 1966	286	Apr. 7–Apr. 13, 1966	Apr. 7–Apr. 18, 1966
					June 30–July 11, 1966	June 30–July 11, 1966
90th	1	Jan. 10, 1967	Dec. 15, 1967	340	Mar. 23–Apr. 3, 1967	Mar. 23–Apr. 3, 1967
					June 29–July 10, 1967	June 29–July 10, 1967
					Aug. 31–Sept. 11, 1967	Aug. 31–Sept. 11, 1967
					Nov. 22–Nov. 27, 1967	Nov. 22–Nov. 27, 1967
	2	Jan. 15, 1968	Oct. 14, 1968	274	Apr. 11–Apr. 17, 1968	Apr. 11–Apr. 22, 1968
					May 29–June 3, 1968	May 29–June 3, 1968
					June 3–July 8, 1968	June 3–July 8, 1968
					Aug. 2–Sept. 4, 1968	Aug. 2–Sept. 4, 1968
91st	1	Jan. 3, 1969	Dec. 23, 1969	355	Feb. 7–Feb. 17, 1969	Feb. 7–Feb. 17, 1969
					Apr. 3–Apr. 14, 1969	Apr. 3–Apr. 14, 1969
					July 2–July 7, 1969	May 28–June 2, 1969
					Aug. 13–Sept. 3, 1969	July 2–July 7, 1969
					Nov. 26–Dec. 1, 1969	Aug. 13–Sept. 3, 1969
						Nov. 6–Nov. 12, 1969
						Nov. 26–Dec. 1, 1969
	2	Jan. 19, 1970	Jan. 2, 1971	349	Feb. 10–Feb. 16, 1970	Feb. 10–Feb. 16, 1970
					Mar. 26–Mar. 31, 1970	Mar. 26–Mar. 31, 1970
					Sept. 2–Sept. 8, 1970	May 27–June 1, 1970
					Oct. 14–Nov. 16, 1970	July 1–July 6, 1970
					Nov. 25–Nov. 30, 1970	Aug. 14–Sept. 9, 1970
					Dec. 22–Dec. 28, 1970	Oct. 14–Nov. 16, 1970
						Nov. 25–Nov. 30, 1970
						Dec. 22–Dec. 29, 1970
92d	1	Jan. 21, 1971	Dec. 17, 1971	331	Feb. 11–Feb. 17, 1971	Feb. 10–Feb. 17, 1971
					Apr. 7–Apr. 14, 1971	Apr. 7–Apr. 19, 1971
					May 26–June 1, 1971	May 27–June 1, 1971
					June 30–July 6, 1971	July 1–July 6, 1971
					Aug. 6–Sept. 8, 1971	Aug. 6–Sept. 8, 1971
					Oct. 21–Oct. 26, 1971	Oct. 7–Oct. 12, 1971
					Nov. 24–Nov. 29, 1971	Oct. 21–Oct. 26, 1971
						Nov. 19–Nov. 29, 1971
	2	Jan. 18, 1972	Oct. 18, 1972	275	Feb. 9–Feb. 14, 1972	Feb. 9–Feb. 16, 1972
					Mar. 30–Apr. 4, 1972	Mar. 29–Apr. 10, 1972
					May 25–May 30, 1972	May 24–May 30, 1972
					June 30–July 17, 1972	June 30–July 17, 1972
					Aug. 18–Sept. 5, 1972	Aug. 18–Sept. 5, 1972
93d	1	Jan. 3, 1973	Dec. 22, 1973	354	Feb. 8–Feb. 15, 1973	Feb. 8–Feb. 19, 1973
					Apr. 18–Apr. 30, 1973	Apr. 19–Apr. 30, 1973
					May 23–May 29, 1973	May 24–May 29, 1973
					June 30–July 9, 1973	June 30–July 10, 1973
					Aug. 3–Sept. 5, 1973	Aug. 3–Sept. 5, 1973
					Oct. 18–Oct. 23, 1973	Oct. 4–Oct. 9, 1973
					Nov. 21–Nov. 26, 1973	Oct. 18–Oct. 23, 1973
						Nov. 15–Nov. 26, 1973
	2	Jan. 21, 1974	Dec. 20, 1974	334	Feb. 8–Feb. 18, 1974	Feb. 7–Feb. 13, 1974
					Mar. 13–Mar. 19, 1974	Apr. 11–Apr. 22, 1974
					Apr. 11–Apr. 22, 1974	May 23–May 28, 1974
					May 23–May 28, 1974	Aug. 22–Sept. 11, 1974
					Aug. 22–Sept. 4, 1974	Oct. 17–Nov. 18, 1974
					Oct. 17–Nov. 18, 1974	Nov. 26–Dec. 3, 1974
					Nov. 26–Dec. 2, 1974	
94th	1	Jan. 14, 1975	Dec. 19, 1975	340	Mar. 26–Apr. 7, 1975	Mar. 26–Apr. 7, 1975
					May 22–June 2, 1975	May 22–June 2, 1975
					June 27–July 7, 1975	June 26–July 8, 1975
					Aug. 1–Sept. 3, 1975	Aug. 1–Sept. 3, 1975
					Oct. 9–Oct. 20, 1975	Oct. 9–Oct. 20, 1975
					Oct. 23–Oct. 28, 1975	Oct. 23–Oct. 28, 1975
					Nov. 20–Dec. 1, 1975	Nov. 20–Dec. 1, 1975
	2	Jan. 19, 1976	Oct. 1, 1976	257	Feb. 6–Feb. 16, 1976	Feb. 11–Feb. 16, 1976
					Apr. 14–Apr. 26, 1976	Apr. 14–Apr. 26, 1976
					May 28–June 2, 1976	May 27–June 1, 1976
					July 2–July 19, 1976	July 2–July 19, 1976
					Aug. 10–Aug. 23, 1976	Aug. 10–Aug. 23, 1976
					Sept. 1–Sept. 7, 1976	Sept. 2–Sept. 8, 1976
95th	1	Jan. 4, 1977	Dec. 15, 1977	346	Feb. 11–Feb. 21, 1977	Feb. 9–Feb. 16, 1977

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
					Apr. 7–Apr. 18, 1977 May 27–June 6, 1977 July 1–July 11, 1977 Aug. 6–Sept. 7, 1977	Apr. 6–Apr. 18, 1977 May 26–June 1, 1977 June 30–July 11, 1977 Aug. 5–Sept. 7, 1977 Oct. 6–Oct. 11, 1977
	2	Jan. 19, 1978	Oct. 15, 1978	270	Feb. 10–Feb. 20, 1978 Mar. 23–Apr. 3, 1978 May 26–June 5, 1978 June 29–July 10, 1978 Aug. 25–Sept. 6, 1978	Feb. 9–Feb. 14, 1978 Mar. 22–Apr. 3, 1978 May 25–May 31, 1978 June 29–July 10, 1978 Aug. 17–Sept. 6, 1978
96th	1	Jan. 15, 1979	Jan. 3, 1980	354	Feb. 9–Feb. 19, 1979 Apr. 10–Apr. 23, 1979 May 24–June 4, 1979 June 27–July 9, 1979 Aug. 3–Sept. 5, 1979 Nov. 20–Nov. 26, 1979 Adjourned sine die, Dec. 20, 1979	Feb. 8–Feb. 13, 1979 Apr. 10–Apr. 23, 1979 May 24–May 30, 1979 June 29–July 9, 1979 Aug. 2–Sept. 5, 1979 Nov. 20–Nov. 26, 1979
	2	Jan. 3, 1980	Dec. 16, 1980	349	Apr. 3–Apr. 15, 1980 May 22–May 28, 1980 July 2–July 21, 1980 Aug. 6–Aug. 18, 1980 Aug. 27–Sept. 3, 1980 Oct. 1–Nov. 12, 1980 Nov. 25–Dec. 1, 1980	Feb. 13–Feb. 19, 1980 Apr. 2–Apr. 15, 1980 May 22–May 28, 1980 July 2–July 21, 1980 Aug. 1–Aug. 18, 1980 Aug. 28–Sept. 3, 1980 Oct. 2–Nov. 12, 1980 Nov. 21–Dec. 1, 1980
97th	1	Jan. 5, 1981	Dec. 16, 1981	347	Feb. 6–Feb. 16, 1981 Apr. 10–Apr. 27, 1981 June 25–July 8, 1981 Aug. 3–Sept. 9, 1981 Oct. 7–Oct. 14, 1981 Nov. 24–Nov. 30, 1981	Feb. 6–Feb. 17, 1981 Apr. 10–Apr. 27, 1981 June 26–July 8, 1981 Aug. 4–Sept. 9, 1981 Oct. 7–Oct. 13, 1981 Nov. 23–Nov. 30, 1981
	2	Jan. 25, 1982	Dec. 23, 1982	333	Feb. 11–Feb. 22, 1982 Apr. 1–Apr. 13, 1982 May 27–June 8, 1982 July 1–July 12, 1982 Aug. 20–Sept. 8, 1982 Oct. 1–Nov. 29, 1982	Feb. 10–Feb. 22, 1982 Apr. 6–Apr. 20, 1982 May 27–June 2, 1982 July 1–July 12, 1982 Aug. 20–Sept. 8, 1982 Oct. 1–Nov. 29, 1982
98th	1	Jan. 3, 1983	Nov. 18, 1983	320	Jan. 3–Jan. 25, 1983 Feb. 3–Feb. 14, 1983 Mar. 24–Apr. 5, 1983 May 26–June 6, 1983 June 29–July 11, 1983 Aug. 4–Sept. 12, 1983 Oct. 7–Oct. 17, 1983	Jan. 6–Jan. 25, 1983 Feb. 17–Feb. 22, 1983 Mar. 24–Apr. 5, 1983 May 26–June 1, 1983 June 30–July 11, 1983 Aug. 4–Sept. 12, 1983 Oct. 6–Oct. 17, 1983
	2	Jan. 23, 1984	Oct. 12, 1984	264	Feb. 9–Feb. 20, 1984 Apr. 12–Apr. 24, 1984 May 24–May 31, 1984 June 29–July 23, 1984 Aug. 10–Sept. 5, 1984	Feb. 9–Feb. 21, 1984 Apr. 12–Apr. 24, 1984 May 24–May 30, 1984 June 29–July 23, 1984 Aug. 10–Sept. 5, 1984
99th	1	Jan. 3, 1985	Dec. 20, 1985	352	Jan. 7–Jan. 21, 1985 Feb. 7–Feb. 18, 1985 Apr. 4–Apr. 15, 1985 May 9–May 14, 1985 May 24–June 3, 1985 June 27–July 8, 1985 Aug. 1–Sept. 9, 1985 Nov. 23–Dec. 2, 1985	Jan. 3–Jan. 21, 1985 Feb. 7–Feb. 19, 1985 Mar. 7–Mar. 19, 1985 Apr. 4–Apr. 15, 1985 May 23–June 3, 1985 June 27–July 8, 1985 Aug. 1–Sept. 4, 1985 Nov. 21–Dec. 2, 1985
	2	Jan. 21, 1986	Oct. 18, 1986	278	Feb. 7–Feb. 17, 1986 Mar. 27–Apr. 8, 1986 May 21–June 2, 1986 June 26–July 7, 1986 Aug. 15–Sept. 8, 1986	Feb. 6–Feb. 18, 1986 Mar. 25–Apr. 8, 1986 May 22–June 3, 1986 June 26–July 14, 1986 Aug. 16–Sept. 8, 1986
100th	1	Jan. 6, 1987	Dec. 22, 1987	351	Jan. 6–Jan. 12, 1987 Feb. 5–Feb. 16, 1987 Apr. 10–Apr. 21, 1987 May 21–May 27, 1987 July 1–July 7, 1987 Aug. 7–Sept. 9, 1987 Nov. 20–Nov. 30, 1987	Jan. 8–Jan. 20, 1987 Feb. 11–Feb. 18, 1987 Apr. 9–Apr. 21, 1987 May 21–May 27, 1987 July 1–July 7, 1987 July 15–July 20, 1987 Aug. 7–Sept. 9, 1987 Nov. 10–Nov. 16, 1987 Nov. 20–Nov. 30, 1987
	2	Jan. 25, 1988	Oct. 22, 1988	272	Feb. 4–Feb. 15, 1988 Mar. 4–Mar. 14, 1988 Mar. 31–Apr. 11, 1988 Apr. 29–May 9, 1988 May 27–June 6, 1988 June 29–July 6, 1988 July 14–July 25, 1988 Aug. 11–Sept. 7, 1988	Feb. 9–Feb. 16, 1988 Mar. 31–Apr. 11, 1988 May 26–June 1, 1988 June 30–July 7, 1988 July 14–July 26, 1988 Aug. 11–Sept. 7, 1988

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
101st	1	Jan. 3, 1989	Nov. 22, 1989	324	Jan. 4–Jan. 20, 1989 Jan. 20–Jan. 25, 1989 Feb. 9–Feb. 21, 1989 Mar. 17–Apr. 4, 1989 Apr. 19–May 1, 1989 May 18–May 31, 1989 June 23–July 11, 1989 Aug. 4–Sept. 6, 1989	Jan. 4–Jan. 19, 1989 Feb. 9–Feb. 21, 1989 Mar. 23–Apr. 3, 1989 Apr. 18–Apr. 25, 1989 May 25–May 31, 1989 June 29–July 10, 1989 Aug. 5–Sept. 6, 1989
	2	Jan. 23, 1990	Oct. 28, 1990	260	Feb. 8–Feb. 20, 1990 Mar. 9–Mar. 20, 1990 Apr. 5–Apr. 18, 1990 May 24–June 5, 1990 June 28–July 10, 1990 Aug. 4–Sept. 10, 1990	Feb. 7–Feb. 20, 1990 Apr. 4–Apr. 18, 1990 May 25–June 5, 1990 June 28–July 10, 1990 Aug. 4–Sept. 5, 1990
102d	1	Jan. 3, 1991	Jan. 3, 1992	366	Feb. 7–Feb. 19, 1991 Mar. 22–Apr. 9, 1991 Apr. 25–May 6, 1991 May 24–June 3, 1991 June 28–July 8, 1991 Aug. 2–Sept. 10, 1991 Nov. 27, 1991–Jan. 3, 1992	Feb. 6–Feb. 19, 1991 Mar. 22–Apr. 9, 1991 May 23–May 29, 1991 June 27–July 9, 1991 Aug. 2–Sept. 11, 1991 Nov. 27, 1991–Jan. 3, 1992
	2	Jan. 3, 1992	Oct. 9, 1992	281	Jan. 3–Jan. 21, 1992 Feb. 7–Feb. 18, 1992 p Apr. 10–Apr. 28, 1992 May 21–June 1, 1992 July 2–July 20, 1992 Aug. 12–Sept. 8, 1992	Jan. 3–Jan. 22, 1992 Apr. 10–Apr. 28, 1992 May 21–May 26, 1992 July 2–July 7, 1992 July 9–July 21, 1992 Aug. 12–Sept. 9, 1992
103d	1	Jan. 5, 1993	Nov. 26, 1993	326	Jan. 7–Jan. 20, 1993 Feb. 4–Feb. 16, 1993 Feb. 18–Feb. 24, 1993 p Apr. 7–Apr. 19, 1993 May 28–June 7, 1993 July 1–July 13, 1993 Aug. 7–Sept. 7, 1993 Oct. 7–Oct. 13, 1993 Nov. 11–Nov. 16, 1993	Jan. 6–Jan. 20, 1993 Jan. 27–Feb. 2, 1993 Feb. 4–Feb. 16, 1993 Apr. 7–Apr. 19, 1993 May 27–June 8, 1993 July 1–July 13, 1993 Aug. 6–Sept. 8, 1993 Sept. 15–Sept. 21, 1993 Oct. 7–Oct. 12, 1993 Nov. 10–Nov. 15, 1993
	2	Jan. 25, 1994	Dec. 1, 1994	311	Feb. 11–Feb. 22, 1994 Mar. 26–Apr. 11, 1994 May 25–June 7, 1994 July 1–July 11, 1994 Aug. 25–Sept. 12, 1994 Oct. 8–Nov. 30, 1994	Jan. 26–Feb. 1, 1994 Feb. 11–Feb. 22, 1994 Mar. 24–Apr. 12, 1994 May 26–June 8, 1994 June 30–July 12, 1994 Aug. 26–Sept. 12, 1994 Oct. 8–Nov. 29, 1994
104th	1	Jan. 4, 1995	Jan. 3, 1996	365	Feb. 16–Feb. 22, 1995 Apr. 7–Apr. 24, 1995 May 26–June 5, 1995 June 30–July 10, 1995 Aug. 11–Sept. 5, 1995 Sept. 29–Oct. 10, 1995 Nov. 20–Nov. 27, 1995	Feb. 16–Feb. 21, 1995 Mar. 16–Mar. 21, 1995 Apr. 7–May 1, 1995 May 3–May 9, 1995 May 25–June 6, 1995 June 30–July 10, 1995 Aug. 4–Sept. 6, 1995 Sept. 29–Oct. 6, 1995 Nov. 20–Nov. 28, 1995
	2	Jan. 3, 1996	Oct. 4, 1996	276	Jan. 10–Jan. 22, 1996 Feb. 1–Feb. 6, 1996 p Feb. 7–Feb. 20, 1996 p Feb. 29–Mar. 5, 1996 p Mar. 29–Apr. 15, 1996 May 24–June 3, 1996 June 28–July 8, 1996 Aug. 2–Sept. 3, 1996	Jan. 9–Jan. 22, 1996 Feb. 1–Feb. 27, 1996 p Mar. 29–Apr. 15, 1996 May 23–May 29, 1996 June 28–July 8, 1996 Aug. 2–Sept. 4, 1996
105th	1	Jan. 7, 1997	Nov. 13, 1997	311	Jan. 9–Jan. 21, 1997 Feb. 13–Feb. 24, 1997 Mar. 21–Apr. 7, 1997 May 23–June 2, 1997 p June 27–July 7, 1997 July 31–Sept. 2, 1997 Oct. 9–Oct. 20, 1997	Jan. 9–Jan. 20, 1997 Jan. 21–Feb. 4, 1997 Feb. 13–Feb. 25, 1997 Mar. 21–Apr. 8, 1997 June 26–July 8, 1997 Aug. 1–Sept. 3, 1997 Oct. 9–Oct. 21, 1997
	2	Jan. 27, 1998	Dec. 19, 1998	327	Feb. 13–Feb. 23, 1998 Apr. 3–Apr. 20, 1998 May 22–June 1, 1998 June 26–July 6, 1998 July 31–Aug. 31, 1998 Adjourned sine die, Oct. 21, 1998.	Jan. 28–Feb. 3, 1998 Feb. 5–Feb. 11, 1998 Feb. 12–Feb. 24, 1998 Apr. 1–Apr. 21, 1998 May 22–June 3, 1998 June 25–July 14, 1998 Aug. 7–Sept. 9, 1998 Oct. 21–Dec. 17, 1998
106th	1	Jan. 6, 1999	Nov. 22, 1999	321	Feb. 12–Feb. 22, 1999 Mar. 25–Apr. 12, 1999 May 27–June 7, 1999	Jan. 6–Jan. 19, 1999 Jan. 19–Feb. 2, 1999 Feb. 12–Feb. 23, 1999

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Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
					July 1–July 12, 1999	Mar. 25–Apr. 12, 1999
					Aug. 5–Sept. 8, 1999	May 27–June 7, 1999
						July 1–July 12, 1999
						Aug. 6–Sept. 8, 1999
	2	Jan. 24, 2000	Dec. 15, 2000	326	Feb. 10–Feb. 22, 2000	Feb. 16–Feb. 29, 2000
					Mar. 9–Mar. 20, 2000	Apr. 13–May 2, 2000
					Apr. 13–Apr. 25, 2000	May 25–June 6, 2000
					May 25–June 6, 2000	June 30–July 10, 2000
					June 30–July 10, 2000	July 27–Sept. 6, 2000
					July 27–Sept. 5, 2000	Nov. 3–Nov. 13, 2000
					Nov. 2–Nov. 14, 2000	Nov. 14–Dec. 4, 2000
					Nov. 14–Dec. 5, 2000	
107th	1	Jan. 3, 2001	Dec. 20, 2001	352	Jan. 8–Jan. 20, 2001	Jan. 6–Jan. 20, 2001
					Feb. 15–Feb. 26, 2001	Jan. 20–Jan. 30, 2001
					Apr. 6–Apr. 23, 2001	Jan. 31–Feb. 6, 2001
					May 26–June 5, 2001	Feb. 14–Feb. 26, 2001
					June 29–July 9, 2001	Apr. 4–Apr. 24, 2001
					Aug. 3–Sept. 4, 2001	May 26–June 5, 2001
					Oct. 18–Oct. 23, 2001	June 28–July 10, 2001
					Nov. 16–Nov. 27, 2001	Aug. 2–Sept. 5, 2001
						Oct. 17–Oct. 23, 2001
						Nov. 19–Nov. 27, 2001
	2	Jan. 23, 2002	Nov. 22, 2002	304	Jan. 29–Feb. 4, 2002	Jan. 29–Feb. 4, 2002
					Feb. 15–Feb. 25, 2002	Feb. 14–Feb. 26, 2002
					Mar. 22–Apr. 8, 2002	Mar. 20–Apr. 9, 2002
					May 23–June 3, 2002	May 24–June 4, 2002
					June 28–July 8, 2002	June 28–July 8, 2002
					Aug. 1–Sept. 3, 2002	July 27–Sept. 4, 2002
					Oct. 17–Nov. 12, 2002 p	
108th	1	Jan. 7, 2003	Dec. 9, 2003	337	Feb. 14–Feb. 24, 2003	Jan. 8–Jan. 27, 2003
					Apr. 11–Apr. 28, 2003	Feb. 13–Feb. 25, 2003
					May 23–June 2, 2003	Apr. 12–Apr. 29, 2003
					June 27–July 7, 2003	May 23–June 2, 2003
					Aug. 1–Sept. 2, 2003	June 27–July 7, 2003
					Oct. 3–Oct. 14, 2003	July 29–Sept. 3, 2003
					Nov. 25–Dec. 9, 2003	Nov. 25–Dec. 8, 2003
	2	Jan. 20, 2004	Dec. 8, 2004	324	Feb. 12–Feb. 23, 2004	Feb. 11–Feb. 24, 2004
					Mar. 12–Mar. 22, 2004	Apr. 2–Apr. 20, 2004
					Apr. 8–Apr. 19, 2004	May 20–June 1, 2004
					May 21–June 1, 2004	June 9–June 14, 2004
					June 9–June 14, 2004	June 25–July 6, 2004
					June 25–July 6, 2004	July 22–Sept. 7, 2004
					July 22–Sept. 7, 2004	Oct. 9–Nov. 16, 2004
					Oct. 11–Nov. 16, 2004	Nov. 24–Dec. 6, 2004
					Nov. 24–Dec. 7, 2004	
109th	1	Jan. 4, 2005	Dec. 22, 2005	353	Jan. 6–Jan. 20, 2005	Jan. 6–Jan. 20, 2005
					Jan. 26–Jan. 31, 2005	Jan. 20–Jan. 25, 2005
					Feb. 18–Feb. 28, 2005	Jan. 26–Feb. 1, 2005
					Mar. 20–Apr. 4, 2005	Feb. 2–Feb. 8, 2005
					Apr. 29–May 9, 2005	Feb. 17–Mar. 1, 2005
					May 26–June 6, 2005	Mar. 21–Apr. 5, 2005
					July 1–July 11, 2005	May 26–June 7, 2005
					July 29–Sept. 1, 2005	July 1–July 11, 2005
					Sept. 1–Sept. 6, 2005	July 29–Sept. 2, 2005
					Oct. 7–Oct. 17, 2005	Oct. 7–Oct. 17, 2005
					Nov. 18–Dec. 12, 2005	Nov. 18–Dec. 6, 2005
	2	Jan. 3, 2006	Dec. 9, 2006	341	Jan. 3–Jan. 18, 2006	Jan. 3–Jan. 31, 2006
					Feb. 17–Feb. 27, 2006	Feb. 1–Feb. 7, 2006
					Mar. 16–Mar. 27, 2006	Feb. 8–Feb. 14, 2006
					Apr. 7–Apr. 24, 2006	Feb. 16–Feb. 28, 2006
					May 26–June 5, 2006	Mar. 16–Mar. 28, 2006
					June 29–July 10, 2006	Apr. 6–Apr. 25, 2006
					Aug. 4–Sept. 5, 2006	May 25–June 6, 2006
					Sept. 30–Nov. 9, 2006	June 29–July 10, 2006
					Nov. 16–Dec. 4, 2006	Aug. 2–Sept. 6, 2006
						Sept. 30–Nov. 9, 2006
						Nov. 15–Dec. 5, 2006
110th	1	Jan. 4, 2007	Dec. 31, 2007	362	Feb. 17–Feb. 26, 2007	Jan. 24–Jan. 29, 2007
					Mar. 29–Apr. 10, 2007	Feb. 16–Feb. 27, 2007
					May 25–June 4, 2007	Mar. 30–Apr. 16, 2007
					June 29–July 9, 2007	May 24–June 5, 2007
					Aug. 3–Sept. 4, 2007	June 28–July 10, 2007
					Oct. 5–Oct. 15, 2007	Aug. 4–Sept. 4, 2007
					Nov. 16–Dec. 3, 2007 p	Nov. 15–Dec. 4, 2007
					Dec. 19–Dec. 31, 2007 p	
	2	Jan. 3, 2008	Jan. 3, 2009	367	Jan. 3–Jan. 22, 2008 p	Jan. 3–Jan. 15, 2008
					Feb. 14–Feb. 26, 2008 p	Mar. 14–Mar. 31, 2008
					Mar. 13–Mar. 31, 2008 p	May 22–June 3, 2008
					May 22–June 2, 2008 p	June 26–July 8, 2008
					June 27–July 7, 2008	Aug. 1–Sept. 8, 2008

Appendix B to opinion of the Court

Congress	Session	Convening Date	Adjournment Date	Length in days[1]	Recesses[2]	
					Senate	House of Representatives
					Aug. 1–Sept. 8, 2008 p Oct. 2–Nov. 17, 2008 p Nov. 20–Dec. 8, 2008 p Dec. 11, 2008–Jan. 2, 2009 p	Oct. 3–Nov. 19, 2008 Nov. 20–Dec. 9, 2008 Dec. 10, 2008–Jan. 3, 2009
111th	1	Jan. 6, 2009	Dec. 24, 2009	353	Feb. 13–Feb. 23, 2009 p Apr. 2–Apr. 20, 2009 May 21–June 1, 2009 June 25–July 6, 2009 Aug. 7–Sept. 8, 2009 p Oct. 8–Oct. 13, 2009 p Nov. 10–Nov. 16, 2009 Nov. 21–Nov. 30, 2009	Feb. 13–Feb. 23, 2009 Apr. 2–Apr. 21, 2009 May 21–June 2, 2009 June 26–July 7, 2009 July 31–Sept. 8, 2009 Nov. 6–Nov. 16, 2009 Nov. 19–Dec. 1, 2009
112th	2 1	Jan. 5, 2010 Jan. 5, 2011	Dec. 22, 2010	352	Jan. 5–Jan. 20, 2010 p Feb. 11–Feb. 23, 2010 Mar. 26–Apr. 12, 2010 May 28–June 7, 2010 June 30–July 12, 2010 Aug. 5–Aug. 12, 2010 Aug. 12–Sept. 13, 2010 Sept. 29–Nov. 15, 2010 p Nov. 19–Nov. 29, 2010 Jan. 5–Jan. 25, 2011 Feb. 17–Feb. 28, 2011 Mar. 17–Mar. 28, 2011 Apr. 14–May 2, 2011 May 26–June 6, 2011 p Aug. 2–Sept. 6, 2011 p	Jan. 5–Jan. 12, 2010 Feb. 9–Feb. 22, 2010 Mar. 25–Apr. 13, 2010 May 28–June 8, 2010 July 1–July 13, 2010 July 30–Aug. 9, 2010 Aug. 10–Sept. 14, 2010 Sept. 29–Nov. 15, 2010 Nov. 18–Nov. 29, 2010 Jan. 26–Feb. 8, 2011 Feb. 18–Feb. 28, 2011 Mar. 17–Mar. 29, 2011 Apr. 15–May 2, 2011 May 13–May 23, 2011 June 24–July 5, 2011 p Aug. 1–Sept. 6, 2011 p

[1]For the purposes of this table, a session's "length in days" is defined as the total number of calendar days from the convening date to the adjournment date, inclusive. It does not mean the actual number of days that Congress met during that session.

[2]For the purposes of this table, a "recess" is defined as a break in House or Senate proceedings of three or more days, excluding Sundays. According to Article I, section 5 of the U. S. Constitution, neither house may adjourn for more than three days without the consent of the other. On occasion, both chambers have held one or more pro forma sessions because of this constitutional obligation or for other purposes. Treated here as recesses, usually no business is conducted during these time periods. On this table, beginning in the 1990s, such pro forma sessions are indicated with a P.

B

The following table shows the proportion of recent appointments that have filled pre-recess vacancies. It was compiled with research assistance from the Supreme Court Library. It contains a random sample of the recess appointments by President George W. Bush and President Barack Obama. The last column indicates whether the vacancy arose during the recess in which it was filled. "A" indicates a vacancy that arose during the recess, "P" indicates a vacancy that arose before the recess, and "U" indicates that the vacancy date could not be ascertained.

Name[1]	**Position**	**Date of Recess Appointment**	**Date the Position Became Vacant**	**Status of Vacancy**
Peter J. Hurtgen	Member (designated Chair), NLRB	8/31/01	8/27/2001[2]	A

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Name[1]	**Position**	**Date of Recess Appointment**	**Date the Position Became Vacant**	**Status of Vacancy**
Dennis L. Schornack	Comm'r on the Part of the US, Int'l Joint Comm'n, US and Canada	3/29/02	Unknown[3]	U
Tony Hammond	Comm'r, Postal Rate Comm'n	8/06/02	2/2001[4]	P
R. Bruce Matthews	Member, Defense Nuclear Facilities Safety Bd. (DNFSB)	4/22/03	5/2002[5]	P
Ephraim Batambuze	Bd. Member, African Dev. Found.	8/22/03	2/10/2002[6]	P
Bradley D. Belt	Member, Social Security Advisory Bd. (SSAB)	12/23/03	9/2002[7]	P
Ronald E. Meisburg	Member, NLRB	12/23/03	8/21/03[8]	P
Charles Johnson	Chief Financial Officer, EPA	5/28/04	2003[9]	P
Jack E. McGregor	Member, Advisory Bd., St. Lawrence Seaway Dev. Corp.	7/02/04	Unknown[10]	U
James R. Kunder	Assistant Adm'r, Bureau for Asia and the Near East, USAID	8/02/04	1/2004[11]	P
Susan J. Grant	Chief Financial Officer, Dept. of Energy	8/02/04	2003[12]	P
Anthony J. Principi	Member (designated Chair), Defense Base Closure and Realignment Comm'n	4/01/05	3/2005 (new position)[13]	P
John R. Bolton	US Representative to the UN	8/01/05	1/2005[14]	P
Ellen R. Sauerbrey	Assistant Sec'y, Population, Refugees, and Migration, Dept. of State	1/04/06	by 7/2005[15]	P
Ronald E. Meisburg	General Counsel, NLRB	1/04/06	6/03/2005[16]	P
John L. Palmer	Member, Bd. of Trustees, Fed. Old-Age and Survivors Ins. Trust Fund and the Fed. Disability Ins. Trust Fund	4/19/06	10/2004[17]	P
Richard E. Stickler	Assistant Sec'y, Mine, Safety, and Health Admin.	10/19/06	11/19/2004[18]	P

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Name[1]	**Position**	**Date of Recess Appointment**	**Date the Position Became Vacant**	**Status of Vacancy**
Susan E. Dudley	Adm'r, OIRA, OMB	4/04/07	2/2006[19]	P
Mark G. Pearce	Member, NLRB	3/27/10	1/2008[20]	P
Mari C. Aponte	Chief of Mission, El Salvador, Dept. of State	8/19/10	1/17/09[21]	P
Richard Griffin Jr.	Member, NLRB	1/04/12	8/27/11[22]	P

[1] The name, position, and date of each recess appointment were taken from The *Noel Canning* Decision 21–29. The sample was generated by selecting every 10th appointment from a chronological list of all recess appointments made during the Presidencies of George W. Bush and Barack Obama.

[2] See White House Press Release: President Bush Announces Hurtgen To Stay on as Member and Chairman of the NLRB, Aug. 31, 2001, online at http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010831-14.html.

[3] Schornack was preceded by Thomas L. Baldini. 147 Cong. Rec. 12592 (2001). We could not find a specific date for Baldini's departure. See Lane, Engler Advisers Tapped for Water Jobs, Crain's Detroit Business, June 18, 2001, p. 6 (Schornack "would replace Marquette's Thomas Baldini, former President Bill Clinton's appointee"); Finley, Senate Often Turns Its Role of Advise and Consent Into Object and Obstruct, Detroit News, Feb. 10, 2002, p. 13A, col. 1. ("The International Joint Commission post is still held by Clinton appointee Tom Baldini, also of Michigan").

[4] Hammond was preceded by Edward Jay Gleiman, 148 Cong. Rec. 4472 (2002), who retired in February 2001, see Campanelli, PRC Chairman Gleiman Retires, Direct Marketing News, Feb. 6, 2001, online at http://www.dmnews.com/prc-chairman-gleiman-retires/article/70877.

[5] Matthews was preceded by Joseph J. DiNunno, 38 Weekly Comp. of Pres. Doc. 804 (2002), who retired in May 2002, see DNFSB Member Biography, online at http://www.dnfsb.gov/about/board-members/joseph-j-dinunno.

[6] Batambuze was preceded by Henry McKoy, 149 Cong. Rec. 4875 (2003), whose term expired on February 9, 2002, see 32 Weekly Comp. of Pres. Doc. 363 (1996).

[7] Belt was preceded by Stanford G. Ross, 149 Cong. Rec. 20993 (2003), whose term on the SSAB expired in September 2002, see SSAB Member List, online at http://www.ssab.gov/AbouttheBoard/Members.aspx.

[8] See N. L. R. B. Bulletin, Ronald Meisburg Receives Recess Appointment From President Bush To Be NLRB Member (Dec. 29, 2003), online at http://mynlrb.nlrb.gov/link/document.aspx/09031d45800d5d75.

[9] Johnson was preceded by Linda Morrison Combs, 150 Cong. Rec. 236 (2004), who apparently left in 2003, see Hearings on S. 113 before the Committee on Homeland Security and Governmental Affairs, 109th Cong., 1st Sess., 2 (2005) ("Combs served as [CFO] of the [EPA] from 2001 to 2003"); see also 149 Cong. Rec. 31985 (2003) (nomination of Linda Morrison Combs to be Assistant Secretary of Transportation); 150 Cong. Rec. 10973 (2004) (confirmation of Combs to be Assistant Secretary of Transportation).

[10] McGregor was preceded by Vincent J. Sorrentino. 149 Cong. Rec. 31985 (2003). We have located no further information about Sorrentino's departure date.

[11] Kunder was preceded by Wendy J. Chamberlin, 150 Cong. Rec. 8983 (2004), who accepted a new appointment as of January 2004, see United Nations Refugee Agency Press Release, Wendy Chamberlin Appointed Deputy High Commissioner, Dec. 12, 2003, online at http://www.unhcr.org/news/NEWS/3fda0f584.html.

[12] Grant was preceded by Bruce M. Carnes, 149 Cong. Rec. 24527 (2003), who resigned during 2003, see Bush Nominee to Energy Department CFO Post OK'd by Committee, Environment and Energy Daily, Mar. 11, 2004; see also 39 Weekly Comp. of Pres. Doc. 308 (2003).

[13] Principi was nominated for this newly created position on March 4, 2005. 151 Cong. Rec. 3543 (2005). The position was created by statute in 2001. 115 Stat. 1343–1344.

[14] See Hoge, Diplomats at U. N. Surprised by Danforth's Resignation, N. Y. Times, Dec. 3, 2004, p. A6.

[15] Sauerbrey was preceded by Arthur Dewey. 151 Cong. Rec. 19554 (2005); see also Weekly Review of Developments in Human Rights and Democracy, Dow Jones Factiva, June 30, 2005; Arthur E. Dewey, Dept. of State Biography, online at http://2001-2009.state. gov/outofdate/bios/d/7988.htm.

[16] Meisburg was preceded by Arthur F. Rosenfeld, whose term expired on June 3, 2005, see NLRB General Counsels Since 1935, online at http://www.nlrb.gov/who-we-are/general-counsel/general-counsels-1935.

[17] Palmer was nominated as a reappointment on November 7, 2005. 151 Cong. Rec. 25016 (2005). The Senate confirmed Palmer to his previous 4-year term on October 24, 2000. 146 Cong. Rec. 23920 (2000).

[18] Stickler was preceded by David D. Lauriski, 152 Cong. Rec. 17151 (2006), who resigned on November 19, 2004, see Dept. of Labor, News Release, U. S. Assistant Secretary of Labor for Mine Safety and Health Dave D. Lauriski Announces His Plans for Departure, Nov. 12, 2004.

[19] Dudley was preceded by John D. Graham, 152 Cong. Rec. 16707 (2006), who left the office in February 2006, see J. R. Pegg, Bush Bypasses Senate To Appoint Controversial Regulatory Chief, 35 Pesticide & Toxic Chemical News, No. 24, pp. 13–14 (Apr. 9, 2007).

[20] Pearce was preceded by Peter N. Kirsanow, whose term had ended by January 2008, see Members of the NLRB Since 1935, online at http://www.nlrb.gov/who-we-are/board/members-nlrb-1935.

[21] Aponte was preceded by Charles Glazer, who left his post on January 17, 2009, see Dept. of State, Office of the Historian, Chiefs of Mission for El Salvador, online at http://history.state. gov/departmenthistory/people/glazer-charles-l.

[22] See App. to Brief for Petitioner 89a.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, concurring in the judgment.

Except where the Constitution or a valid federal law provides otherwise, all "Officers of the United States" must be appointed by the President "by and with the Advice and Consent of the Senate." U. S. Const., Art. II, §2, cl. 2. That general rule is subject to an exception: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.*, §2, cl. 3. This case requires us to decide whether the Recess Appointments Clause authorized three appointments made by President Obama to the National Labor Relations Board in January 2012 without the Senate's consent.

To prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in "the Recess of the Senate," that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that "happen during the Recess," that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and structure, and both were well understood at the founding. The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet either condition.

Today's Court agrees that the appointments were invalid, but for the far narrower reason that they were made during a 3-day break in the Senate's session. On its way to that result, the majority sweeps away the key textual limitations on the recess-appointment power. It holds, first, that the President can make appointments without the Senate's participation even during short breaks in the middle of the Senate's session, and second, that those appointments can fill offices that became vacant long before the break in which they were filled. The majority justifies those atextual results on an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor, so the Court should not "upset the compromises and working arrangements that the elected branches of Government themselves have reached." *Ante,* at 526.

The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority's insistence on deferring to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.

I. Our Responsibility

Today's majority disregards two overarching principles that ought to guide our consideration of the questions presented here.

First, the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Indeed,

"[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton* v. *City of New York*, 524 U. S. 417, 450 (1998) (KENNEDY, J., concurring). Those structural provisions reflect the founding generation's deep conviction that "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher* v. *Synar*, 478 U. S. 714, 722 (1986). It is for that reason that "the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond* v. *United States*, 564 U. S. 211, 222 (2011); see, *e. g.*, *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010); *Clinton*, *supra*; *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211 (1995); *Bowsher*, *supra*; *INS* v. *Chadha*, 462 U. S. 919 (1983); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982). Those decisions all rest on the bedrock principle that "the constitutional structure of our Government" is designed first and foremost not to look after the interests of the respective branches, but to "protec[t] individual liberty." *Bond*, *supra*, at 223.

Second and relatedly, when questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch "'to say what the law is.'" *Zivotofsky* v. *Clinton*, 566 U. S. 189, 196 (2012) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). This Court does not defer to the other branches' resolution of such controversies; as JUSTICE KENNEDY has previously written, our role is in no way "lessened" because it might be said that "the two political branches are adjusting their own powers between themselves." *Clinton*, *supra*, at 449 (concurring opinion). Since the separation of powers exists for the protection of individual liberty, its vitality "does not depend" on "whether 'the encroached-upon branch approves the encroachment.'"

Free Enterprise Fund, *supra*, at 497 (quoting *New York* v. *United States*, 505 U. S. 144, 182 (1992)); see also *Freytag* v. *Commissioner*, 501 U. S. 868, 879–880 (1991); *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276–277 (1991). Rather, policing the "enduring structure" of constitutional government when the political branches fail to do so is "one of the most vital functions of this Court." *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 468 (1989) (KENNEDY, J., concurring in judgment).

Our decision in *Chadha* illustrates that principle. There, we held that a statutory provision authorizing one House of Congress to cancel an executive action taken pursuant to statutory authority—a so-called "legislative veto"—exceeded the bounds of Congress's authority under the Constitution. 462 U. S., at 957–959. We did not hesitate to hold the legislative veto unconstitutional even though Congress had enacted, and the President had signed, nearly 300 similar provisions over the course of 50 years. *Id.*, at 944–945. Just the opposite: We said the other branches' enthusiasm for the legislative veto "sharpened rather than blunted" our review. *Id.*, at 944. Likewise, when the charge is made that a practice "enhances the President's powers beyond" what the Constitution permits, "[i]t is no answer . . . to say that Congress surrendered its authority by its own hand." *Clinton*, 524 U. S., at 451 (KENNEDY, J., concurring). "[O]ne Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design." *Id.*, at 452 (citations omitted).

Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision. See, *e. g.*, *Alden* v. *Maine*, 527 U. S. 706, 743–744 (1999); *Bowsher*, *supra*, at 723–724; *Myers* v. *United States*, 272 U. S. 52, 174–175 (1926);

see also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (Frankfurter, J., concurring) (arguing that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned" should inform interpretation of the "Executive Power" vested in the President); *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 95, and n. 1 (1990) (SCALIA, J., dissenting). But "'[p]ast practice does not, by itself, create power.'" *Medellín* v. *Texas*, 552 U. S. 491, 532 (2008) (quoting *Dames & Moore* v. *Regan*, 453 U. S. 654, 686 (1981)). That is a necessary corollary of the principle that the political branches cannot by agreement alter the constitutional structure. Plainly, then, a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court—in other words, the sort of practice on which the majority relies in this case—does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.

Ignoring our more recent precedent in this area, which is extensive, the majority relies on *The Pocket Veto Case*, 279 U. S. 655, 689 (1929), for the proposition that when interpreting a constitutional provision "regulating the relationship between Congress and the President," we must defer to the settled practice of the political branches if the provision is "'"in any respect of doubtful meaning."'" *Ante*, at 524; see *ante*, at 526, 533, 540, 549. The language the majority quotes from that case was pure dictum. The *Pocket Veto* Court had to decide whether a bill passed by the House and Senate and presented to the President less than 10 days before the adjournment of the first session of a particular Congress, but neither signed nor vetoed by the President, became a law. Most of the opinion analyzed that issue like any other legal question and concluded that treating the bill as a law would have been inconsistent with the text and structure of the Constitution. Only near the end of the opinion did the

Court add that its conclusion was "confirmed" by longstanding Presidential practice in which Congress appeared to have acquiesced. 279 U. S., at 688–689. We did not suggest that the case would have come out differently had the longstanding practice been otherwise.[1]

[1] The other cases cited by the majority in which we have afforded significant weight to historical practice, *ante*, at 525, are consistent with the principles described above. Nearly all involved venerable and unchallenged practices, and constitutional provisions that were either deeply ambiguous or plainly supportive of the practice. See *Dames & Moore* v. *Regan*, 453 U. S. 654, 679–681, and n. 8, 686 (1981) (citing Presidential practice dating from 1799 and never questioned by Congress to inform meaning of "Executive Power"); *Ex parte Grossman*, 267 U. S. 87, 118–119 (1925) (citing unchallenged Presidential practice dating from 1841 as support for a construction of the pardon power based on the "common law," the "history of the clause in the Convention," and "the ordinary meaning of its words"); *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469–471, 474 (1915) (citing Presidential practice dating from "an early period in the history of the government," "uniformly and repeatedly acquiesced in" by Congress and previously upheld by this Court, to establish "a recognized administrative power of the Executive in the management of the public lands"); *McPherson* v. *Blacker*, 146 U. S. 1, 25–35 (1892) (citing method of choosing Presidential electors prevalent among the States "from the formation of the government until now," as to the constitutionality of which "'no question ha[d] ever arisen,'" in support of construction consistent with the constitutional text and its drafting history); *McCulloch* v. *Maryland*, 4 Wheat. 316, 401–402 (1819) (citing power "exercised by the first Congress elected under the present constitution," "recognized by many successive legislatures, and . . . acted upon by the judicial department," in support of the conclusion that the Necessary and Proper Clause allowed Congress to incorporate a bank); *Stuart* v. *Laird*, 1 Cranch 299, 309 (1803) (citing practice that "commence[d] with the organization of the judicial system" in rejecting challenge to Supreme Court Justices' riding circuit). Even *Mistretta* v. *United States*, 488 U. S. 361 (1989), which concluded that the constitutional text did not prohibit judges from undertaking extrajudicial duties and found "additional evidence" for that conclusion in a longstanding practice that it acknowledged had been "controversial," emphasized that it was relying on "contemporaneous practice by the Founders themselves" that had been "frequent and continuing" since ratification. *Id.*, at 397–400.

II. Intra-Session Breaks

The first question presented is whether "the Recess of the Senate," during which the President's recess-appointment power is active, is (a) the period between two of the Senate's formal sessions, or (b) any break in the Senate's proceedings. I would hold that "the Recess" is the gap between sessions and that the appointments at issue here are invalid because they undisputedly were made *during* the Senate's session. The Court's contrary conclusion—that "the Recess" includes "breaks in the midst of a session," *ante*, at 526—is inconsistent with the Constitution's text and structure, and it requires judicial fabrication of vague, unadministrable limits on the recess-appointment power (thus defined) that overstep the judicial role. And although the majority relies heavily on "historical practice," no practice worthy of our deference supports the majority's conclusion on this issue.

A. Plain Meaning

A sensible interpretation of the Recess Appointments Clause should start by recognizing that the Clause uses the term "Recess" in contradistinction to the term "Session." As Alexander Hamilton wrote: "The time within which the power is to operate 'during the recess of the Senate' and the duration of the appointments 'to the end of the next session' of that body, conspire to elucidate the sense of the provision." The Federalist No. 67, p. 455 (J. Cooke ed. 1961).

In the founding era, the terms "recess" and "session" had well-understood meanings in the marking-out of legislative time. The life of each elected Congress typically consisted (as it still does) of two or more formal sessions separated by adjournments "*sine die*," that is, without a specified return date. See GPO, Congressional Directory, 113th Cong., pp. 524–542 (2013–2014) (hereinafter Congressional Directory) (listing sessions of Congress from 1789 through 2013); 705 F. 3d 490, 512, and nn. 1–2 (CADC 2013) (case below);

ante, at 526. The period *between* two sessions was known as "the recess." See 26 Annals of Cong. 748 (1814) (Sen. Gore) ("The time of the Senate consists of two periods, viz: their session and their recess"). As one scholar has thoroughly demonstrated, "in government practice the phrase 'the Recess' *always* referred to the gap between sessions." Natelson, The Origins and Meaning of "Vacancies that May Happen During the Recess" in the Constitution's Recess Appointments Clause, 37 Harv. J. L. & Pub. Pol'y 199, 213 (2014) (hereinafter Natelson); see *id.*, at 214–227 (providing dozens of examples). By contrast, other provisions of the Constitution use the verb "adjourn" rather than "recess" to refer to the commencement of breaks *during* a formal legislative session. See, *e. g.*, Art. I, § 5, cl. 1; *id.*, § 5, cl. 4.[2]

To be sure, in colloquial usage both words, "recess" and "session," could take on alternative, less precise meanings. A session could include any short period when a legislature's members were "assembled for business," and a recess could refer to any brief "suspension" of legislative "business." 2 N. Webster, American Dictionary of the English Language (1828). So the Continental Congress could complain of the noise from passing carriages disrupting its "daily Session,"

[2] The majority claims that "the phrase 'the recess' was used to refer to intra-session recesses at the time of the founding," *ante*, at 528, but it offers strikingly little support for that assertion. It first cites a letter from George Washington that is quite obviously an example of imprecise, colloquial usage. See 3 Records of the Federal Convention of 1787, p. 76 (M. Farrand rev. 1966) ("I had put my carriage in the hands of a workman to be repaired and had not the means of mooving [sic] during the recess"). It next cites an example from the New Jersey Legislature that simply reflects that body's practice of dividing its time not only into "sessions" but also into distinct, formal "sittings" within each session, with "the recess" denoting the period between sittings. See Brief for Respondent Noel Canning 23; see also Natelson 207. Finally, the majority cites three pages from the Solicitor General's brief without acknowledging the arguments offered in response to the Solicitor General's few supposed counterexamples. See, *e. g.*, Brief for Respondent Noel Canning 21–24; Natelson 222, n. 120.

29 Journals of the Continental Congress 1774–1789, p. 561 (1785) (J. Fitzpatrick ed. 1933), and the House could "take a recess" from 4 o'clock to 6 o'clock, Journal of the House of Representatives, 17th Cong., 2d Sess., p. 259 (1823). But as even the majority acknowledges, the Constitution's use of "the word 'the' in '*the* [R]ecess' " tends to suggest "that the phrase refers to the single break separating formal sessions." *Ante*, at 527.

More importantly, neither the Solicitor General nor the majority argues that the Clause uses "session" in its loose, colloquial sense. And if "the next Session" denotes a *formal* session, then "the Recess" must mean the break *between* formal sessions. As every commentator on the Clause until the 20th century seems to have understood, the "Recess" and the "Session" to which the Clause refers are mutually exclusive, alternating states. See, *e. g.*, The Federalist No. 67, at 455 (explaining that appointments would require Senatorial consent "during the session of the Senate" and would be made by the President alone "*in their recess*"); 1 Op. Atty. Gen. 631 (1823) (contrasting vacancies occurring "during the recess of the Senate" with those occurring "during the session of the Senate"); 2 Op. Atty. Gen. 525, 527 (1832) (discussing a vacancy that "took place while the Senate was in session, and not during the recess"). It is linguistically implausible to suppose—as the majority does—that the Clause uses one of those terms ("Recess") informally and the other ("Session") formally in a single sentence, with the result that an event can occur during *both* the "Recess" *and* the "Session."

Besides being linguistically unsound, the majority's reading yields the strange result that an appointment made during a short break near the beginning of one official session will not terminate until the end of the *following* official session, enabling the appointment to last for up to two years. The majority justifies that result by observing that the process of confirming a nominee "may take several months."

Ante, at 534. But the average duration of the confirmation process is irrelevant. The Clause's self-evident design is to have the President's unilateral appointment last only until the Senate has "had an *opportunity* to act on the subject." 3 J. Story, Commentaries on the Constitution of the United States § 1551, p. 410 (1833) (emphasis added).

One way to avoid the linguistic incongruity of the majority's reading would be to read both "the Recess" and "the next Session" colloquially, so that the recess-appointment power would be activated during any temporary suspension of Senate proceedings, but appointments made pursuant to that power would last only until the beginning of the next suspension (which would end the next colloquial session). See, *e. g.*, Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487, 1569 (2005) (hereinafter Rappaport, Original Meaning). That approach would be more linguistically defensible than the majority's. But it would not cure the most fundamental problem with giving "Recess" its colloquial, rather than its formal, meaning: Doing so leaves the recess-appointment power without a textually grounded principle limiting the time of its exercise.

The dictionary definitions of "recess" on which the majority relies provide no such principle. On the contrary, they make clear that in colloquial usage, a recess could include *any* suspension of legislative business, no matter how short. See 2 S. Johnson, A Dictionary of the English Language 1602 (4th ed. 1773). Webster even provides a stark illustration: "[T]he house of representatives had a *recess* of half an hour." 2 Webster, *supra*. The notion that the Constitution empowers the President to make unilateral appointments every time the Senate takes a half-hour lunch break is so absurd as to be self-refuting. But that, in the majority's view, is what the text authorizes.

The boundlessness of the colloquial reading of "the Recess" thus refutes the majority's assertion that the Clause's "purpose" of "ensur[ing] the continued functioning of the

Federal Government" demands that it apply to intra-session breaks as well as inter-session recesses. *Ante*, at 528. The majority disregards another self-evident purpose of the Clause: to preserve the Senate's role in the appointment process—which the founding generation regarded as a critical protection against "'despotism,'" *Freytag*, 501 U. S., at 883—by clearly delineating the times when the President can appoint officers without the Senate's consent. Today's decision seriously undercuts *that* purpose. In doing so, it demonstrates the folly of interpreting constitutional provisions designed to establish "a structure of government that would protect liberty," *Bowsher*, 478 U. S., at 722, on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible. "Convenience and efficiency," we have repeatedly recognized, "are not the primary objectives" of our constitutional framework. *Free Enterprise Fund*, 561 U. S., at 499 (internal quotation marks omitted).

Relatedly, the majority contends that the Clause's supposed purpose of keeping the wheels of government turning demands that we interpret the Clause to maintain its relevance in light of the "new circumstance" of the Senate's taking an increasing number of intra-session breaks that exceed three days. *Ante*, at 534. Even if I accepted the canard that courts can alter the Constitution's meaning to accommodate changed circumstances, I would be hard pressed to see the relevance of that notion here. The rise of intra-session adjournments has occurred in tandem with the development of modern forms of communication and transportation that mean the Senate "is always available" to consider nominations, even when its Members are temporarily dispersed for an intra-session break. Tr. of Oral Arg. 21 (GINSBURG, J.). The Recess Appointments Clause therefore is, or rather, should be, an anachronism—"essentially an historic relic, something whose original purpose has disappeared." *Id.*, at 19 (KAGAN, J.). The need it was designed to fill no longer

exists, and its only remaining use is the ignoble one of enabling the President to circumvent the Senate's role in the appointment process. That does not justify "read[ing] it out of the Constitution" and, contra the majority, *ante*, at 556, I would not do so; but neither would I distort the Clause's original meaning, as the majority does, to ensure a prominent role for the recess-appointment power in an era when its influence is far more pernicious than beneficial.

To avoid the absurd results that follow from its colloquial reading of "the Recess," the majority is forced to declare that some intra-session breaks—though undisputedly within the phrase's colloquial meaning—are simply "too short to trigger the Recess Appointments Clause." *Ante*, at 538. But it identifies no textual basis whatsoever for limiting the length of "the Recess," nor does it point to any clear standard for determining how short is too short. It is inconceivable that the Framers would have left the circumstances in which the President could exercise such a significant and potentially dangerous power so utterly indeterminate. Other structural provisions of the Constitution that turn on duration are quite specific: Neither House can adjourn "for more than three days" without the other's consent. Art. I, § 5, cl. 4. The President must return a passed bill to Congress "within ten Days (Sundays excepted)," lest it become a law. *Id.*, § 7, cl. 2. Yet on the majority's view, when the first Senate considered taking a 1-month break, a 3-day weekend, or a half-hour siesta, it had no way of knowing whether the President would be constitutionally authorized to appoint officers in its absence. And any officers appointed in those circumstances would have served under a cloud, unable to determine with any degree of confidence whether their appointments were valid.[3]

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[3] The majority insists that "the most likely reason the Framers did not place a textual floor underneath the word 'recess' is that they did not foresee the *need* for one" because they did not anticipate that intra-session breaks "would become lengthier and more significant than inter-session

Fumbling for some textually grounded standard, the majority seizes on the Adjournments Clause, which bars either House from adjourning for more than three days without the other's consent. *Id.*, § 5, cl. 4. According to the majority, that Clause establishes that a 3-day break is *always* "too short" to trigger the Recess Appointments Clause. *Ante*, at 536. It goes without saying that nothing in the constitutional text supports that disposition. If (as the majority concludes) "the Recess" means a recess in the colloquial sense, then it necessarily includes breaks shorter than three days. And the fact that the Constitution includes a 3-day limit in one clause but omits it from the other weighs strongly against finding such a limit to be implicit in the clause in which it does not appear. In all events, the dramatically different contexts in which the two clauses operate make importing the 3-day limit from the Adjournments Clause into the Recess Appointments Clause "both arbitrary and mistaken." Rappaport, Original Meaning 1556.

And what about breaks longer than three days? The majority says that a break of four to nine days is "presumptively too short" but that the presumption may be rebutted in an "unusual circumstance," such as a "national catastrophe . . . that renders the Senate unavailable but calls for an urgent response." *Ante*, at 538. The majority must hope that the *in terrorem* effect of its "presumptively too short" pronouncement will deter future Presidents from making any recess appointments during 4-to-9-day breaks and thus save us from the absurd spectacle of unelected judges evaluating (after an evidentiary hearing?) whether an alleged "ca-

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ones." *Ante*, at 535–536. The majority's logic escapes me. The Framers' supposed failure to anticipate "length[y]" intra-session breaks might explain why (as I maintain) they did not bother to authorize recess appointments during intra-session breaks at all; but it cannot explain why (as the majority holds) they would have enacted a text that authorizes appointments during *all* intra-session breaks—even the short ones the majority says they *did* anticipate—without placing a temporal limitation on that power.

tastrophe" was sufficiently "urgent" to trigger the recess-appointment power. The majority also says that "political opposition in the Senate would not qualify as an unusual circumstance." *Ibid.* So if the Senate should refuse to confirm a nominee whom the President considers highly qualified; or even if it should refuse to confirm any nominee for an office, thinking the office better left vacant for the time being; the President's power would not be triggered during a 4-to-9-day break, no matter how "urgent" the President's perceived need for the officer's assistance. (The majority protests that this "should go without saying—except that JUSTICE SCALIA compels us to say it," *ibid.*, seemingly forgetting that the appointments at issue in this very case were justified on those grounds and that the Solicitor General has asked us to view the recess-appointment power as a "safety valve" against Senatorial "intransigence." Tr. of Oral Arg. 21.)

As for breaks of 10 or more days: We are presumably to infer that such breaks do not trigger any "presumpt[ion]" against recess appointments, but does that mean the President has an utterly free hand? Or can litigants seek invalidation of an appointment made during a 10-day break by pointing to an absence of "unusual" or "urgent" circumstances necessitating an immediate appointment, albeit without the aid of a "presumpt[ion]" in their favor? Or, to put the question as it will present itself to lawyers in the Executive Branch: Can the President make an appointment during a 10-day break simply to overcome "political opposition in the Senate" despite the absence of any "national catastrophe," even though it "go[es] without saying" that he cannot do so during a 9-day break? Who knows? The majority does not say, and neither does the Constitution.[4]

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[4] The majority erroneously suggests that the "lack of a textual floor raises a problem that plagues" both interpretations of "the Recess." *Ante*, at 536. Not so. If the Clause is given its plain meaning, the Presi-

Even if the many questions raised by the majority's failure to articulate a standard could be answered, a larger question would remain: If the Constitution's text empowers the President to make appointments during any break in the Senate's proceedings, by what right does the majority subject the President's exercise of that power to vague, court-crafted limitations with no textual basis? The majority claims its temporal guideposts are informed by executive practice, but a President's self-restraint cannot "bind his successors by diminishing their powers." *Free Enterprise Fund*, 561 U. S., at 497; cf. *Clinton* v. *Jones*, 520 U. S. 681, 718 (1997) (BREYER, J., concurring in judgment) ("voluntary actions" by past Presidents "tel[l] us little about what the Constitution commands").

An interpretation that calls for this kind of judicial adventurism cannot be correct. Indeed, if the Clause really did use "Recess" in its colloquial sense, then there would be no "judicially discoverable and manageable standar[d] for resolving" whether a particular break was long enough to trigger the recess-appointment power, making that a nonjusticiable political question. *Zivotofsky*, 566 U. S., at 195 (internal quotation marks omitted).

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dent cannot make recess appointments during the session but can make recess appointments during any break *between* sessions, no matter how short. Contra the majority, that is not a "problem." True, the recess-appointment power applies even during very short inter-session breaks. But inter-session breaks typically occur at most a few times a year, and the recess-appointment power is of limited utility during very short inter-session breaks since, as explained below, the President can fill only those vacancies that arise during the break. See Part III, *infra*. Of course, as the Senate Judiciary Committee has argued, the break must be actual and not "constructive"; the Senate must adjourn for some measurable period of time between the two sessions. See *infra*, at 587–589. But the requirement that there actually *be* a recess does not involve anywhere near the level of indeterminacy entailed by the majority's requirement that the recess be *long enough* (or the circumstances unusual enough), as determined by a court, to trigger the recess-appointment power.

B. Historical Practice

For the foregoing reasons, the Constitution's text and structure unambiguously refute the majority's freewheeling interpretation of "the Recess." It is not plausible that the Constitution uses that term in a sense that authorizes the President to make unilateral appointments during *any* break in Senate proceedings, subject only to hazy, atextual limits crafted by this Court centuries after ratification. The majority, however, insists that history "offers strong support" for its interpretation. *Ante*, at 528. The historical practice of the political branches is, of course, irrelevant when the Constitution is clear. But even if the Constitution were thought ambiguous on this point, history does not support the majority's interpretation.

1. 1789 to 1866

To begin, the majority dismisses the 78 years of history from the founding through 1866 as "not helpful" because during that time Congress took hardly any "significant" intra-session breaks, by which the majority evidently means breaks longer than three days. *Ibid.* (citing table in Appendix A, which does not include breaks of three or fewer days). In fact, Congress took 11 intra-session breaks of more than three days during that time, see Congressional Directory 524–527, and it appears Presidents made recess appointments during none of them.

More importantly, during those eight decades, Congress must have taken thousands of breaks that were three days or shorter. On the majority's reading, every one of those breaks would have been within the Clause's text—the majority's newly minted limitation not yet having been announced. Yet there is no record of anyone, ever, having so much as *mentioned the possibility* that the recess-appointment power was activated during those breaks. That would be surprising indeed if the text meant what the majority thinks

it means. Cf. *Printz* v. *United States*, 521 U. S. 898, 907–908 (1997).

2. 1867 and 1868

The first intra-session recess appointments in our history almost certainly were made by President Andrew Johnson in 1867 and 1868.[5] That was, of course, a period of dramatic conflict between the Executive and Congress that saw the first-ever impeachment of a sitting President. The Solicitor General counts 57 intra-session recess appointments during those two years. App. to Brief for Petitioner 1a–9a. But the precise nature and historical understanding of many of those appointments is subject to debate. See, *e. g.*, Brief for Constitutional Law Scholars as *Amici Curiae* 23–24; Rappaport, Nonoriginalism 27–33. It seems likely that at least 36 of the 57 appointments were made with the understanding that they took place during a recess *between sessions*. See *id.*, at 27–31.

As for the remainder, the historical record reveals nothing about how they were justified, if at all. There is no indication that Johnson's Attorney General or anyone else considered at the time whether those appointments were made between or during formal legislative sessions or, if the latter, how they could be squared with the constitutional text. The majority drives that point home by citing a judicial opinion

[5] The majority does not contend otherwise. The Solicitor General claims that President Lincoln appointed a handful of brigadier generals during intra-session breaks in 1862 and 1863, but he does not include those appointments in his list of known intra-session recess appointments. Compare Brief for Petitioner 22 with App. to Brief for Petitioner 1a. Noel Canning convincingly argues that the generals were not given recess appointments but only unofficial "acting appointments" for which they received no commissions. Brief for Respondent Noel Canning 25; see Rappaport, Why Nonoriginalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause (manuscript, at 27, n. 79) (hereinafter Rappaport, Nonoriginalism), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374563 (all Internet materials as visited June 24, 2014, and available in the Clerk of Court's case file).

that upheld one of the appointments nearly two decades later with no analysis of the question presented here. See *ante*, at 528 (citing *Gould* v. *United States*, 19 Ct. Cl. 593 (1884)). Johnson's intra-session appointments were disavowed by the first Attorney General to address that question, see *infra*, at 587, and were not followed as precedent by the Executive Branch for more than 50 years, see *infra*, at 588. Thus, the relevance of those appointments to our constitutional inquiry is severely limited. Cf. Brief for Political Scientists and Historians as *Amici Curiae* 21 (Johnson's appointments "should be viewed as anomalies" that were "*sui generis* in the first 130 years of the Republic").

3. 1869 to 1920

More than half a century went by before any other President made an intra-session recess appointment, and there is strong reason to think that during that period neither the Executive nor the Senate believed such a power existed. For one thing, the Senate adjourned for more than 3 days 45 times during that period, and 43 of those adjournments exceeded 10 days (and thus would not even be subject to the majority's "presumption" against the availability of recess appointments). See Congressional Directory 527–529. Yet there is no evidence that a single appointment was made during any of those adjournments or that any President before the 20th century even considered making such appointments.

In 1901 Philander Knox, the first Attorney General known to have opined on the question, explicitly stated that the recess-appointment power was limited to the period between formal sessions. 23 Op. Atty. Gen. 599. Knox advised President Theodore Roosevelt that he could not appoint an appraiser of merchandise during an intra-session adjournment. He explained:

> "[T]he Constitution and laws make it clear that in our legislative practice an adjournment during a session of

> Congress means a merely temporary suspension of business from day to day . . . whereas *the recess* means the period after the final adjournment of Congress for the session, and before the next session begins. . . . It is this period following the final adjournment for the session which is *the recess* during which the President has power to fill vacancies . . . . Any intermediate temporary adjournment is not such recess, although it may be *a* recess in the general and ordinary use of that term." *Id.*, at 601.[6]

Knox went on to observe that none of the "many elaborate opinions" of previous Attorneys General concerning the recess-appointment power had asserted that the power could be exercised "during a temporary adjournment of the Senate," rather than "during the recess of the Senate between two sessions of Congress." *Id.*, at 602. He acknowledged the contrary example furnished by Johnson's appointments in 1867 and 1868, but noted (with perhaps too much tact) that "[t]he public circumstances producing this state of affairs were unusual and involved results which should not be viewed as precedents." *Id.*, at 603.

That was where things stood when, in 1903, Roosevelt made a number of controversial recess appointments. At noon on December 7, the Senate moved seamlessly from a special session into a regular one scheduled to begin at that hour. See 37 Cong. Rec. 544; 38 Cong. Rec. 1. Roosevelt claimed to have made the appointments in a "constructive" recess between the two sessions. See Special Session Is Merged Into Regular, N. Y. Times, Dec. 8, 1903, p. 1. He and his allies in the Senate justified the appointments on the theory that "at the moment the gavel falls to summon the

[6] The majority dismisses Knox's opinion as overly formalistic because it "relied heavily upon the use of the word 'the' " in the phrase "the Recess." *Ante*, at 530. It did not. As the passage quoted above makes clear, Knox was relying on the common understanding of what "the Recess" meant in the context of marking out legislative time.

regular session into being there is an infinitesimal fraction of a second, which is the recess between the two sessions." Extra Session Muddle, N. Y. Times, Dec. 7, 1903, p. 3. In 1905, the Senate Judiciary Committee published a report criticizing the appointments on the ground that "the Constitution means a real recess, not a constructive one." S. Rep. No. 4389, 58th Cong., 3d Sess., p. 4. The report explained that the recess is "the period of time when the Senate is not sitting in regular or extraordinary session . . . when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." *Id.*, at 2 (emphasis deleted).

The majority seeks support in this episode, claiming that the Judiciary Committee embraced a "broad and functional definition of 'recess' " consistent with the one the majority adopts. *Ante*, at 533. On the contrary, the episode powerfully *refutes* the majority's theory. Roosevelt's legal justification for his appointments was extremely aggressive, but even he recognized that "the Recess of the Senate" could take place only between formal sessions. If the majority's view of the Clause had been considered plausible, Roosevelt could have strengthened his position considerably by making the appointments during an intra-session break of a few days, or at least a few hours. (Just 10 minutes after the new session began on December 7, the Senate took "a recess for one hour." 38 Cong. Rec. 2.) That he instead strained to declare a dubious *inter-session* recess of an "infinitesimal fraction of a second" is powerful evidence that the majority's view of "the Recess" was not taken seriously even as late as the beginning of the 20th century.

Yet the majority contends that "to the extent that the Senate or a Senate committee has expressed a view, that view has favored a functional definition of 'recess' [that] encompasses intra-session recesses." *Ante*, at 531. It rests that contention entirely on the 1905 Judiciary Committee Report.

This distorts what the Committee said when it denied Roosevelt's claim that there had been a recess. If someone avers that a catfish is a cat, and I respond by pointing out that a catfish lives in water and does not have four legs, I have not endorsed the proposition that every land-dwelling quadruped is a cat. Likewise, when the Judiciary Committee explained that an instantaneous transition from one session to another is not a recess because the Senate is never absent, it did not suggest that the Senate's absence is enough to create a recess. To assume otherwise, as the majority does, is to commit the fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q. Contrary to that fallacious assumption, the Judiciary Committee surely believed, consistent with the Executive's clear position at the time, that "the Recess" was limited to (actual, not constructive) breaks *between sessions*.

4. 1921 to the Present

It is necessary to skip over the first 13 decades of our Nation's history in order to find a Presidential legal adviser arguably embracing the majority's interpretation of "the Recess." In 1921 President Harding's Attorney General, Harry Daugherty, advised Harding that he could make recess appointments while the Senate stood adjourned for 28 days during the session because "the term 'recess' must be given a practical construction." 33 Op. Atty. Gen. 20, 25. Daugherty acknowledged Knox's 1901 opinion to the contrary, *id.*, at 21, but he (committing the same fallacy as today's majority) thought the 1905 Judiciary Committee Report had come to the opposite conclusion, *id.*, at 23–24. He also recognized the fundamental flaw in this interpretation: that it would be impossible to "accurately dra[w]" a line between intra-session breaks that constitute "the Recess" and those that do not. *Id.*, at 25. But he thought the absence of a standard gave the President "discretion to determine

when there is a real and genuine recess." *Ibid.* While a "palpable abuse of discretion might subject his appointment to review," Daugherty thought that "[e]very presumption [should] be indulged in favor of the validity of whatever action he may take." *Ibid.*[7]

Only after Daugherty's opinion did the flow of intra-session recess appointments start, and for several years it was little more than a trickle. The Solicitor General has identified 22 such appointments made by Presidents Harding, Coolidge, Hoover, and Franklin Roosevelt between 1921 and 1944. App. to Brief for Petitioner 9a–12a. Intra-session recess appointments experienced a brief heyday after World War II, with President Truman making about 150 such appointments to civilian positions and several thousand to military posts from 1945 through 1950. *Id.*, at 12a–27a. (The majority's impressive-sounding claim that "Presidents have made thousands of intra-session recess appointments," *ante*, at 529, depends entirely on post-war military appointments that Truman made in just two years, 1947 and 1948.) President Eisenhower made only 43 intra-session recess appointments, App. to Brief for Petitioner 27a–30a, after which the practice sank back into relative obscurity. Presidents Kennedy, Lyndon Johnson, and Ford made none, while Nixon made just 7. *Id.*, at 30a–31a. The practice rose again in the last decades of the 20th century: President Carter made 17 intra-session recess appointments, Reagan 72, George H. W. Bush 37, Clinton 53, and George W. Bush 135. *Id.*, at 31a–61a. When the Solicitor General filed his brief, President Obama had made 26. *Id.*, at 62a–64a. Even excluding Truman's military appointments, roughly 90 percent of all

[7] I say Daugherty "arguably" embraced the majority's view because he may have been endorsing, not the majority's position, but the intermediate view that reads both "the Recess" and "the next Session" in functional terms, so that intra-session appointments would last only until the next intra-session break. See *supra*, at 578; Rappaport, Nonoriginalism 34–35.

the intra-session recess appointments in our history have been made since 1945.

Legal advisers in the Executive Branch during this period typically endorsed the President's authority to make intra-session recess appointments by citing Daugherty's opinion with little or no additional analysis. See, *e. g.*, 20 Opinions of Office of Legal Counsel (Op. OLC) 124, 161 (1996) (finding the question to have been "settled within the executive branch" by Daugherty's "often-cited opinion"). The majority's contention that "opinions of Presidential legal advisers . . . are nearly unanimous in determining that the Clause authorizes [intra-session recess] appointments," *ante*, at 529, is thus true but misleading: No Presidential legal adviser approved that practice before 1921, and subsequent approvals have rested more on precedent than on independent examination.

The majority is correct that during this period, the Senate "as a body" did not formally repudiate the emerging executive practice. *Ante*, at 531. And on one occasion, Comptroller General Lindsay Warren cited Daugherty's opinion as representing "the accepted view" on the question, 28 Comp. Gen. 30, 34 (1948), although there is no evidence he consulted any Senators or that his statement reflected their views. But the rise of intra-session recess appointments in the latter half of the 20th century drew sharp criticism from a number of Senators on both sides of the aisle. At first, their objections focused on the length of the intra-session breaks at issue. See, *e. g.*, 130 Cong. Rec. 22774–22776 (1984) (Sen. Sarbanes) (decrying recess appointment during a 3-week intra-session adjournment as "a circumvention of the Senate confirmation power"); *id.*, at 23235 (resolution offered by Sen. Byrd, with 39 cosponsors, urging that no recess appointments occur during intra-session breaks of fewer than 30 days).

Later, many Senators sought to end intra-session recess appointments altogether. In 1993, the Senate Legal Coun-

sel prepared a brief to be filed on behalf of the Senate in *Mackie* v. *Clinton*, 827 F. Supp. 56 (DC 1993), vacated in part as moot, 1994 WL 163761 (CADC 1994) (*per curiam*), but "Republican opposition" blocked the filing. 139 Cong. Rec. 15266–15267. The brief argued that "the recess-[appointment] power is limited to Congress' annual recess between sessions," that no contrary executive practice "of any appreciable magnitude" had existed before "the past fifty years," and that the Senate had not "acquiesced in this steady expansion of presidential power." *Id.*, at 15268, 15270. It explained that some Senators had limited their objections to shorter intra-session breaks out of a desire "to coexist with the Executive" but that "the Executive's subsequent, steady chipping away at the length of recess sufficient for making recess appointments ha[d] demonstrated the need to return to the Framers' original intent and limit the power to intersession adjournments." *Id.*, at 15267, 15272. Senator Kennedy reiterated that position in a brief to this Court in 2004. Brief for Sen. Kennedy as *Amicus Curiae* in *Franklin* v. *United States*, O. T. 2004, No. 04–5858, p. 5. Today the partisan tables are turned, and that position is urged on us by the Senate's RepublicanMembers. See Brief for Sen. McConnell et al. as *AmiciCuriae* 26.

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What does all this amount to? In short: Intra-session recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until 1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties. It is astonishing for the majority to assert that this history lends "strong support," *ante*, at 528, to its interpretation of the Recess Appointments Clause. And the majority's contention that recent executive practice

in this area merits deference because the Senate has not done more to oppose it is utterly divorced from our precedent. "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," *Freytag*, 501 U. S., at 880, and the Senate could not give away those protections even if it wanted to. See *Chadha*, 462 U. S., at 957–958; *Clinton*, 524 U. S., at 451–452 (KENNEDY, J., concurring).

Moreover, the majority's insistence that the Senate gainsay an executive practice "as a body" in order to prevent the Executive from acquiring power by adverse possession, *ante*, at 531, will systematically favor the expansion of executive power at the expense of Congress. In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch. See generally Bradley and Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 439–447 (2012). All Presidents have a high interest in expanding the powers of their office, since the more power the President can wield, the more effectively he can implement his political agenda; whereas individual Senators may have little interest in opposing Presidential encroachment on legislative prerogatives, especially when the encroacher is a President who is the leader of their own party. (The majority would not be able to point to a lack of "formal action" by the Senate "as a body" challenging intra-session recess appointments, *ante*, at 533, had the appointing President's party in the Senate not blocked such action on multiple occasions.) And when the President wants to assert a power and establish a precedent, he faces neither the collective-action problems nor the procedural inertia inherent in the legislative process. The majority's methodology thus all but guarantees the continuing aggrandizement of the Executive Branch.

III. Pre-Recess Vacancies

The second question presented is whether vacancies that "happen during the Recess of the Senate," which the President is empowered to fill with recess appointments, are (a) vacancies that *arise* during the recess, or (b) all vacancies that *exist* during the recess, regardless of when they arose. I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled, and I would hold that the appointments at issue here—which undisputedly filled pre-recess vacancies—are invalid for that reason as well as for the reason that they were made during the session. The Court's contrary conclusion is inconsistent with the Constitution's text and structure, and it further undermines the balance the Framers struck between Presidential and Senatorial power. Historical practice also fails to support the majority's conclusion on this issue.

A. Plain Meaning

As the majority concedes, "the most natural meaning of 'happens' as applied to a 'vacancy' . . . is that the vacancy 'happens' when it initially occurs." *Ante,* at 538. The majority adds that this meaning is most natural "to a modern ear," *ibid.*, but it fails to show that founding-era ears heard it differently. "Happen" meant then, as it does now, "[t]o fall out; to chance; to come to pass." 1 Johnson, Dictionary of the English Language 913. Thus, a vacancy that *happened* during the recess was most reasonably understood as one that *arose* during the recess. It was, of course, possible in certain contexts for the word "happen" to mean "happen to be" rather than "happen to occur," as in the idiom "it so happens." But that meaning is not at all natural when the subject is a vacancy, a state of affairs that comes into existence at a particular moment in time.[8]

[8] Despite initially admitting that the text "does not naturally favor" its interpretation, the majority halfheartedly suggests that the "'happen to be'" reading may be admissible when the subject, like "vacancy," denotes

In any event, no reasonable reader would have understood the Recess Appointments Clause to use the word "happen" in the majority's "happen to be" sense, and thus to empower the President to fill all vacancies that might *exist* during a recess, regardless of when they arose. For one thing, the Clause's language would have been a surpassingly odd way of giving the President that power. The Clause easily could have been written to convey that meaning clearly: It could have referred to "all Vacancies that may exist during the Recess," or it could have omitted the qualifying phrase entirely and simply authorized the President to "fill up all Vacancies during the Recess." Given those readily available alternative phrasings, the reasonable reader might have wondered, why would any intelligent drafter intending the majority's reading have inserted the words "that may happen"—words that, as the majority admits, make the majority's desired reading awkward and unnatural, and that must be effectively read out of the Clause to achieve that reading?

For another thing, the majority's reading not only strains the Clause's language but distorts its constitutional role, which was meant to be subordinate. As Hamilton explained, appointment with the advice and consent of the Senate was to be "the general mode of appointing officers of the United States." The Federalist No. 67, at 455. The Senate's check on the President's appointment power was seen as vital because "'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag*, 501 U. S., at 883. The unilateral power conferred on the President by the Recess Appointments Clause was therefore un-

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a "continuing state." *Ante*, at 538–539. That suggestion distorts ordinary English usage. It is indeed natural to say that an ongoing activity or event, like a war, a parade, or a financial crisis, is "happening" for as long as it continues. But the same is not true when the subject is a settled state of affairs, like death, marriage, or vacancy, all of which "happen" when they come into being.

derstood to be "nothing more than a supplement" to the "general method" of advice and consent. The Federalist No. 67, at 455.

If, however, the Clause had allowed the President to fill *all* pre-existing vacancies during the recess by granting commissions that would last throughout the following session, it would have been impossible to regard it—as the Framers plainly did—as a mere codicil to the Constitution's principal, power-sharing scheme for filling federal offices. On the majority's reading, the President would have had no need *ever* to seek the Senate's advice and consent for his appointments: Whenever there was a fair prospect of the Senate's rejecting his preferred nominee, the President could have appointed that individual unilaterally during the recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on *ad infinitum*. (Circumvention would have been especially easy if, as the majority also concludes, the President was authorized to make such appointments during any intra-session break of more than a few days.) It is unthinkable that such an obvious means for the Executive to expand its power would have been overlooked during the ratification debates.[9]

The original understanding of the Clause was consistent with what the majority concedes is the text's "most natural meaning." *Ante*, at 538. In 1792, Attorney General Edmund Randolph, who had been a leading member of the Constitutional Convention, provided the Executive Branch's first formal interpretation of the Clause. He advised President

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[9] The majority insists that "character and politics" will ordinarily prevent the President from circumventing the Senate, and that the Senate has "political resources" to respond to attempts at circumvention. *Ante*, at 542. Neither character nor politics prevented Theodore Roosevelt from proclaiming a fictitious recess lasting an "infinitesimal fraction of a second." In any event, the Constitution does not entrust the Senate's role in the appointments process to the vagaries of character and politics. See, *e. g.*, *Freytag* v. *Commissioner*, 501 U. S. 868, 879–880 (1991).

Washington that the Constitution did not authorize a recess appointment to fill the office of Chief Coiner of the United States Mint, which had been created by Congress on April 2, 1792, during the Senate's session. Randolph wrote: "[I]s it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day." Opinion on Recess Appointments (July 7, 1792), in 24 Papers of Thomas Jefferson 165–166 (J. Catanzariti ed. 1990). Randolph added that his interpretation was the most congruent with the Constitution's structure, which made the recess-appointment power "an exception to the general participation of the Senate." *Ibid.* (footnote omitted).

President John Adams' Attorney General, Charles Lee, was in agreement. See Letter to George Washington (July 7, 1796) (the President may "fill for a limited time an old office *become vacant* during [the] recess" (emphasis added)), online at http://founders.archives.gov/documents/Washington/99-01-02-00702; Letter from James McHenry to John Adams (May 7, 1799) (hereinafter 1799 McHenry Letter) (conveying Lee's advice that certain offices were "'vacanc[ies] happening during the session, which the President cannot fill, during the recess, by the powers vested in him by the constitution'"), online at http://wardepartmentpapers.org/document.php?id=31766.[10] One of the most prominent early academic

[10] The majority does not deny that Lee took those positions, but it claims he also "later informed [Thomas] Jefferson that, in the Adams administration, 'whenever an office became vacant, so short a time before Congress rose, as not to give an opportunity of enquiring for a proper character, they let it lie always till recess.'" *Ante*, at 543 (quoting Letter from Jefferson to Wilson Cary Nicholas (Jan. 26, 1802), in 36 Papers of Thomas Jefferson 433 (B. Oberg ed. 2009) (hereinafter 1802 Jefferson Letter)). Assuming Lee in fact made the statement attributed to him by Jefferson, and further assuming that Lee endorsed the constitutionality of the practice described in that statement (which Jefferson does not say), that practice could only have been regarded as a pragmatic exception to the general

commenters on the Constitution read the Clause the same way. See 1 St. George Tucker, Blackstone's Commentaries, App. 342–343 (1803) (assuming the President could appoint during the recess only if "the office became vacant during the recess").

Early Congresses seem to have shared Randolph's and Lee's view. A statute passed by the First Congress authorized the President to appoint customs inspectors "with the advice and consent of the Senate" and provided that "if the appointment . . . shall not be made during the present session of Congress, the President . . . is hereby empowered to make such appointments during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Act of Mar. 3, 1791, § 4, 1 Stat. 200. That authorization would have been superfluous if the Recess Appointments Clause had been understood to apply to pre-existing vacancies. We have recognized that an action taken by the First Congress "provides 'contemporaneous and weighty evidence' of the Constitution's meaning." *Bowsher*, 478 U. S., at 723–724. And other statutes passed in the early years of the Republic contained similar authorizations. See App. to Brief for Respondent Noel Canning 1a–17a.[11]

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view of the Clause that Lee, like Randolph, espoused. And the practice must not have been extensive, since the Solicitor General has been unable to identify even a single appointment made by Adams that filled a pre-recess vacancy. See *infra*, at 602–603.

[11] The majority suggests that these statutes may have reflected, not a belief that the recess-appointment power was limited to vacancies arising during the recess, but a "separate" belief that the power could not be used for "new offices" created by Congress and not previously filled. *Ante*, at 546. But the latter view (which the majority does not endorse) was inseparably linked with the former (which the majority rejects), as is made clear by the very source the majority cites. See Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 Papers of Alexander Hamilton 94 (H. Syrett ed. 1976) ("[T]he power to fill the Vacancy is not the power to make an original appointment. The phrase 'Which may have happened' serves to confirm this construction. . . . [I]ndependent of the authority of a special law, the President cannot fill a vacancy which happens

Also illuminating is the way the Third Congress interpreted the Constitution's Senate Vacancies Clause, which uses language similar to that of the Recess Appointments Clause. Before the passage of the Seventeenth Amendment, the Constitution provided that "if Vacancies [in the Senate] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature." Art. I, § 3, cl. 2. Senator George Read of Delaware resigned in December 1793; the state legislature met in January and February 1794; and the Governor appointed Kensey Johns to fill the seat in March 1794. The Senate refused to seat Johns, resolving that he was "not entitled to a seat in the Senate of the United States; a session of the Legislature of the said State having intervened, between the resignation . . . and the appointment." 4 Annals of Cong. 77–78 (1794). It is thus clear that the phrase "happen . . . during the Recess" in the Senate Vacancies Clause was understood to refer to vacancies that *arose*, not merely existed, during the recess in which the appointment was made. It is not apparent why the nearly identical language of the Recess Appointments Clause would have been understood differently.

The majority, however, relies heavily on a contrary account of the Clause given by Attorney General William Wirt in 1823. See 1 Op. Atty. Gen. 631. Wirt notably began—as does the majority—by acknowledging that his predecessors' reading was "most accordant with the letter of the constitu-

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during a session of the Senate"); see also 2 Op. Atty. Gen., at 334 ("If the vacancy exist during the session of the Senate, as in the first creation of an office by law, it has been held that the President cannot appoint during the recess, unless he is specially authorized so to do by law"); W. Rawle, A View of the Constitution of the United States of America 163 (2d ed. 1829) (reprint 2009) ("It has been held by [the Senate], that if new offices are created by congress, the president cannot, after the adjournment of the senate, make appointments to fill them. The vacancies do not *happen* during the recess of the senate").

tion." *Id.*, at 632. But he thought the "most natural" reading had to be rejected because it would interfere with the "substantial purpose of the constitution," namely, "keep[ing] . . . offices filled." *Id.*, at 631–632. He was chiefly concerned that giving the Clause its plain meaning would produce "embarrassing inconveniences" if a distant office were to become vacant during the Senate's session, but news of the vacancy were not to reach the President until the recess. *Id.*, at 632, 634. The majority fully embraces Wirt's reasoning. *Ante*, at 539–541.

Wirt's argument is doubly flawed. To begin, the Constitution provides ample means, short of rewriting its text, for dealing with the hypothetical dilemma Wirt posed. Congress can authorize "acting" officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792. See 5 U. S. C. § 3345; Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281; 705 F. 3d, at 511; Rappaport, Original Meaning 1514–1517. And on "extraordinary Occasions" the President can call the Senate back into session to consider a nomination. Art. II, § 3. If the Framers had thought those options insufficient and preferred to authorize the President to make recess appointments to fill vacancies arising late in the session, they would have known how to do so. Massachusetts, for example, had authorized its Governor to make certain recess appointments "in case a vacancy shall happen . . . in the recess of the General Court [*i. e.*, the state legislature], *or at so late a period in any session of the same Court, that the vacancy . . . shall not be supplied in the same session thereof.*" 1783 Mass. Acts ch. 12, in Acts and Laws of the Commonwealth of Massachusetts 523 (1890) (emphasis added).

The majority protests that acting appointments, unlike recess appointments, are an "inadequate" solution to Wirt's hypothetical dilemma because acting officers "may have less authority than Presidential appointments." *Ante*, at 541. It cites an OLC opinion which states that "an acting of-

ficer . . . is frequently considered merely a caretaker without a mandate to take far-reaching measures." 6 Op. OLC 119, 121 (1982). But just a few lines later, the majority says that "the lack of Senate approval . . . may diminish the recess appointee's ability, as a practical matter, to get a controversial job done." *Ante*, at 542. The majority does not explain why an acting officer would have less authority "as a practical matter" than a recess appointee. The majority also objects that requiring the President to rely on acting officers would "lessen the President's ability to staff the Executive Branch with people of his own choosing," *ante*, at 541—a surprising charge, since that is the very purpose of the Constitution's advice-and-consent requirement. As for special sessions, the majority thinks it a sufficient answer to say that they are "burdensome," *ibid.*, an observation that fails to distinguish them from many procedures required by our structural Constitution.

More fundamentally, Wirt and the majority are mistaken to say that the Constitution's "'substantial purpose'" is to "'keep . . . offices filled.'" *Ibid.* (quoting 1 Op. Atty. Gen., at 632). The Constitution is not a road map for maximally efficient government, but a system of "carefully crafted restraints" designed to "protect the people from the improvident exercise of power." *Chadha*, 462 U. S., at 957, 959. Wirt's and the majority's *argumentum ab inconvenienti* thus proves far too much. There are many circumstances other than a vacancy that can produce similar inconveniences if they arise late in the session: For example, a natural disaster might occur to which the Executive cannot respond effectively without a supplemental appropriation. But in those circumstances, the Constitution would not permit the President to appropriate funds himself. See Art. I, § 9, cl. 7. Congress must either anticipate such eventualities or be prepared to be haled back into session. The troublesome need to do so is not a bug to be fixed by this Court, but a calculated feature of the constitutional framework. As we have

recognized, while the Constitution's government-structuring provisions can seem "clumsy" and "inefficient," they reflect "hard choices . . . consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Chadha*, *supra*, at 959.

B. Historical Practice

For the reasons just given, it is clear that the Constitution authorizes the President to fill unilaterally only those vacancies that arise during a recess, not every vacancy that happens to exist during a recess. Again, however, the majority says "[h]istorical practice" requires the broader interpretation. *Ante*, at 543. And again the majority is mistaken. Even if the Constitution were wrongly thought to be ambiguous on this point, a fair recounting of the relevant history does not support the majority's interpretation.

1. 1789 to 1822

The majority correctly admits that there is "no undisputed record of Presidents George Washington, John Adams, or Thomas Jefferson" using a recess appointment to fill a prerecess vacancy. *Ibid.* That is not surprising in light of Randolph's early conclusion that doing so would be unconstitutional. Adams on one occasion contemplated filling prerecess vacancies but was dissuaded by, among others, Attorney General Lee, who said the Constitution did not permit him to do so. See 1799 McHenry Letter.[12] And the Solici-

[12] See also Letter from Adams to James McHenry (April 16, 1799), in 8 Works of John Adams 632 (C. Adams ed. 1853) (proposing the appointments); Letter from Adams to McHenry (May 16, 1799), in *id.*, at 647 (agreeing to "suspend [the appointments] for the present, perhaps till the meeting of the Senate"). Before advising Adams, McHenry also consulted Alexander Hamilton, who agreed that the appointments would be unlawful. See Letter from McHenry to Hamilton (Apr. 26, 1799), in 23 Papers of Alexander Hamilton, at 69, 70 ("It would seem that, under this Constitutional power, the President cannot alone . . . fill up vacancies that may happen during a session of the senate"); Letter from Hamilton to McHenry

tor General does not allege that even a single appointment made by Adams filled a pre-recess vacancy. Jefferson, too, at one point thought the Clause "susceptible of" the majority's reading, 1802 Jefferson Letter, but his administration, like Adams', appears never to have adopted that reading.

James Madison's administration seems to have rejected the majority's reading as well. In 1814, Madison wanted to appoint Andrew Jackson to a vacant major-generalship in the Army during the Senate's recess, but he accepted, without contradiction or reservation, his Secretary of War's advice that he lacked the power to do so because the post's previous occupant had resigned before the recess. He therefore ordered that Jackson be given a "brevet of Major General," *i. e.*, a warrant conferring the nominal rank without the salary thereof. Letter from John Armstrong to Madison (May 14, 1814); Letter from Madison to Armstrong (May 17, 1814). In conveying the brevet, Madison's Secretary of War explained to Jackson that "'[t]he vacancy produced by Gen. Hampton's resignation, not having been filled during the late session of the Senate, cannot be supplied constitutionally, during the recess.'" Letter from Armstrong to Jackson (May 22, 1814). A week later, when Madison learned that a different major general had resigned *during* the recess, he thought that development would enable him to appoint Jackson "at once." Letter from Madison to Armstrong (May 24, 1814); see Letter from Armstrong to Madison (May 20, 1814) (reporting the resignation).[13]

The majority discounts that evidence of an occasion when Madison and his advisers actually considered the precise constitutional question presented here. It does so apparently

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(May 3, 1799), in *id.*, at 94 ("It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate").

[13] All the letters cited in this paragraph are available online courtesy of the Library of Congress. See James Madison Papers, http://memory.loc.gov/ammem/collections/madison_papers.

because Madison, in acting on the advice he was given without questioning the interpretation of the recess-appointment power that was offered as the reason for that advice, did not explicitly say "I agree." The majority prefers to focus on five appointments by Madison, unremarked by anyone at the time, that "the evidence suggests" filled pre-recess vacancies. *Ante*, at 543. Even if the majority is correct about those appointments, there is no indication that any thought was given to their constitutionality, either within or outside the Executive Branch. A handful of appointments that appear to contravene the written opinions of Attorneys General Randolph and Lee and the written evidence of Madison's own beliefs about what the Constitution authorized, and that lack any contemporaneous explanation, are not convincing evidence of the Constitution's original meaning.[14]

If Madison or his predecessors made any appointments in reliance on the broader reading, those appointments must have escaped general notice. In 1822, the Senate Committee on Military Affairs declared that the President had "no power to make [appointments] in the recess" where "the vacancies did not *happen* in the recess." 38 Annals of Cong. 500. The Committee believed its construction had been "heretofore observed" and that "no instance ha[d] before occurred . . . where the President ha[d] felt himself authorized to fill such vacancies, without special authority by law." *Ibid.*; see also T. Sergeant, Constitutional Law 373 (2d ed. 1830) ("[I]t seemed distinctly understood to be the sense of the senate, that [it] is only in offices that become vacant dur-

[14] The same can be said of the Solicitor General's claim to have found two recess appointments by Washington and four by Jefferson that filled pre-existing vacancies. Noel Canning disputes that claim, pointing out that Washington told the Senate the offices in question had "'fallen vacant during the recess'" and arguing that Jefferson may have removed the incumbent officers during the recess. Brief for Respondent Noel Canning 44. Suffice it to say that if either Washington or Jefferson had adopted the broader reading, against the written advice of Attorneys General Randolph and Lee, one would expect a good deal more evidence of that fact.

ing the recess, that the president is authorised to exercise the right of appointing").

2. 1823 to 1862

The Executive Branch did not openly depart from Randolph's and Lee's interpretation until 1823, when Wirt issued the opinion discussed earlier. Even within that branch, Wirt's view was hotly contested: William Crawford, Monroe's Treasury Secretary, argued "with great pertinacity" that the Clause authorized the President to fill only "vacancies which happen during the recess" and not those "which happen while Congress are in session." 5 Memoirs of John Quincy Adams 486–487 (C. Adams ed. 1875). Wirt's analysis nonetheless gained ground in the Executive Branch over the next four decades; but it did so slowly and fitfully.

In 1830, Attorney General Berrien disagreed with Wirt when he wrote that "[i]f the vacancy exist during the session of the Senate, . . . the President cannot appoint during the recess." 2 Op. Atty. Gen. 333, 334. Two years later, Attorney General Taney endorsed Wirt's view although doing so was, as he acknowledged, unnecessary to resolve the issue before him: whether the President could, during the recess, fill a vacancy resulting from the expiration of a prior recess appointment at the end of the Senate's session. 2 Op. Atty. Gen. 525, 528 (1832). Addressing the same issue in 1841, Attorney General Legaré appeared to believe the dispositive question was whether the office could be said to have "becom[e] vacant" during the recess. 3 Op. Atty. Gen. 673, 674. And in 1845, Attorney General Mason thought it "well established" that "[i]f vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess." 4 Op. Atty. Gen. 361, 363.[15]

[15] A year later Mason, like Taney and Legaré before him, concluded that when a recess appointment expired at the end of the Senate's session, the President could fill the resulting vacancy during the ensuing recess. In

The tide seemed to turn—as far as the Executive Branch was concerned—in the mid-19th century: Attorney General Cushing in 1855 and Attorney General Bates in 1862 both treated Wirt's position as settled without subjecting it to additional analysis. 7 Op. Atty. Gen. 186, 223; 10 Op. Atty. Gen. 356. Bates, however, entertained "serious doubts" about its validity. *Ibid.* And as one 19th-century court shrewdly observed in rejecting Wirt's interpretation, the frequency with which Attorneys General during this period were called upon to opine on the question likely "indicate[s] that no settled administrative usage had been . . . established." *In re District Attorney of United States*, 7 F. Cas. 731, 738 (No. 3,924) (DC Pa. 1868). The Solicitor General identifies only 10 recess appointments made between 1823 and 1863 that filled pre-recess vacancies—about one every four years. App. to Brief for Petitioner 68a–71a. That is hardly an impressive number, and most of the appointments were to minor offices (like Deputy Postmaster for Janesville, Wisconsin, *id.*, at 70a) unlikely to have gotten the Senate's attention. But the Senate did notice when, in 1862, President Lincoln recess-appointed David Davis to fill a seat on this Court that had become vacant before the recess, *id.*, at 71a—and it reacted with vigor.

3. 1863 to 1939

Two months after Lincoln's recess appointment of Davis, the Senate directed the Judiciary Committee "to inquire whether the practice . . . of appointing officers to fill vacancies which have not occurred during the recess of Congress, but which existed at the preceding session of Congress, is in accordance with the Constitution; and if not, what remedy shall be applied." Cong. Globe, 37th Cong., 3d Sess., 100

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reaching that conclusion, Mason reiterated that the recess-appointment power "depends on the happening of vacancies when the Senate is not in session" and said the vacancy at issue was "within the meaning of" the Clause because the happening of the vacancy and the termination of the session had "occurred *eo instanti*." 4 Op. Atty. Gen. 523, 526–527 (1846).

(1862). The Committee responded with a report denouncing Wirt's interpretation of the Clause as "artificial," "forced and unnatural," "unfounded," and a "perversion of language." S. Rep. No. 80, 37th Cong., 3d Sess., pp. 4–6 (1863). Because the majority all but ignores this evidence of the Senate's views, it is worth quoting the report at some length:

> "When must the vacancy . . . accrue or spring into existence? May it begin during the session of the Senate, or must it have its beginning during the recess? We think the language too clear to admit of reasonable doubt, and that, upon principles of just construction, this period must have its inceptive point after one session has closed and before another session has begun. . . .
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> "We . . . dissent from the construction implied by the substituted reading, 'happened to exist,' for the word 'happen' in the clause. . . . [I]f a vacancy once exists, it has in law happened; for it is in itself an instantaneous event. It implies no continuance of the act that produces it, but takes effect, and is complete and perfect at an indivisible point of time, like the beginning or end of a recess. Once in existence, it has *happened*, and the mere continuance of the condition of things which the occurrence produces, cannot, without confounding the most obvious distinctions, be taken or treated as the occurrence itself, as Mr. Wirt seems to have done. . . .
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> "Again, we see no propriety in forcing the language from its popular meaning in order to meet and fulfil one confessedly great purpose, (the keeping the office filled,) while there is plainly another purpose of equal magnitude and importance (fitting qualifications) attached to and inseparable from the former." *Id.*, at 3–6.

The Committee acknowledged that the broad reading "ha[d] been, from time to time, sanctioned by Attorneys General . . . and that the Executive ha[d], from time to time, practiced

upon it," but it said the Executive's practice was entitled to no weight because the Constitution's text was "too plain to admit of a doubt or to need interpretation." *Id.*, at 7.

On the same day the Committee published its scathing report, its chairman, Senator Trumbull, proposed a law barring the payment of any officer appointed during the recess to fill a pre-recess vacancy. Cong. Globe, 37th Cong., 3d Sess., 564. Senator Fessenden spoke in support of the proposal:

> "It ought to be understood distinctly, that when an officer does not come within the rules of law, and is appointed in that way in defiance of the wishes of the Senate, he shall not be paid. It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments." *Id.*, at 565.

The amendment was adopted by the Senate, *ibid.*, and after passing the House became the Pay Act, which provided that "no money shall be paid . . . out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy . . . which . . . existed while the Senate was in session." Act of Feb. 9, 1863, § 2, 12 Stat. 646 (codified at Rev. Stat. § 1761; subsequently codified as amended at 5 U. S. C. § 56 (1925–1926 ed.)).

The Pay Act would remain in force without significant modification for nearly eight decades. The Executive Branch, however, refused to acknowledge that the Act embodied the Senate's rejection of the broad reading of "happen." Several Attorneys General continued to treat Wirt's interpretation as settled without so much as mentioning the Act. See 12 Op. Atty. Gen. 32 (1866); 12 Op. Atty. Gen. 449 (1868); 14 Op. Atty. Gen. 562 (1875); 15 Op. Atty. Gen. 207 (1877). And when, 17 years after its passage, Attorney General Devens deigned to acknowledge the Act, he preposter-

ously described it as "conced[ing]" the President's power to make the appointments for which the Act barred payment. 16 Op. Atty. Gen. 522, 531 (1880).

The majority is not that bold. Instead, it relegates the 1863 Judiciary Committee Report to a pair of anodyne sentences in which it says only that the Committee "disagreed with" Wirt's interpretation. *Ante*, at 547. (With like understatement, one could say that Shakespeare's Mark Antony "disagreed with" Caesar's detractors.) Even more remarkably, the majority goes on to claim that the Senate's passage of the Pay Act on the same day the Committee issued its report was not a strong enough statement to impede the constitutionalization-by-adverse-possession of the power asserted by the Executive. Why not? Because, the majority says, some Senators may have disagreed with the report, and because the Senate did not go so far as to make acceptance of a recess appointment that filled a pre-recess vacancy "a federal crime." *Ibid.* That reasoning starkly illustrates the excessive burden the majority places on the Legislative Branch in contests with the Executive over the separation of powers. See *supra*, at 593.

Despite its minimization by subsequent Attorneys General and by today's majority, there is no reason to doubt that the Pay Act had a deterrent effect. The Solicitor General has identified just 40 recess appointments that filled pre-recess vacancies during the nearly eight decades between the Act's passage in 1863 and its amendment in 1940. App. to Brief for Petitioner 71a–79a.[16]

[16] In the early 20th century, some Senators acceded to the majority's reading of the Clause, as the majority is eager to point out, *ante*, at 547–548. In 1904, Senator Tillman allowed that "the Senate ha[d] acquiesced" in the President's use of the recess-appointment power to fill pre-existing vacancies, 38 Cong. Rec. 1606, though he also quoted at length from the 1863 Judiciary Committee Report and said he did "not see how anybody can find any argument to controvert the position [the report] takes," *id.*, at 1608. And in 1916, Senators Robinson and Sutherland accepted the

4. 1940 to the Present

The majority finds it highly significant that in 1940, Congress created a few carefully limited exceptions to the Pay Act's prohibition on paying recess appointees who filled pre-recess vacancies. See Act of July 11, 1940, ch. 580, 54 Stat. 751, now codified with nonsubstantive amendments at 5 U. S. C. § 5503. Under the current version of the Act, "[p]ayment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy" that "existed while the Senate was in session" *unless* either the vacancy arose, or a different individual's nomination to fill the vacancy was rejected, "within 30 days before the end of the session"; or a nomination was pending before the Senate at the end of the session, and the individual nominated was not himself a recess appointee. § 5503(a)(1)–(3). And if the President fills a pre-recess vacancy under one of the circumstances specified in the Act, the law requires that he submit a nomination for that office to the Senate "not later than 40 days after the beginning of the next session." § 5503(b).

The majority says that by allowing salaries to be paid to recess appointees in these narrow circumstances, "the 1940 Senate (and later Senates) in effect supported" the majority's interpretation of the Clause. *Ante*, at 549. Nonsense. Even as amended, the Act strictly regulates payment to recess appointees who fill pre-recess vacancies, and it still forbids payment to many officers whose appointments are constitutional under the majority's interpretation. As *amici* Senators observe, the 1940 amendments "reflect at most a desire not to punish public servants caught in the crossfire" of interbranch conflict. Brief for Sen. McConnell et al. as *Amici Curiae* 30. Surely that inference is more reasonable

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majority's reading without analysis. 53 Cong. Rec. 4298. The reader can decide whether those statements by three Senators justify the assertion that the Senate "abandoned its hostility" to the broad reading, *ante*, at 547.

than the majority's supposition that Congress, by permitting *some* of the appointees covered by the Act to be paid, meant to signal that it now believed *all* of the covered appointments were valid.

Moreover, given the majority's interpretation of the Recess Appointments Clause, it is fairly debatable whether the current version of the Pay Act is constitutional (and *a fortiori*, whether the pre-1940 version was constitutional). Even as amended, the Act seeks to limit and channel the President's exercise of the recess-appointment power by forbidding payment to officers whose appointments are (per the majority) within the President's sole constitutional authority if those appointments do not comply with conditions imposed by Congress, and by requiring the President to submit a nominee to the Senate in the first 40 days of the ensuing session. There is a colorable argument—which is routinely made by lawyers in the Executive Branch—that Congress "'cannot use the appropriations power to control a Presidential power that is beyond its direct control.'" 33 Op. OLC ——, —— (2009), online at http://www.justice.gov/olc/opiniondocs/section7054.pdf (quoting 20 Op. OLC 253, 267 (1996)). Consistent with that view, the Office of Legal Counsel has maintained that Congress could not "condition . . . the funding of an officer's salary on being allowed to appoint the officer." 13 Op. OLC 258, 261 (1989).

If that is correct, then the Pay Act's attempt to control the President's exercise of the recess-appointment power at least raises a substantial constitutional question under the majority's reading of the Recess Appointments Clause. See Rappaport, Original Meaning 1544–1546. The Executive has not challenged the Act's constitutionality in this case, and I express no opinion on whether such a challenge would succeed. I simply point out that it is impossible to regard the amended Pay Act as evidence of Senatorial acquiescence in the majority's reading when that reading has the potential to invalidate the Act.

Since the Pay Act was amended, individual Senators have continued to maintain that recess appointments may not constitutionally be used to fill pre-recess vacancies. See, *e. g.*, 130 Cong. Rec. 22780 (statement of seven Senators that a recess appointment to the Federal Reserve Board in 1984 was unconstitutional because the vacancy "did not happen during the recess"); Brief for Sen. McConnell et al. as *Amici Curiae* 26 (45 Senators taking that view of the Clause). And there is no evidence that the watering-down of the Pay Act produced an immediate flood of recess appointments filling pre-recess vacancies. The Solicitor General has pointed us to only 40 such appointments between 1940 and the present. App. to Brief for Petitioner 79a–89a.

The majority, however, finds it significant that in two small "random sample[s]" of contemporary recess appointments—24 since 1981 and 21 since 2000—the bulk of the appointments appear to have filled pre-existing vacancies. *Ante*, at 546. Based on that evidence, the majority thinks it "a fair inference that a large proportion of the recess appointments in the history of the Nation have filled pre-existing vacancies." *Ibid.* The extrapolation of that sweeping conclusion from a small set of recent data does not bear even the slightest scrutiny. The majority ignores two salient facts: First, from the founding until the mid-19th century, the President's authority to make such appointments was far from settled even within the Executive Branch. Second, from 1863 until 1940, it was *illegal* to pay *any* recess appointee who filled a pre-recess vacancy, which surely discouraged Presidents from making, and nominees from accepting, such appointments. Consequently, there is no reason to assume that the majority's sampling—even if it accurately reflects practices during the last three decades—is at all typical of practices that prevailed throughout "the history of the Nation."[17]

[17] The majority also notes that many of the *intra-session* recess appointments identified by the Solicitor General were made "within two weeks of the beginning of the recess," which, according to the majority, "strongly

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In sum: Washington's and Adams' Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading. The contrary reading was first defended by an executive official in 1823, was vehemently rejected by the Senate in 1863, was vigorously resisted by legislation in place from 1863 until 1940, and is arguably inconsistent with legislation in place from 1940 to the present. The Solicitor General has identified only about 100 appointments that have ever been made under the broader reading, and while it seems likely that a good deal more have been made in the last few decades, there is good reason to doubt that many were made before 1940 (since the appointees could not have been compensated). I can conceive of no sane constitutional theory under which this evidence of "historical practice"—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch.

IV. Conclusion

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a *consistent* and *unchal-*

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suggests that many of the vacancies initially arose prior to the recess." *Ante*, at 545. The inference is unwarranted, since there are many circumstances other than random chance that could cause a vacancy to arise early in the recess: For example, the prior officeholder may have been another recess appointee whose commission expired at the end of the Senate's session, or he may have waited until the recess to resign so that his successor could be compensated without violating the Pay Act. In any event, the overwhelming majority of the intra-session recess appointments on the Solicitor General's list occurred after 1945 and do not shed light on earlier practices.

lenged practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution's original meaning. There is thus no ground for the majority's deference to the unconstitutional recess-appointment practices of the Executive Branch.

The majority replaces the Constitution's text with a new set of judge-made rules to govern recess appointments. Henceforth, the Senate can avoid triggering the President's now-vast recess-appointment power by the odd contrivance of never adjourning for more than three days without holding a *pro forma* session at which it is understood that no business will be conducted. *Ante*, at 549–550. How this new regime will work in practice remains to be seen. Perhaps it will reduce the prevalence of recess appointments. But perhaps not: Members of the President's party in Congress may be able to prevent the Senate from holding *pro forma* sessions with the necessary frequency, and if the House and Senate disagree, the President may be able to adjourn both "to such Time as he shall think proper." U. S. Const., Art. II, § 3. In any event, the limitation upon the President's appointment power is there not for the benefit of the Senate, but for the protection of the people; it should not be dependent on Senate action for its existence.

The real tragedy of today's decision is not simply the abolition of the Constitution's limits on the recess-appointment power and the substitution of a novel framework invented by this Court. It is the damage done to our separation-of-powers jurisprudence more generally. It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. We should therefore take every opportu-

nity to affirm the primacy of the Constitution's enduring principles over the politics of the moment. Our failure to do so today will resonate well beyond the particular dispute at hand. Sad, but true: The Court's embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

I concur in the judgment only.

Syllabus

HARRIS ET AL. *v.* QUINN, GOVERNOR OF ILLINOIS, ET AL.

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

No. 11–681. Argued January 21, 2014—Decided June 30, 2014

Illinois' Home Services Program (Rehabilitation Program) allows Medicaid recipients who would normally need institutional care to hire a "personal assistant" (PA) to provide homecare services. Under state law, the homecare recipients (designated "customers") and the State both play some role in the employment relationship with the PAs. Customers control most aspects of the employment relationship, including the hiring, firing, training, supervising, and disciplining of PAs; they also define the PA's duties by proposing a "Service Plan." Other than compensating PAs, the State's involvement in employment matters is minimal. Its employer status was created by executive order, and later codified by the legislature, solely to permit PAs to join a labor union and engage in collective bargaining under Illinois' Public Labor Relations Act (PLRA).

Pursuant to this scheme, respondent SEIU Healthcare Illinois & Indiana (SEIU–HII) was designated the exclusive union representative for Rehabilitation Program employees. The union entered into collective-bargaining agreements with the State that contained an agency-fee provision, which requires all bargaining unit members who do not wish to join the union to pay the union a fee for the cost of certain activities, including those tied to the collective-bargaining process. A group of Rehabilitation Program PAs brought a class action against SEIU–HII and other respondents in Federal District Court, claiming that the PLRA violated the First Amendment insofar as it authorized the agency-fee provision. The District Court dismissed their claims, and the Seventh Circuit affirmed in relevant part, concluding that the PAs were state employees within the meaning of *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209.

Held: The First Amendment prohibits the collection of an agency fee from Rehabilitation Program PAs who do not want to join or support the union. Pp. 627–657.

(a) In upholding the Illinois law's constitutionality, the Seventh Circuit relied on *Abood*, which, in turn, relied on *Railway Employees* v. *Hanson*, 351 U. S. 225, and *Machinists* v. *Street*, 367 U. S. 740. Unlike *Abood*, those cases involved private-sector collective-bargaining agreements. The *Abood* Court treated the First Amendment issue as largely

settled by *Hanson* and *Street* and understood those cases to have upheld agency fees based on the desirability of "labor peace" and the problem of "'free riders[hip].'" 431 U. S., at 220–222, 224. However, "prevent-[ing] nonmembers from free-riding on the union's efforts" is a rationale "generally insufficient to overcome First Amendment objections," *Knox* v. *Service Employees*, 567 U. S. 298, 311, and in this respect, *Abood* is "something of an anomaly," 567 U. S., at 311.

The *Abood* Court's analysis is questionable on several grounds. The First Amendment analysis in *Hanson* was thin, and *Street* was not a constitutional decision. And the Court fundamentally misunderstood *Hanson*'s narrow holding, which upheld the authorization, not imposition, of an agency fee. The *Abood* Court also failed to appreciate the distinction between core union speech in the public sector and core union speech in the private sector, as well as the conceptual difficulty in public-sector cases of distinguishing union expenditures for collective bargaining from those designed for political purposes. Nor does the *Abood* Court seem to have anticipated the administrative problems that would result in attempting to classify union expenditures as either chargeable or nonchargeable, see, *e. g.*, *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, or the practical problems that would arise from the heavy burden facing objecting nonmembers wishing to challenge the union's actions. Finally, the *Abood* Court's critical "labor peace" analysis rests on the unsupported empirical assumption that exclusive representation in the public sector depends on the right to collect an agency fee from nonmembers. Pp. 627–638.

(b) Because of *Abood*'s questionable foundations, and because Illinois' PAs are quite different from full-fledged public employees, this Court refuses to extend *Abood* to the situation here. Pp. 638–647.

(1) PAs are much different from public employees. Unlike full-fledged public employees, PAs are almost entirely answerable to the customers and not to the State, do not enjoy most of the rights and benefits that inure to state employees, and are not indemnified by the State for claims against them arising from actions taken during the course of their employment. Even the scope of collective bargaining on their behalf is sharply limited. Pp. 638–643.

(2) *Abood*'s rationale is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law. Even the best argument for *Abood*'s anomalous approach is a poor fit here. What justifies the agency fee in the *Abood* context is the fact that the State compels the union to promote and protect the interests of nonmembers in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances." *Lehnert*, *supra*, at 556. That rationale has little application here, where Illinois

law requires that all PAs receive the same rate of pay and the union has no authority with respect to a PA's grievances against a customer. Pp. 643–645.

(3) Extending *Abood*'s boundaries to encompass partial-public employees would invite problems. State regulations and benefits affecting such employees exist along a continuum, and it is unclear at what point, short of full-fledged public employment, *Abood* should apply. Under respondents' view, a host of workers who currently receive payments from a government entity for some sort of service would become candidates for inclusion within *Abood*'s reach, and it would be hard to see where to draw the line. Pp. 645–647.

(c) Because *Abood* does not control here, generally applicable First Amendment standards apply. Thus, the agency-fee provision here must serve a "'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox, supra,* at 310. None of the interests that respondents contend are furthered by the agency-fee provision is sufficient. Pp. 647–651.

(1) Their claim that the agency-fee provision promotes "labor peace" misses the point. Petitioners do not contend that they have a First Amendment right to form a rival union or that SEIU–HII has no authority to serve as the exclusive bargaining representative. This, along with examples from some federal agencies and many state laws, demonstrates that a union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked. Features of the Illinois scheme—*e. g.,* PAs do not work together in a common state facility and the union's role is very restricted—further undermine the "labor peace" argument. Pp. 649–650.

(2) Respondents also argue that the agency-fee provision promotes the welfare of PAs, thereby contributing to the Rehabilitation Program's success. Even assuming that SEIU–HII has been an effective advocate, the agency-fee provision cannot be sustained unless the union could not adequately advocate without the receipt of nonmember agency fees. No such showing has been made. Pp. 650–651.

(d) Respondents' additional arguments for sustaining the Illinois scheme are unconvincing. First, they urge the application of a balancing test derived from *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563. This Court has never viewed *Abood* and its progeny as based on *Pickering* balancing. And even assuming that *Pickering* applies, that case's balancing test clearly tips in favor of the objecting employees' First Amendment interests. Second, respondents err in contending that a refusal to extend *Abood* here will call into question this Court's decisions in *Keller* v. *State Bar of Cal.*, 496 U. S. 1, and *Board of Regents of Univ. of Wis. System* v. *Southworth*,

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529 U. S. 217, for those decisions fit comfortably within the framework applied here. Pp. 652–656.

656 F. 3d 692, reversed in part, affirmed in part, and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 657.

William L. Messenger argued the cause for petitioners. With him on the briefs were *Catherine E. Stetson*, *Neal Kumar Katyal*, *Dominic F. Perella*, and *Mary Helen Wimberly*.

Paul M. Smith argued the cause for respondents. On the brief for respondent Quinn were *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, *Jane Elinor Notz*, Deputy Solicitor General, *Brett E. Legner*, *Nadine Jean Wichern*, *Eldad Malamuth*, and *Clifford W. Berlow*. *Stephen P. Berzon*, *Scott A. Kronland*, *Stacey M. Leyton*, *Matthew J. Murray*, *Judith A. Scott*, *Walter Kamiat*, *Nicole G. Berner*, and *Robert E. Bloch* filed a brief for respondent SEIU Healthcare Illinois & Indiana. *John M. West*, *Joel D'Alba*, and *Margaret Angelucci* filed a brief for respondent AFSCME Council 31 et al.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Deputy Solicitor General Kneedler*, *John F. Bash*, *M. Patricia Smith*, and *Nora Carroll*.*

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*Briefs of *amici curiae* urging reversal were filed for California Public-School Teachers et al. by *Michael A. Carvin*, *Terence J. Pell*, and *Michael E. Rosman*; for the Cato Institute et al. by *David B. Rivkin, Jr.*, *Andrew M. Grossman*, *Lee A. Casey*, *Ilya Shapiro*, and *Karen R. Harned*; for the Center for Constitutional Jurisprudence et al. by *John C. Eastman*, *Anthony T. Caso*, *Edwin Meese III*, *Deborah J. La Fetra*, and *Martin S. Kaufman*; for Family Child Care Inc. et al. by *Michael E. Avakian*; for the Illinois Policy Institute by *Jacob H. Huebert*; for the Mackinac Center for Public Policy by *Michael J. Reitz* and *Patrick J. Wright*; and for Albert Contreras et al. by *Thomas R. McCarthy* and *William S. Consovoy*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York,

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support. We hold that it does not, and we therefore reverse the judgment of the Court of Appeals.

I

A

Millions of Americans, due to age, illness, or injury, are unable to live in their own homes without assistance and are unable to afford the expense of in-home care. In order to

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Barbara D. Underwood, Solicitor General, *Richard Dearing*, Deputy Solicitor General, and *Valerie Figueredo*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Dustin McDaniel* of Arkansas, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Thomas J. Miller* of Iowa, *Jack Conway* of Kentucky, *Janet T. Mills* of Maine, *Lori Swanson* of Minnesota, *Chris Koster* of Missouri, *Joseph A. Foster* of New Hampshire, *Gary K. King* of New Mexico, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, and *William Sorrell* of Vermont; for the State of California et al. by *Robert W. Ferguson*, Attorney General of Washington, *Noah Guzzo Purcell*, Solicitor General, and *Laura J. Watson*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, and *Ellen F. Rosenblum* of Oregon; for American Association of People with Disabilities et al. by *Samuel R. Bagenstos*, *Ira A. Burnim*, and *Jennifer Mathis*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, *James B. Coppess*, and *Laurence Gold*; for Homecare Historians by *Charles A. Rothfeld*, *Paul W. Hughes*, *Michael B. Kimberly*, and *Eugene R. Fidell*; for Labor Law Professors by *Charlotte Garden*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Laura R. Juran*, *Jeremiah A. Collins*, and *Patrick J. Szymanski*; for the Paraprofessional Healthcare Institute by *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Kevin K. Russell*; for Public Safety Employees by *Gregg M. Adam*, *Gary M. Messing*, and *Gonzalo C. Martinez*; and for 21 Past Presidents of the District of Columbia Bar by *John W. Nields, Jr.*, and *Robert D. Lenhard.*

prevent these individuals from having to enter a nursing home or other facility, the federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization. See 42 U. S. C. § 1396n(c)(1). A State that adopts such a program receives federal funds to compensate persons who attend to the daily needs of individuals needing in-home care. *Ibid.*; see also 42 CFR §§ 440.180, 441.300–441.310 (2013). Almost every State has established such a program. See Dept. of Health and Human Services, Understanding Medicaid Home and Community Services: A Primer (2010).

One of those States is Illinois, which has created the Illinois Department of Human Services Home Services Program, known colloquially as the state "Rehabilitation Program." Ill. Comp. Stat., ch. 20, § 2405/3(f) (West 2012); 89 Ill. Admin. Code § 676.10 (2007). "[D]esigned to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State," § 676.10(a), the Rehabilitation Program allows participants to hire a "personal assistant" who provides homecare services tailored to the individual's needs. Many of these personal assistants are relatives of the person receiving care, and some of them provide care in their own homes. See App. 16–18.

Illinois law establishes an employer-employee relationship between the person receiving the care and the person providing it. The law states explicitly that the person receiving home care—the "customer"—"shall be *the* employer of the [personal assistant]." 89 Ill. Admin. Code § 676.30(b) (emphasis added). A "personal assistant" is defined as "an individual employed *by the customer* to provide . . . varied services that have been approved by the customer's physician," § 676.30(p) (emphasis added), and the law makes clear that Illinois "shall not have control or input in the employment relationship between the customer and the personal assistants," § 676.10(c).

Other provisions of the law emphasize the customer's employer status. The customer "is responsible for controlling all aspects of the employment relationship between the customer and the [personal assistant (or PA)], including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the personal assistant, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." § 676.30(b).[1] In general, the customer "has complete discretion in which Personal Assistant he/she wishes to hire." § 684.20(b).

A customer also controls the contents of the document, the Service Plan, that lists the services that the customer will receive. § 684.10(a). No Service Plan may take effect without the approval of both the customer and the customer's physician. See §§ 684.10, 684.40, 684.50, 684.75. Service Plans are highly individualized. The Illinois State Labor Relations Board noted in 1985 that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals . . . to work under the direction and control of private third parties." *Illinois Dept. of Central Management Servs.*, No. S–RC–115, 2 PERI ¶2007, p. VIII–30 (1985), superseded, 2003 Ill. Laws p. 1929.

While customers exercise predominant control over their employment relationship with personal assistants, the State, subsidized by the federal Medicaid program, pays the per-

[1] Although this regulation states clearly that a customer has complete discretion with respect to hiring and firing a personal assistant, the dissent contends that the State also has the authority to end the employment of a personal assistant whose performance is not satisfactory. Nothing in the regulations supports this view. Under 89 Ill. Admin. Code § 677.40(d), the State may stop paying a personal assistant if it is found that the assistant does not meet "the standards established by DHS as found at 89 Ill. Adm. Code 686." These standards are the basic hiring requirements set out in § 686.10, see n. 2, *infra*. Providing adequate performance after hiring is nowhere mentioned in § 686.10.

sonal assistants' salaries. The amount paid varies depending on the services provided, but as a general matter, it "corresponds to the amount the State would expect to pay for the nursing care component of institutionalization if the individual chose institutionalization." 89 Ill. Admin. Code § 679.50(a).

Other than providing compensation, the State's role is comparatively small. The State sets some basic threshold qualifications for employment. See §§ 686.10(h)(1)–(10).[2] (For example, a personal assistant must have a Social Security number, must possess basic communication skills, and must complete an employment agreement with the customer. §§ 686.10, 686.20, 686.40.) The State mandates an annual performance review *by the customer*, *helps the customer* conduct that review, and mediates disagreements between customers and their personal assistants. § 686.30. The State *suggests* certain duties that personal assistants should assume, such as performing "household tasks," "shopping," providing "personal care," performing "incidental health care tasks," and "monitoring to ensure the health and safety of the customer." § 686.20. In addition, a state employee must "identify the appropriate level of service provider" "*based on the customer's approval* of the initial Service Plan," § 684.20(a) (emphasis added), and must sign each customer's Service Plan, § 684.10.

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[2] It is true, as the dissent notes, *post*, at 660–661 (opinion of KAGAN, J.), that a personal assistant must provide two written or oral references, see § 686.10(c), but judging the adequacy of these references is the sole prerogative of the customer. See § 676.30(b). And while the regulations say that an applicant must have either previous experience or training, see § 686.10(f), they also provide that a customer has complete discretion to judge the adequacy of training and prior experience. See § 684.20(b) (the customer has complete discretion with respect to hiring and training a personal assistant). See also § 686.10(b) (the customer may hire a minor—even under some circumstances, a person as young as 14); § 686.10(f) (the customer may hire a personal assistant who was never previously employed so long as the assistant has adequate training); § 684.20(b) (criminal record check not required).

B

Section 6 of the Illinois Public Labor Relations Act (PLRA) authorizes state employees to join labor unions and to bargain collectively on the terms and conditions of employment. Ill. Comp. Stat., ch. 5, § 315/6(a). This law applies to "[e]mployees of the State and any political subdivision of the State," subject to certain exceptions, and it provides for a union to be recognized if it is "designated by the [Public Labor Relations] Board as the representative of the majority of public employees in an appropriate unit . . . ." §§ 315/6(a), (c).

The PLRA contains an agency-fee provision, *i. e.*, a provision under which members of a bargaining unit who do not wish to join the union are nevertheless required to pay a fee to the union. See *Oil Workers* v. *Mobil Oil Corp.*, 426 U. S. 407, 409, n. 1 (1976). Labeled a "fair share" provision, this section of the PLRA provides: "When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." § 315/6(e). This payment is "deducted by the employer from the earnings of the nonmember employees and paid to the employee organization." *Ibid.*

In the 1980's, the Service Employees International Union (SEIU) petitioned the Illinois Labor Relations Board for permission to represent personal assistants employed by customers in the Rehabilitation Program, but the board rebuffed this effort. *Illinois Dept. of Central Management Servs.*, 2 PERI ¶2007, at VIII–30. The board concluded that "it is clear . . . that [Illinois] does not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned

by the [PLRA], their 'employer' or, at least, their sole employer." *Ibid.*

In March 2003, however, Illinois' newly elected Governor, Rod Blagojevich, circumvented this decision by issuing Executive Order 2003–08. See App. to Pet. for Cert. 45a–47a. The order noted the Illinois Labor Relations Board decision but nevertheless called for state recognition of a union as the personal assistants' exclusive representative for the purpose of collective bargaining with the State. This was necessary, Governor Blagojevich declared, so that the State could "receive feedback from the personal assistants in order to effectively and efficiently deliver home services." *Id.*, at 46a. Without such representation, the Governor proclaimed, personal assistants "cannot effectively voice their concerns about the organization of the Home Services program, their role in the program, or the terms and conditions of their employment under the Program." *Ibid.*

Several months later, the Illinois Legislature codified that executive order by amending the PLRA. Pub. Act no. 93–204, § 5, 2003 Ill. Laws p. 1930. While acknowledging "the right of the persons receiving services . . . to hire and fire personal assistants or supervise them," the Act declared personal assistants to be "public employees" of the State of Illinois—but "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act." Ill. Comp. Stat., ch. 20, § 2405/3(f). The statute emphasized that personal assistants are not state employees for any other purpose, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." *Ibid.*

Following a vote, SEIU Healthcare Illinois & Indiana (SEIU–HII) was designated as the personal assistants' exclusive representative for purposes of collective bargaining. See App. 23. The union and the State subsequently entered into collective-bargaining agreements that require all personal assistants who are not union members to pay a "fair share" of the union dues. *Id.*, at 24–25. These payments

are deducted directly from the personal assistants' Medicaid payments. *Ibid.* The record in this case shows that each year, personal assistants in Illinois pay SEIU–HII more than $3.6 million in fees. *Id.*, at 25.

C

Three of the petitioners in the case now before us—Theresa Riffey, Susan Watts, and Stephanie Yencer-Price—are personal assistants under the Rehabilitation Program. They all provide in-home services to family members or other individuals suffering from disabilities.[3] Susan Watts, for example, serves as personal assistant for her daughter, who requires constant care due to quadriplegic cerebral palsy and other conditions. See *id.*, at 18.

In 2010, these petitioners filed a putative class action on behalf of all Rehabilitation Program personal assistants in the United States District Court for the Northern District of Illinois. See 656 F. 3d 692, 696 (CA7 2011). Their complaint, which named the Governor and the union as defendants, sought an injunction against enforcement of the fair-share provision and a declaration that the Illinois PLRA violates the First Amendment insofar as it requires personal assistants to pay a fee to a union that they do not wish to support. *Ibid.*

The District Court dismissed their claims with prejudice, and the Seventh Circuit affirmed in relevant part, concluding that the case was controlled by this Court's decision in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977). 656 F. 3d, at 698. The Seventh Circuit held that Illinois and the customers who receive in-home care are "joint employers" of the personal assistants, and the court stated that it had "no difficulty concluding that the State employs personal assistants within the meaning of *Abood*." *Ibid.*

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[3] The other five petitioners are personal assistants under a similar Illinois program called the "Disabilities Program." See *infra*, at 657, n. 30.

Petitioners sought certiorari. Their petition pointed out that other States were following Illinois' lead by enacting laws or issuing executive orders that deem personal assistants to be state employees for the purpose of unionization and the assessment of fair-share fees. See Pet. for Cert. 22. Petitioners also noted that Illinois has enacted a law that deems "individual maintenance home health workers"—a category that includes registered nurses, licensed practical nurses, and certain therapists who work in private homes—to be "public employees" for similar purposes. Ill. Pub. Act no. 97–1158, 2012 Ill. Laws p. 7823.

In light of the important First Amendment questions these laws raise, we granted certiorari. 570 U. S. 948 (2013).

II

In upholding the constitutionality of the Illinois law, the Seventh Circuit relied on this Court's decision in *Abood*, *supra*, which held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining process. *Id.*, at 235–236. Two Terms ago, in *Knox* v. *Service Employees*, 567 U. S. 298 (2012), we pointed out that *Abood* is "something of an anomaly." 567 U. S., at 311. "'The primary purpose' of permitting unions to collect fees from nonmembers," we noted, "is 'to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" *Ibid.* (quoting *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 181 (2007)). But "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." 567 U. S., at 311.

For this reason, *Abood* stands out, but the State of Illinois now asks us to sanction what amounts to a very significant expansion of *Abood*—so that it applies, not just to full-fledged public employees, but also to others who are deemed

to be public employees solely for the purpose of unionization and the collection of an agency fee. Faced with this argument, we begin by examining the path that led to this Court's decision in *Abood*.

A

The starting point was *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956), a case in which the First Amendment was barely mentioned. The dispute in *Hanson* resulted from an amendment to the Railway Labor Act (RLA). *Id.*, at 229, 232. As originally enacted in 1926, the RLA did not permit a collective-bargaining agreement to require employees to join or make any payments to a union. See *Machinists* v. *Street*, 367 U. S. 740, 750 (1961). At that time and for many years thereafter, there was "a strong and long-standing tradition of voluntary unionism on the part of the standard rail unions." *Ibid.*

Eventually, however, the view of the unions changed. See *id.*, at 760–761. The RLA's framework for resolving labor disputes "is more complex than that of any other industry," *id.*, at 755, and amendments enacted in 1934 increased the financial burden on unions by creating the 36-member National Railroad Adjustment Board, one-half of whose members were appointed and paid by the unions. *Id.*, at 759–760. In seeking authorization to enter into union-shop agreements, *i. e.*, agreements requiring all employees to join a union and thus pay union dues, see *Oil Workers*, 426 U. S., at 409, n. 1, the unions' principal argument "was based on their role in this regulatory framework," *Street*, 367 U. S., at 761. A union spokesman argued that the financial burdens resulting from the RLA's unique and complex scheme justified union-shop provisions in order to provide the unions with needed dues. *Ibid.*

These arguments were successful, and the RLA was amended in 1951 to *permit* a railroad and a union to enter into an agreement containing a union-shop provision. This amendment brought the RLA into conflict with the laws of States that guaranteed the "right to work" and thereby out-

lawed the union shop. Nebraska, the setting of *Hanson*, was one such State. 351 U. S., at 228.

In *Hanson*, the Union Pacific Railroad Company and its unionized workers entered into a collective-bargaining agreement that contained a provision requiring employees, "as a condition of their continued employment," to join and remain members of the union. *Id.*, at 227. Employees who did not want to join the union brought suit in state court, contending that the union-shop provision violated a provision of the Nebraska Constitution banning adverse employment actions "'because of refusal to join or affiliate with a labor organization.'" *Id.*, at 228 (quoting Neb. Const., Art. XV, § 13). The employer countered that the RLA trumped the Nebraska provision, but the Nebraska courts agreed with the employees and struck down the union-shop agreement.

When the case reached this Court, the primary issue was whether the provision of the RLA that authorized union-shop agreements was "germane to the exercise of power under the Commerce Clause." 351 U. S., at 234–235. In an opinion by Justice Douglas, the Court held that this provision represented a permissible regulation of commerce. The Court reasoned that the challenged provision "'stabilized labor-management relations'" and thus furthered "'industrial peace.'" *Id.*, at 233–234.

The employees also raised what amounted to a facial constitutional challenge to the same provision of the RLA. The employees claimed that a "union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id.*, at 236. But because the lawsuit had been filed shortly after the collective-bargaining agreement was approved, the record contained no evidence that the union had actually engaged in political or ideological activities.[4]

[4] The employees' First Amendment claim necessarily raised the question of governmental action, since the First Amendment does not restrict private conduct, and the *Hanson* Court, in a brief passage, concluded that

The *Hanson* Court dismissed the objecting employees' First Amendment argument with a single sentence. The Court wrote: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." *Id.*, at 238.

This explanation was remarkable for two reasons. First, the Court had never previously held that compulsory membership in, and the payment of dues to, an integrated bar was constitutional, and the constitutionality of such a requirement was hardly a foregone conclusion. Indeed, that issue did not reach the Court until five years later, and it produced a plurality opinion and four separate writings. See *Lathrop* v. *Donohue*, 367 U. S. 820 (1961) (plurality opinion).[5]

Second, in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment *did not permit* compulsory membership in an integrated bar. See 367 U. S., at 878–880. The analogy drawn in *Hanson*, he wrote, fails. "Once we approve this measure," he warned, "we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose." 367 U. S., at 884. He continued:

> "I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades. Those brigades are not compatible with the First Amendment." *Id.*, at 884–885 (footnote omitted).

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governmental action was present. This was so, the Court reasoned, because the union-shop provision of the RLA took away a right that employees had previously enjoyed under state law. 351 U. S., at 232–233.

[5] A related question arose in *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), which we discuss *infra*, at 655–656.

The First Amendment analysis in *Hanson* was thin, and the Court's resulting First Amendment holding was narrow. As the Court later noted, "all that was held in *Hanson* was that [the RLA] was constitutional in its *bare authorization* of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." *Street*, 367 U. S., at 749 (emphasis added). The Court did not suggest that "industrial peace" could justify a law that "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought," or a law that forces a person to "conform to [a union's] ideology." *Hanson*, *supra*, at 236–237. The RLA did not compel such results, and the record in *Hanson* did not show that this had occurred.

B

Five years later, in *Street*, *supra*, the Court considered another case in which workers objected to a union shop. Employees of the Southern Railway System raised a First Amendment challenge, contending that a substantial part of the money that they were required to pay to the union was used to support political candidates and causes with which they disagreed. A Georgia court enjoined the enforcement of the union-shop provision and entered judgment for the dissenting employees in the amount of the payments that they had been forced to make to the union. The Georgia Supreme Court affirmed. *Id.*, at 742–745.

Reviewing the State Supreme Court's decision, this Court recognized that the case presented constitutional questions "of the utmost gravity," *id.*, at 749, but the Court found it unnecessary to reach those questions. Instead, the Court construed the RLA "as not vesting the unions with unlimited power to spend exacted money." *Id.*, at 768. Specifically, the Court held, the RLA "is to be construed to deny the unions, over an employee's objection, the power to use his

exacted funds to support political causes which he opposes." *Id.*, at 768–769.

Having construed the RLA to contain this restriction, the *Street* Court then went on to discuss the remedies available for employees who objected to the use of union funds for political causes. The Court suggested two: The dissenting employees could be given a refund of the portion of their dues spent by the union for political or ideological purposes, or they could be given a refund of the portion spent on those political purposes that they had advised the union they disapproved.[6] *Id.*, at 774–775.

Justice Black, writing in dissent, objected to the Court's suggested remedies, and he accurately predicted that the Court's approach would lead to serious practical problems. *Id.*, at 796–797. That approach, he wrote, while "very lucrative to special masters, accountants and lawyers," would do little for "the individual workers whose First Amendment freedoms have been flagrantly violated." *Id.*, at 796. He concluded:

> "Unions composed of a voluntary membership, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they favor. But to the extent that Government steps in to force people to help espouse the particular causes of a group, that group—whether composed of railroad workers or lawyers—loses its status as a voluntary group." *Ibid.*

Justice Frankfurter, joined by Justice Harlan, also dissented, arguing that the Court's remedy was conceptually flawed because a union may further the objectives of mem-

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[6] Only four Justices fully agreed with this approach, but a fifth, Justice Douglas, went along due to "the practical problem of mustering five Justices for a judgment in this case." 367 U. S., at 778–779 (concurring opinion).

bers by political means. See *id.*, at 813–815. He noted, for example, that reports from the AFL–CIO Executive Council "emphasize that labor's participation in urging legislation and candidacies is a major one." *Id.*, at 813. In light of "the detailed list of national and international problems on which the AFL–CIO speaks," he opined, "it seems rather naive" to believe "that economic and political concerns are separable." *Id.*, at 814.

C

This brings us to *Abood*, which, unlike *Hanson* and *Street*, involved a public-sector collective-bargaining agreement. The Detroit Federation of Teachers served "as the exclusive representative of teachers employed by the Detroit Board of Education." 431 U. S., at 211–212. The collective-bargaining agreement between the union and the board contained an agency-shop clause requiring every teacher to "pay the Union a service charge equal to the regular dues required of Union members." *Id.*, at 212. A putative class of teachers sued to invalidate this clause. Asserting that "they opposed collective bargaining in the public sector," the plaintiffs argued that "'a substantial part'" of their dues would be used to fund union "'activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice.'" *Id.*, at 212–213.

This Court treated the First Amendment issue as largely settled by *Hanson* and *Street*. 431 U. S., at 217, 223. The Court acknowledged that *Street* was resolved as a matter of statutory construction without reaching any constitutional issues, 431 U. S., at 220, and the Court recognized that forced membership and forced contributions impinge on free speech and associational rights, *id.*, at 223. But the Court dismissed the objecting teachers' constitutional arguments with this observation: "[T]he judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important

contribution of the union shop to the system of labor relations established by Congress." *Id.*, at 222.

The *Abood* Court understood *Hanson* and *Street* to have upheld union-shop agreements in the private sector based on two primary considerations: the desirability of "labor peace" and the problem of "'free riders[hip].'" 431 U. S., at 220–222, 224.

The Court thought that agency-shop provisions promote labor peace because the Court saw a close link between such provisions and the "principle of exclusive union representation." *Id.*, at 220. This principle, the Court explained, "prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization." *Id.*, at 220–221. In addition, the Court noted, the "designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment." *Id.*, at 220. And the Court pointed out that exclusive representation "frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.*, at 221.

Turning to the problem of free ridership, *Abood* noted that a union must "'fairly and equitably . . . represent all employees'" regardless of union membership, and the Court wrote as follows: The "union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation." *Id.*, at 221–222.

The plaintiffs in *Abood* argued that *Hanson* and *Street* should not be given much weight because they did not arise in the public sector, and the Court acknowledged that public-

sector bargaining is different from private-sector bargaining in some notable respects. 431 U. S., at 227–228. For example, although public and private employers both desire to keep costs down, the Court recognized that a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases." *Id.*, at 228. The Court also noted that "decisionmaking by a public employer is above all a political process" undertaken by people "ultimately responsible to the electorate." *Ibid.* Thus, whether a public employer accedes to a union's demands, the Court wrote, "will depend upon a blend of political ingredients," thereby giving public employees "more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector." *Id.*, at 228, 229. But despite these acknowledged differences between private- and public-sector bargaining, the Court treated *Hanson* and *Street* as essentially controlling.

Instead of drawing a line between the private and public sectors, the *Abood* Court drew a line between, on the one hand, a union's expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes," 431 U. S., at 232, and, on the other, expenditures for political or ideological purposes, *id.*, at 236.

D

The *Abood* Court's analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then.

The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union. As we have explained, *Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few

years later. Surely a First Amendment issue of this importance deserved better treatment.

The *Abood* Court fundamentally misunderstood the holding in *Hanson*, which was really quite narrow. As the Court made clear in *Street*, "all that was held in *Hanson* was that [the RLA] was constitutional *in its bare authorization* of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." 367 U. S., at 749 (emphasis added). In *Abood*, on the other hand, the State of Michigan did more than simply *authorize* the imposition of an agency fee. A state instrumentality, the Detroit Board of Education, actually *imposed* that fee. This presented a very different question.

Abood failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home.[7]

Abood failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in

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[7] Recent experience has borne out this concern. See DiSalvo, The Trouble With Public Sector Unions, National Affairs No. 5, p. 15 (2010) ("In Illinois, for example, public-sector unions have helped create a situation in which the state's pension funds report a liability of more than $100 billion, at least 50% of it unfunded").

the public sector, both collective bargaining and political advocacy and lobbying are directed at the government.

Abood does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either "chargeable" (in *Abood*'s terms, expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes," 431 U. S., at 232) or nonchargeable (*i. e.*, expenditures for political or ideological purposes, *id.*, at 236). In the years since *Abood*, the Court has struggled repeatedly with this issue. See *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984); *Teachers* v. *Hudson*, 475 U. S. 292 (1986); *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507 (1991); *Locke* v. *Karass*, 555 U. S. 207 (2009). In *Lehnert*, the Court held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U. S., at 519. But as noted in JUSTICE SCALIA's dissent in that case, "each one of the three 'prongs' of the test involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden)." *Id.*, at 551 (opinion concurring in judgment in part and dissenting in part).

Abood likewise did not foresee the practical problems that would face objecting nonmembers. Employees who suspect that a union has improperly put certain expenses in the "germane" category must bear a heavy burden if they wish to challenge the union's actions. "[T]he onus is on the employees to come up with the resources to mount the legal challenge in a timely fashion," *Knox*, 567 U. S., at 319 (citing *Lehnert*, *supra*, at 513), and litigating such cases is expensive. Because of the open-ended nature of the *Lehnert* test, classifying particular categories of expenses may not be straightforward. See *Jibson* v. *Michigan Ed. Assn.–NEA*,

30 F. 3d 723, 730 (CA6 1994). And although *Hudson* required that a union's books be audited, auditors do not themselves review the correctness of a union's categorization. See *Knox*, *supra*, at 318–319 (citing *Andrews* v. *Education Assn. of Cheshire*, 829 F. 2d 335, 340 (CA2 1987)). See also *American Federation of Television and Recording Artists, Portland Local*, 327 N. L. R. B. 474, 477 (1999) ("It is settled that determinations concerning whether particular expenditures are chargeable are legal determinations which are outside the expertise of the auditor. Thus, as we have stated, the function of the auditor is to verify that the expenditures that the union claims it made were in fact made for the purposes claimed, not to pass on the correctness of the union's allocation of expenditures to the chargeable and nonchargeable categories"); *California Saw and Knife Works*, 320 N. L. R. B. 224, 241 (1995) ("We first agree [that the company at issue] did not violate its duty of fair representation by failing to use an independent auditor to determine the allocation of chargeable and nonchargeable expenditures"); *Price* v. *International Union, United Auto, Aerospace & Agricultural Implement Workers of Am.*, 927 F. 2d 88, 93–94 (CA2 1991) ("*Hudson* requires only that the usual function of an auditor be performed, *i. e.*, to determine that the expenses claimed were in fact made. That function does not require that the auditor make a legal decision as to the appropriateness of the allocation of expenses to the chargeable and non-chargeable categories").

Finally, a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop. As we will explain, see *infra*, at 648–651, this assumption is unwarranted.

III

A

Despite all this, the State of Illinois now asks us to approve a very substantial expansion of *Abood*'s reach. *Abood*

involved full-fledged public employees, but in this case, the status of the personal assistants is much different. The Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining. For all other purposes, Illinois regards the personal assistants as private-sector employees. This approach has important practical consequences.

For one thing, the State's authority with respect to these two groups is vastly different. In the case of full-fledged public employees, the State establishes all of the duties imposed on each employee, as well as all of the qualifications needed for each position. The State vets applicants and chooses the employees to be hired. The State provides or arranges for whatever training is needed, and it supervises and evaluates the employees' job performance and imposes corrective measures if appropriate. If a state employee's performance is deficient, the State may discharge the employee in accordance with whatever procedures are required by law.

With respect to the personal assistants involved in this case, the picture is entirely changed. The job duties of personal assistants are specified in their individualized Service Plans, which must be approved by the customer and the customer's physician. 89 Ill. Admin. Code § 684.10. Customers have complete discretion to hire any personal assistant who meets the meager basic qualifications that the State prescribes in § 686.10. See § 676.30(b) (the customer "is responsible for controlling all aspects of the employment relationship between the customer and the [personal assistant], including, *without limitation*, locating and hiring the [personal assistant]" (emphasis added)); § 684.20(b) ("complete discretion in which Personal Assistant [the customer] wishes to hire" subject to baseline eligibility requirements).

Customers supervise their personal assistants on a daily basis, and no provision of the Illinois statute or implementing

regulations gives the State the right to enter the home in which the personal assistant is employed for the purpose of checking on the personal assistant's job performance. Cf. § 676.20(b) (customer controls "without limitation . . . supervising the work performed by the [personal assistant], imposing . . . disciplinary action against the [personal assistant]"). And while state law mandates an annual review of each personal assistant's work, that evaluation is also controlled by the customer. §§ 686.10(k), 686.30. A state counselor is assigned to assist the customer in performing the review but has no power to override the customer's evaluation. See *ibid.* Nor do the regulations empower the State to discharge a personal assistant for substandard performance. See n. 1, *supra*. Discharge, like hiring, is entirely in the hands of the customer. See § 676.30.

Consistent with this scheme, under which personal assistants are almost entirely answerable to the customers and not to the State, Illinois withholds from personal assistants most of the rights and benefits enjoyed by full-fledged state employees. As we have noted already, state law explicitly excludes personal assistants from statutory retirement and health insurance benefits. Ill. Comp. Stat., ch. 20, § 2405/3(f). It also excludes personal assistants from group life insurance and certain other employee benefits provided under the State Employees Group Insurance Act of 1971. *Ibid.* ("Personal assistants shall not be covered by the State Employees Group Insurance Act of 1971"). And the State "does not provide paid vacation, holiday, or sick leave" to personal assistants. 89 Ill. Admin. Code § 686.10(h)(7).

Personal assistants also appear to be ineligible for a host of benefits under a variety of other state laws, including the State Employee Vacation Time Act (see Ill. Comp. Stat., ch. 5, § 360/1); the State Employee Health Savings Account Law (see § 377/10–1); the State Employee Job Sharing Act (see § 380/0.01); the State Employee Indemnification Act (see

§ 350/2); and the Sick Leave Bank Act (see § 400/1). Personal assistants are apparently not entitled to the protection that the Illinois Whistleblower Act provides for full-fledged state employees. See Ill. Comp. Stat., ch. 740, § 174/1. And it likewise appears that personal assistants are shut out of many other state employee programs and benefits. The Illinois Department of Central Management Services lists many such programs and benefits, including a deferred compensation program, full worker's compensation privileges,[8] behavioral health programs, a program that allows state employees to retain health insurance for a time after leaving state employment, a commuter savings program, dental and vision programs, and a flexible spending program.[9] All of these programs and benefits appear to fall within the provision of the Rehabilitation Program declaring that personal assistants are not state employees for "any purposes" other than collective bargaining. See Ill. Comp. Stat., ch. 20, § 2405/3(f).

Just as the State denies personal assistants most of the rights and benefits enjoyed by full-fledged state workers, the State does not assume responsibility for actions taken by personal assistants during the course of their employment. The governing statute explicitly disclaims "vicarious liability in tort." *Ibid.* So if a personal assistant steals from a customer, neglects a customer, or abuses a customer, the State washes its hands.

Illinois deems personal assistants to be state employees for one purpose only, collective bargaining,[10] but the scope of

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[8] Under 89 Ill. Admin. Code § 686.10(h)(9), a personal assistant "may apply for Workers' Compensation benefits through [the State] . . . however, . . . the customer, not DHS, is the employer for these purposes."

[9] See http://www2.illinois.gov/cms/Employees/benefits/StateEmployee/Pages/default.aspx (all Internet materials as visited June 27, 2014, and available in Clerk of Court's case file).

[10] What is significant is not the label that the State assigns to the personal assistants but the substance of their relationship to the customers and the State. Our decision rests in no way on state-law labels. Cf. *post*, at 665–666. Indeed, it is because the First Amendment's meaning does not turn

bargaining that may be conducted on their behalf is sharply limited. Under the governing Illinois statute, collective bargaining can occur only for "terms and conditions of employment that are within the State's control." *Ibid.* That is not very much.

As an illustration, consider the subjects of mandatory bargaining under federal and state labor law that are out of bounds when it comes to personal assistants. Under federal law, mandatory subjects include the days of the week and the hours of the day during which an employee must work,[11] lunch breaks,[12] holidays,[13] vacations,[14] termination of employment,[15] and changes in job duties.[16] Illinois law similarly makes subject to mandatory collective-bargaining decisions concerning the "hours and terms and conditions of employment." *Belvidere* v. *Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 201, 692 N. E. 2d 295, 301 (1998); see also, *e. g.*, *Aurora Sergeants Assn.*, 24 PERI ¶25 (2008) (holding that days of the week worked by police officers is subject to mandatory collective bargaining). But under the Rehabilitation Program, all these topics are governed by the Service Plan, with respect to which the union has no role. See 89 Ill. Admin. Code §676.30(b) (the customer "is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating, and otherwise supervising the work performed

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on state-law labels that we refuse to allow the State to make a nonemployee a full-fledged employee "[s]olely for purposes of coverage under the Illinois Public Labor Relations Act," Ill. Comp. Stat., ch. 20, §2405/3(f), through the use of a statutory label.

[11] See *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965).

[12] See *In re National Grinding Wheel Co.*, 75 N. L. R. B. 905 (1948).

[13] See *In re Singer Mfg. Co.*, 24 N. L. R. B. 444 (1940).

[14] See *Great Southern Trucking Co.* v. *NLRB*, 127 F. 2d 180 (CA4 1942).

[15] See *N. K. Parker Transport, Inc.*, 332 N. L. R. B. 547, 551 (2000).

[16] See *St. John's Hospital*, 281 N. L. R. B. 1163, 1168 (1986).

by the PA, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA"); § 684.50 (the Service Plan must specify "the frequency with which the specific tasks are to be provided" and "the number of hours each task is to be provided per month").

B

1

The unusual status of personal assistants has important implications for present purposes. *Abood*'s rationale, whatever its strengths and weaknesses, is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law. Under the Illinois scheme now before us, however, the union's powers and duties are sharply circumscribed, and as a result, even the best argument for the "extraordinary power" that *Abood* allows a union to wield, see *Davenport*, 551 U. S., at 184, is a poor fit.

In our post-*Abood* cases involving public-sector agency-fee issues, *Abood* has been a given, and our task has been to attempt to understand its rationale and to apply it in a way that is consistent with that rationale. In that vein, *Abood*'s reasoning has been described as follows. The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee because "private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Lehnert*, 500 U. S., at 556 (opinion of SCALIA, J.). What justifies the agency fee, the argument goes, is the fact that the State compels the union to promote and protect the interests of nonmembers. *Ibid.* Specifically, the union must not discriminate between members and nonmembers in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing griev-

ances." *Ibid.* This means that the union "cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others." *Ibid.* And it has the duty to provide equal and effective representation for nonmembers in grievance proceedings, see Ill. Comp. Stat., ch. 5, §§ 315/6, 315/8, an undertaking that can be very involved. See, *e. g.*, SEIU: Member Resources, available at www.seiu.org/a/members/disputes-and-grievances-rights-procedures-and-best-practices.php (detailing the steps involved in adjusting grievances).

This argument has little force in the situation now before us. Illinois law specifies that personal assistants "shall be paid at the hourly rate set by law," see 89 Ill. Admin. Code § 686.40(a), and therefore the union cannot be in the position of having to sacrifice higher pay for its members in order to protect the nonmembers whom it is obligated to represent. And as for the adjustment of grievances, the union's authority and responsibilities are narrow, as we have seen. The union has no authority with respect to any grievances that a personal assistant may have with a customer, and the customer has virtually complete control over a personal assistant's work.

The union's limited authority in this area has important practical implications. Suppose, for example, that a customer fires a personal assistant because the customer wrongly believes that the assistant stole a fork. Or suppose that a personal assistant is discharged because the assistant shows no interest in the customer's favorite daytime soaps. Can the union file a grievance on behalf of the assistant? The answer is no.

It is true that Illinois law requires a collective-bargaining agreement to "contain a grievance resolution procedure which shall apply to all employees in the bargaining unit," Ill. Comp. Stat., ch. 5, § 315/8, but in the situation here, this procedure appears to relate solely to any grievance that a

personal assistant may have with the State,[17] not with the customer for whom the personal assistant works.[18]

2

Because of *Abood*'s questionable foundations, and because the personal assistants are quite different from full-fledged public employees, we refuse to extend *Abood* to the new situ-

[17] Under the current collective-bargaining agreement, a "grievance" is "a dispute regarding the meaning or implementation of a specific provision brought by the Union or a Personal Assistant." App. 51; see also *id.*, at 51–54. "Neither the Union nor the Personal Assistant can grieve the hiring or termination of the Personal Assistant, reduction in the number of hours worked by the Personal Assistant or assigned to the Customer, and/or any action taken by the Customer." *Id.*, at 51. That apparently limits the union's role in grievance adjustments to the State's failure to perform its duties under the collective-bargaining agreement, *e. g.*, if the State were to issue an incorrect paycheck, the union could bring a grievance. See *id.*, at 48.

[18] Contrary to the dissent's argument, *post*, at 666–667, the scope of the union's bargaining authority has an important bearing on the question whether *Abood* should be extended to the situation now before us. As we have explained, the best argument that can be mounted in support of *Abood* is based on the fact that a union, in serving as the exclusive representative of all the employees in a bargaining unit, is required by law to engage in certain activities that benefit nonmembers and that the union would not undertake if it did not have a legal obligation to do so. But where the law withholds from the union the authority to engage in most of those activities, the argument for *Abood* is weakened. Here, the dissent does not claim that the union's approach to negotiations on wages or benefits would be any different if it were not required to negotiate on behalf of the nonmembers as well as members. And there is no dispute that the law does not require the union to undertake the burden of representing personal assistants with respect to their grievances with customers; on the contrary, the law entirely excludes the union from that process. The most that the dissent can identify is the union's obligation to represent nonmembers regarding grievances with the State, but since most aspects of the personal assistants' work is controlled entirely by the customers, this obligation is relatively slight. It bears little resemblance to the obligation imposed on the union in *Abood*.

ation now before us.[19] *Abood* itself has clear boundaries; it applies to public employees. Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems. Consider a continuum, ranging, on the one hand, from full-fledged state employees to, on the other hand, individuals who follow a common calling and benefit from advocacy or lobbying conducted by a group to which they do not belong and pay no dues. A State may not force every person who benefits from this group's efforts to make payments to the group. See *Lehnert*, 500 U. S., at 556 (opinion of SCALIA, J.). But what if regulation of this group is increased? What if the Federal Government or a State begins to provide or increases subsidies in this area? At what point, short of the point at which the individuals in question become full-fledged state employees, should *Abood* apply?

If respondents' and the dissent's views were adopted, a host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within *Abood*'s reach. Medicare-funded home health employees may be one such group. See Brief for Petitioners 51; 42 U. S. C. § 1395x(m); 42 CFR § 424.22(a). The same goes for adult foster care providers in Oregon (Ore. Rev. Stat. § 443.733 (2013)) and Washington (Wash. Rev. Code § 41.56.029 (2012)) and certain workers under the federal Child Care and Development Fund programs (45 CFR § 98.2 (2013)).

If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just

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[19] It is therefore unnecessary for us to reach petitioners' argument that *Abood* should be overruled, and the dissent's extended discussion of *stare decisis* is beside the point. Cf. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164–166 (2008) (declining to extend the "implied" right of action under § 10(b) of the Securities Exchange Act "beyond its present boundaries").

where to draw the line,[20] and we therefore confine *Abood*'s reach to full-fledged state employees.[21]

IV

A

Because *Abood* is not controlling, we must analyze the constitutionality of the payments compelled by Illinois law under generally applicable First Amendment standards. As we explained in *Knox*, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." 567 U. S., at 309; see also, *e. g.*, *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 797 (1988); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *Wooley* v. *Maynard*, 430 U. S. 705, 713–715 (1977). And "compelled funding of the speech of other private speakers or groups" presents the same dangers as compelled speech. *Knox*, *supra*, at 309. As a result, we explained in *Knox* that an agency-fee provision imposes "a 'significant impingement on First Amendment rights,'" and

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[20] The dissent suggests that the concept of joint employment already supplies a clear line of demarcation, see *post*, at 664–665, but absent a clear statutory definition, employer status is generally determined based on a variety of factors that often do not provide a clear answer. See generally 22 Illinois Jurisprudence: Labor and Employment § 1:02 (2012); *American Federation of State, County and Municipal Employees, Council 31* v. *State Labor Relations Bd.*, 216 Ill. 2d 567, 578–582, 839 N. E. 2d 479, 486–487 (2005); *Manahan* v. *Daily News-Tribune*, 50 Ill. App. 3d 9, 12–16, 365 N. E. 2d 1045, 1048–1050 (1977). More important, the joint-employer standard was developed for use in other contexts. What matters here is whether the relationship between the State and the personal assistants is sufficient to bring this case within *Abood*'s reach.

[21] The dissent claims that our refusal to extend *Abood* to the Rehabilitation Program personal assistants produces a "perverse result" by penalizing the State for giving customers extensive control over the care they receive. *Post*, at 668. But it is not at all perverse to recognize that a State may exercise more control over its full-fledged employees than it may over those who are not full-fledged state employees or are privately employed.

this cannot be tolerated unless it passes "exacting First Amendment scrutiny." 567 U. S., at 310–311.

In *Knox*, we considered specific features of an agency-shop agreement—allowing a union to impose upon nonmembers a special assessment or dues increase without providing notice and without obtaining the nonmembers' affirmative agreement—and we held that these features could not even satisfy the standard employed in *United States* v. *United Foods, Inc.*, 533 U. S. 405, 415 (2001), where we struck down a provision that compelled the subsidization of commercial speech. We did not suggest, however, that the compelled speech in *Knox* was like the commercial speech in *United Foods*. On the contrary, we observed that "[t]he subject of the speech at issue [in *United Foods*]—promoting the sale of mushrooms—was not one that is likely to stir the passions of many, but the mundane commercial nature of that speech only highlights the importance of our analysis and our holding." *Knox*, *supra*, at 309–310.

While the features of the agency-fee provision in *Knox* could not meet even the commercial-speech standard employed in *United Foods*, it is apparent that the speech compelled in this case is not commercial speech. Our precedents define commercial speech as "speech that does no more than propose a commercial transaction," *United Foods*, *supra*, at 409 (citing *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 761–762 (1976)), and the union speech in question in this case does much more than that. As a consequence, it is arguable that the *United Foods* standard is too permissive.

B

For present purposes, however, no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*. Specifically, this provision does not serve a "'compelling state interes[t] . . . that cannot be achieved through means

significantly less restrictive of associational freedoms.'" *Knox*, *supra*, at 310 (quoting *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984)). Respondents contend that the agency-fee provision in this case furthers several important interests, but none is sufficient.

1

Focusing on the benefits of the union's status as the exclusive bargaining agent for all employees in the unit, respondents argue that the agency-fee provision promotes "labor peace," but their argument largely misses the point. Petitioners do not contend that they have a First Amendment right to form a rival union. Nor do they challenge the authority of the SEIU–HII to serve as the exclusive representative of all the personal assistants in bargaining with the State. All they seek is the right not to be forced to contribute to the union, with which they broadly disagree.

A union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee. Under federal law, in agencies in which unionization is permitted, "[e]ach employee shall have the right to form, join, or assist any labor organization, *or to refrain from any such activity*, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U. S. C. § 7102 (emphasis added).[22]

Moreover, even if the agency-fee provision at issue here were tied to the union's status as exclusive bargaining agents, features of the Illinois scheme would still undermine the argument that the agency fee plays an important role in maintaining labor peace. For one thing, any threat to labor

[22] A similar statute adopts the same rule specifically as to the U. S. Postal Service. See 39 U. S. C. § 1209(c).

peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes, either the customers' or their own. Cf. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 51 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools"). Federal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace. "[A]ny individual employed . . . in the domestic service of any family or person at his home" is excluded from coverage under the National Labor Relations Act. See 29 U. S. C. § 152(3).

The union's very restricted role under the Illinois law is also significant. Since the union is largely limited to petitioning the State for greater pay and benefits, the specter of conflicting demands by personal assistants is lessened. And of course, state officials must deal on a daily basis with conflicting pleas for funding in many contexts.

2

Respondents also maintain that the agency-fee provision promotes the welfare of personal assistants and thus contributes to the success of the Rehabilitation Program. As a result of unionization, they claim, the wages and benefits of personal assistants have been substantially improved;[23] orientation and training programs, background checks, and a program to deal with lost and erroneous paychecks have been instituted;[24] and a procedure was established to resolve grievances arising under the collective-bargaining agree-

[23] Wages rose from $7 per hour in 2003 to $13 per hour in 2014. Brief for Respondent Quinn 7. Current wages, according to respondents, are $11.65 per hour. Brief for Respondent SEIU–HII 6.

[24] See generally Brief for Respondent Quinn 6–8; Brief for Respondent SEIU–HII 6.

ment (but apparently not grievances relating to a Service Plan or actions taken by a customer).[25]

The thrust of these arguments is that the union has been an effective advocate for personal assistants in the State of Illinois, and we will assume that this is correct. But in order to pass exacting scrutiny, more must be shown. The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made.

In claiming that the agency fee was needed to bring about the cited improvements, the State is in a curious position. The State is not like the closed-fisted employer that is bent on minimizing employee wages and benefits and that yields only grudgingly under intense union pressure. As Governor Blagojevich put it in the executive order that first created the Illinois program, the State took the initiative because it was eager for "feedback" regarding the needs and views of the personal assistants. See App. to Pet. for Cert. 46a. Thereafter, a majority of the personal assistants voted to unionize. When they did so, they must have realized that this would require the payment of union dues, and therefore it may be presumed that a high percentage of these personal assistants became union members and are willingly paying union dues. Why are these dues insufficient to enable the union to provide "feedback" to a State that is highly receptive to suggestions for increased wages and other improvements? A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions. Respondents' showing falls far short of what the First Amendment demands.

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[25] See Brief for Respondent Quinn 7.

V

Respondents and their supporting *amici* make two additional arguments that must be addressed.

A

First, respondents and the Solicitor General urge us to apply a balancing test derived from *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). See Brief for Respondent Quinn 25–26; Brief for Respondent SEIU–HII 35–36; Brief for United States as *Amicus Curiae* 11. And they claim that under the *Pickering* analysis, the Illinois scheme must be sustained. This argument represents an effort to find a new justification for the decision in *Abood*, because neither in that case nor in any subsequent related case have we seen *Abood* as based on *Pickering* balancing.[26]

In any event, this effort to recast *Abood* falls short. To begin, the *Pickering* test is inapplicable because with respect to the personal assistants, the State is not acting in a traditional employer role.[27] But even if it were, application of *Pickering* would not sustain the agency-fee provision.

Pickering and later cases in the same line concern the constitutionality of restrictions on speech by public employees.

[26] The *Abood* majority cited *Pickering* once, in a footnote, for the proposition that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U. S., at 230, n. 27. And it was cited once in Justice Powell's concurrence, for the uncontroversial proposition that "'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Id.*, at 259 (opinion concurring in judgment) (quoting *Pickering*, 391 U. S., at 568). *United States* v. *United Foods, Inc.*, 533 U. S. 405 (2001), cited *Pickering* only once—in dissent. 533 U. S., at 425 (opinion of BREYER, J.). Neither *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), nor *Knox* v. *Service Employees*, 567 U. S. 298 (2012), cited *Pickering* a single time.

[27] Nor is the State acting as a "proprietor in managing its internal operations" with respect to personal assistants. See *NASA* v. *Nelson*, 562 U. S. 134, 138, 150 (2011).

Under those cases, employee speech is unprotected if it is not on a matter of public concern (or is pursuant to an employee's job duties), but speech on matters of public concern may be restricted only if "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern." 391 U. S., at 568. See also *Borough of Duryea* v. *Guarnieri*, 564 U. S. 379 (2011); *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006); *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994) (plurality opinion); *Connick* v. *Myers*, 461 U. S. 138 (1983).

Attempting to fit *Abood* into the *Pickering* framework, the United States contends that union speech that is germane to collective bargaining does not address matters of public concern and, as a result, is not protected. Taking up this argument, the dissent insists that the speech at issue here is not a matter of public concern. According to the dissent, this is "the prosaic stuff of collective bargaining." *Post*, at 675. Does it have any effect on the public? The dissent's answer is: "not terribly much." *Post*, at 675–676. As the dissent sees it, speech about such funding is not qualitatively different from the complaints of a small-town police chief regarding such matters as the denial of $338 in overtime pay or directives concerning the use of police vehicles and smoking in the police station. See *ibid.*; *Guarnieri*, *supra*, at 384.[28]

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[28] The dissent misunderstands or mischaracterizes our cases in this line. We have never held that the wages paid to a public-sector bargaining unit are not a matter of public concern. The $338 payment at issue in *Guarnieri* had a negligible impact on public coffers, but payments made to public-sector bargaining units may have massive implications for government spending. See *supra*, at 636, and n. 7. That is why the dissent's "analogy," *post*, at 676, is not illustrative at all. We do not doubt that a single public employee's pay is usually not a matter of public concern. But when the issue is pay for an entire collective-bargaining unit involving millions of dollars, that matter affects statewide budgeting decisions.

This argument flies in the face of reality. In this case, for example, the category of union speech that is germane to collective bargaining unquestionably includes speech in favor of increased wages and benefits for personal assistants. Increased wages and benefits for personal assistants would almost certainly mean increased expenditures under the Medicaid program, and it is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern.

In recent years, Medicaid expenditures have represented nearly a quarter of all state expenditures. See National Association of State Budget Officers, Summary: Fall 2013 Fiscal Survey of States (Dec. 10, 2013), online at http://www.nasbo.org. "Medicaid has steadily eaten up a growing share of state budgets."[29] In fiscal year 2014, "[t]hirty-five states increased spending for Medicaid for a net increase of $6.8 billion." *Ibid.* Accordingly, speech by a powerful union that relates to the subject of Medicaid funding cannot be equated with the sort of speech that our cases have treated as concerning matters of only private concern. See, *e. g.*, *San Diego* v. *Roe*, 543 U. S. 77 (2004) (*per curiam*); *Connick*, *supra*, at 148 (speech that "reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause célèbre*" (emphasis added)).

For this reason, if *Pickering* were to be applied, it would be necessary to proceed to the next step of the analysis prescribed in that case, and this would require an assessment of both the degree to which the agency-fee provision promotes the efficiency of the Rehabilitation Program and the degree to which that provision interferes with the First Amendment interests of those personal assistants who do not wish to support the union.

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[29] See Cooper, Bigger Share of State Cash for Medicaid, N. Y. Times, Dec. 14, 2011, p. A23.

We need not discuss this analysis at length because it is covered by what we have already said. Agency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees. See *Knox*, 567 U. S., at 318–319 (citing *Lehnert*, 500 U. S., at 513; *Jibson* v. *Michigan Ed. Assn.*, 30 F. 3d 723, 730 (CA6 1994)). And on the other side of the balance, the arguments on which the United States relies—relating to the promotion of labor peace and the problem of free riders—have already been discussed. Thus, even if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld.

B

Respondents contend, finally, that a refusal to extend *Abood* to cover the situation presented in this case will call into question our decisions in *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), and *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217 (2000). Respondents are mistaken.

In *Keller*, we considered the constitutionality of a rule applicable to all members of an "integrated" bar, *i. e.*, "an association of attorneys in which membership and dues are required as a condition of practicing law." 496 U. S., at 5. We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members. *Id.*, at 14.

This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." *Ibid.* States also have a strong interest in allo-

cating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

Contrary to respondents' submission, the same is true with respect to *Southworth*, *supra*. In that case, we upheld the constitutionality of a university-imposed mandatory student activities fee that was used in part to support a wide array of student groups that engaged in expressive activity. The mandatory fee was challenged by students who objected to some of the expression that the fee was used to subsidize, but we rejected that challenge, and our holding is entirely consistent with our decision in this case.

Public universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). This may be done by providing funding for a broad array of student groups. If the groups funded are truly diverse, many students are likely to disagree with things that are said by some groups. And if every student were entitled to a partial exemption from the fee requirement so that no portion of the student's fee went to support a group that the student did not wish to support, the administrative problems would likely be insuperable. Our decision today thus does not undermine *Southworth*.

* * *

For all these reasons, we refuse to extend *Abood* in the manner that Illinois seeks. If we accepted Illinois' argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.

The judgment of the Court of Appeals is reversed in part and affirmed in part,[30] and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Abood v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), answers the question presented in this case. *Abood* held that a government entity may, consistently with the First Amendment, require public employees to pay a fair share of the cost that a union incurs negotiating on their behalf for better terms of employment. That is exactly what Illinois did in entering into collective bargaining agreements with the Service Employees International Union Healthcare (SEIU) which included fair-share provisions. Contrary to the Court's decision, those agreements fall squarely within *Abood*'s holding. Here, Illinois employs, jointly with individuals suffering from disabilities, the in-home care providers whom the SEIU

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[30] The Court of Appeals held—and we agree—that the First Amendment claims of the petitioners who work not in the Rehabilitation Program but in a different but related program, the "Disabilities Program," are not ripe. This latter program is similar in its basic structure to the Rehabilitation Program, see App. to Pet. for Cert. 14a, but the Disabilities Program personal assistants have not yet unionized. The Disabilities Program petitioners claim that under Illinois Executive Order No. 2009–15, they face imminent unionization and, along with it, compulsory dues payments. Executive Order No. 2009–15, they note, is "almost identical to EO 2003–08, except that it targets providers in the Disabilities Program." Brief for Petitioners 10.

In a 2009 mail-ballot election, the Disabilities Program personal assistants voted down efforts by SEIU Local 73 and American Federation of State, County, and Municipal Employees Council 31 to become their representatives. See App. 27. The record before us does not suggest that there are any further elections currently scheduled. Nor does the record show that any union is currently trying to obtain certification through a card check program. Under these circumstances, we agree with the holding of the Court of Appeals.

represents. Illinois establishes, following negotiations with the union, the most important terms of their employment, including wages, benefits, and basic qualifications. And Illinois's interests in imposing fair-share fees apply no less to those caregivers than to other state workers. The petitioners' challenge should therefore fail.

And that result would fully comport with our decisions applying the First Amendment to public employment. *Abood* is not, as the majority at one point describes it, "something of an anomaly," allowing uncommon interference with individuals' expressive activities. *Ante*, at 627. Rather, the lines it draws and the balance it strikes reflect the way courts generally evaluate claims that a condition of public employment violates the First Amendment. Our decisions have long afforded government entities broad latitude to manage their workforces, even when that affects speech they could not regulate in other contexts. *Abood* is of a piece with all those decisions: While protecting an employee's most significant expression, that decision also enables the government to advance its interests in operating effectively—by bargaining, if it so chooses, with a single employee representative and preventing free riding on that union's efforts.

For that reason, one aspect of today's opinion is cause for satisfaction, though hardly applause. As this case came to us, the principal question it presented was whether to overrule *Abood*: The petitioners devoted the lion's share of their briefing and argument to urging us to overturn that nearly 40-year-old precedent (and the respondents and *amici* countered in the same vein). Today's majority cannot resist taking potshots at *Abood*, see *ante*, at 635–638, but it ignores the petitioners' invitation to depart from principles of *stare decisis*. And the essential work in the majority's opinion comes from its extended (though mistaken) distinction of *Abood*, see *ante*, at 638–647, not from its gratuitous dicta critiquing *Abood*'s foundations. That is to the good—or at least better than it might be. The *Abood* rule is deeply entrenched, and is

the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation. Our precedent about precedent, fairly understood and applied, makes it impossible for this Court to reverse that decision.

I

I begin where this case should also end—with this Court's decision in *Abood*. There, some public school teachers in Detroit challenged a clause in their collective bargaining agreement compelling non-union members to pay the union a service charge equivalent to regular dues. The Court upheld the requirement so long as the union was using the money for "collective bargaining, contract administration, and grievance adjustment," rather than for political or ideological activities. 431 U. S., at 225–226. In so doing, the Court acknowledged that such a fair-share provision "has an impact upon [public employees'] First Amendment interests"; employees, after all, might object to policies adopted or "activities undertaken by the union in its role as exclusive representative." *Id.*, at 222. Still, the Court thought, the government's own interests "constitutionally justified" the interference. *Ibid.* Detroit had decided, the Court explained, that bargaining with a single employee representative would promote "labor stability" and peaceful labor relations—by ensuring, for example, that different groups of employees did not present "conflicting demands." *Id.*, at 221, 229. And because such an exclusive bargaining agent has a legal duty to represent all employees, rather than just its own members, a compulsory surcharge fairly distributes "the cost of [bargaining] among those who benefit" and "counteracts the incentive that employees might otherwise have to become 'free riders.'" *Id.*, at 222.

This case thus raises a straightforward question: Does *Abood* apply equally to Illinois's care providers as to Detroit's teachers? No one thinks that the fair-share provisions in the two cases differ in any relevant respect. Nor

do the petitioners allege that the SEIU is crossing the line *Abood* drew by using their payments for political or ideological activities. The only point in dispute is whether it matters that the personal assistants here are employees not only of the State but also of the disabled persons for whom they care. Just as the Court of Appeals held, that fact should make no difference to the analysis. See 656 F. 3d 692, 698 (CA7 2011).

To see how easily *Abood* resolves this case, consider how Illinois structured the petitioners' employment, and also why it did so. The petitioners work in Illinois's Medicaid-funded Rehabilitation Program, which provides in-home services to persons with disabilities who otherwise would face institutionalization. Under the program, each disabled person (the State calls them "customers") receives care from a personal assistant; the total workforce exceeds 20,000. The State could have asserted comprehensive control over all the caregivers' activities. But because of the personalized nature of the services provided, Illinois instead chose (as other States have as well) to share authority with the customers themselves. The result is that each caregiver has joint employers—the State and the customer—with each controlling significant aspects of the assistant's work.[1]

For its part, Illinois sets all the workforce-wide terms of employment. Most notably, the State determines and pays the employees' wages and benefits, including health insurance (while also withholding taxes). See 89 Ill. Admin. Code §§ 686.10(h)(10), 686.40(a)–(b) (2007); App. 44–46. By regula-

[1] The majority describes the petitioners as "partial" or "quasi" public employees, a label of its own devising. *Ante*, at 646. But employment law has a real name—joint employees—for workers subject at once to the authority of two or more employers (a not uncommon phenomenon). See, *e. g.*, 29 CFR § 791.2 (2013); *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 475 (1964). And the Department of Labor recently explained that in-home care programs, if structured like Illinois's, establish joint employment relationships. See 78 Fed. Reg. 60483–60484 (2013).

tion, Illinois establishes the job's basic qualifications: For example, the assistant must provide references or recommendations and have adequate experience and training for the services given. See §§ 686.10(c), (f). So too, the State describes the services any personal assistant may provide, and prescribes the terms of standard employment contracts entered into between personal assistants and customers. See §§ 686.10(h), 686.20.

Illinois as well structures the individual relationship between the customer and his assistant (in ways the majority barely acknowledges). Along with both the customer and his physician, a state-employed counselor develops a service plan laying out the assistant's specific job responsibilities, hours, and working conditions. See §§ 684.10, 684.50. That counselor also assists the customer in conducting a state-mandated annual performance review, based on state-established criteria, and mediates any resulting disagreements. See § 686.30.

Within the structure designed by the State, the customer of course has crucial responsibilities. He exercises day-to-day supervisory control over the personal assistant. See § 676.30(b). And he gets both to hire a particular caregiver (from among the pool of applicants Illinois has deemed qualified) and to impose any needed discipline, up to and including discharge. See *ibid.*; § 677.40(d). But even as to those matters, the State plays a role. Before a customer may hire an assistant, the counselor must sign off on the employee's ability to follow the customer's directions and communicate with him. See §§ 686.10(d)–(e) (requiring that the employee demonstrate these capabilities "to the satisfaction of" the counselor). And although only a customer can actually fire an assistant, the State can effectively do so by refusing to pay one who fails to "meet [state] standards." § 677.40(d). The majority reads that language narrowly, see *ante*, at 622, n. 1, 640, but the State does not: It has made clear not just in its litigation papers, but also in its collective bargaining agree-

ments and customer guidance that it will withhold payment from an assistant (or altogether disqualify her from the program) based on credible allegations of customer abuse, neglect, or financial exploitation. See App. 55; Brief for Respondent Quinn 3, 50; Ill. Dept. of Human Servs., Customer Guidance for Managing Providers 8, online at http://www.dhs.state.il.us/OneNetLibrary/27897/documents/Brochures/4365.pdf (as visited June 27, 2014, and available in Clerk of Court's case file).[2]

Given that set of arrangements, *Abood* should control. Although a customer can manage his own relationship with a caregiver, Illinois has sole authority over every workforce-wide term and condition of the assistants' employment—in other words, the issues most likely to be the subject of collective bargaining. In particular, if an assistant wants an increase in pay, she must ask the State, not the individual customer. So too if she wants better benefits. (Although the majority notes that caregivers do not receive *statutory* retirement and health insurance benefits, see *ante*, at 640, that is irrelevant: Collective bargaining between the State and the SEIU has focused on benefits from the beginning, and has produced state-funded health insurance for personal assistants.) And because it is Illinois that would sit down at a bargaining table to address those subjects—the ones that matter most to employees and so most affect workforce stability—the State's stake in a fair-share provision is the same as in *Abood*. Here too, the State has an interest in promoting effective operations by negotiating with an equitably and adequately funded exclusive bargaining agent over terms and conditions of employment. That Illinois has delegated to program customers various individualized employment

[2] Indeed, pursuant to the grievance procedure in the present collective bargaining agreement, the SEIU obtained an arbitration award reversing the State's decision to disqualify an assistant from the program for such reasons. See Brief for Respondent SEIU 7 (citing Doc. No. 32–5 in Case No. 10–cv–02477 (ND Ill.)).

issues makes no difference to those state interests. If anything, as the State has contended, the dispersion of employees across numerous workplaces and the absence of day-to-day state supervision provides an additional reason for Illinois to want to "address concerns common to all personal assistants" by negotiating with a single representative: Only in that way, the State explains, can the employees effectively convey their concerns about employment under the Rehabilitation Program. App. to Pet. for Cert. 46a (Exec. Order No. 2003–8).

Indeed, the history of that program forcefully demonstrates Illinois's interest in bargaining with an adequately funded exclusive bargaining agent—that is, the interest *Abood* recognized and protected. Workforce shortages and high turnover have long plagued in-home care programs, principally because of low wages and benefits. That labor instability lessens the quality of care, which in turn forces disabled persons into institutions and (massively) increases costs to the State. See Brief for Paraprofessional Healthcare Institute as *Amicus Curiae* 16–26; Brief for State of California et al. as *Amici Curiae* 4–5. The individual customers are powerless to address those systemic issues; rather, the State—because of its control over workforce-wide terms of employment—is the single employer that can do so. And here Illinois determined (as have nine other States, see Brief for Respondent SEIU 51, n. 14) that negotiations with an exclusive representative offered the best chance to set the Rehabilitation Program on firmer footing. Because of that bargaining, as the majority acknowledges, home-care assistants have nearly doubled their wages in less than 10 years, obtained state-funded health insurance, and benefited from better training and workplace safety measures. See *ante*, at 650–651; Brief for Respondent Quinn 7; App. 44–48. The State, in return, has obtained guarantees against strikes or other work stoppages, see *id.*, at 55—and most important, believes it has gotten a more stable workforce providing

higher quality care, thereby avoiding the costs associated with institutionalization. Illinois's experience thus might serve as a veritable poster child for *Abood*—not, as the majority would have it, some strange extension of that decision.

It is not altogether easy to understand why the majority thinks what it thinks: Today's opinion takes the tack of throwing everything against the wall in the hope that something might stick. A vain hope, as it turns out. Even once disentangled, the various strands of the majority's reasoning do not distinguish this case from *Abood*.

Parts of the majority's analysis appear to rest on the simple presence of another employer, possessing significant responsibilities, in addition to the State. See *ante*, at 638–640, 642–643. But this Court's cases provide no warrant for holding that joint public employees are not real ones. To the contrary, the Court has made clear that the government's wide latitude to manage its workforce extends to such employees, even as against their First Amendment claims. The government's prerogative as employer, we recently explained, turns not on the "formal status" of an employee, but on the nature of the public "interests at stake"; we therefore rejected the view that "the Government's broad authority in managing its affairs should apply with diminished force" to contract employees whose "direct employment relationship" is with another party. *NASA* v. *Nelson*, 562 U. S. 134, 150 (2011). And indeed, we reached the same result (in language that might have been written for this case) when such employees "d[id] not work at the government's workplace[,] d[id] not interact daily with government officers and employees," and were not subject to the government's "day-to-day control" over "the details of how work is done." *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 676–677 (1996).[3] Here, as I have explained, Illinois's interests as an

[3] The majority claims that the Court developed this law "for use in other contexts," *ante*, at 647, n. 20, but that is true only in the narrowest sense. The decisions I cite dealt with First Amendment claims that joint

employer and program administrator are substantial, see *supra*, at 660–662; and accordingly, the State's sharing of employment responsibilities with another party should not matter.[4]

Next, the majority emphasizes that the Illinois Legislature deemed personal assistants "public employees" solely "for the purposes of coverage under the Illinois Public Labor Relations Act" and not for other purposes, like granting statutory benefits and incurring vicarious liability in tort. Ill. Comp. Stat., ch. 20, § 2405/3(f) (West 2012); see *ante*, at 625, 640–641; but cf. *Martin* v. *Illinois*, 2005 WL 2267733, *5–*8 (Ill. Workers' Compensation Comm'n, July 26, 2005) (treating caregivers as public employees for purposes of workers' compensation).[5] But once again, it is hard to see why that fact is relevant. The majority must agree (this Court has made the point often enough) that "state law labels," adopted

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or contract employees made against the government. The only difference is that those suits challenged different restrictions on the employees' expressive activities.

[4] In a related argument, the majority frets that if *Abood* extends to the joint employees here, a "host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within *Abood*'s reach." *Ante*, at 646. But as I have just shown, this Court has not allowed such worries about line-drawing to limit the government's authority over joint and contract employees in the past. And rightly so, because whatever close cases may arise at the margin (there always are some), the essential distinction between such employees and mere recipients of government funding is not hard to maintain. Consider again the combination of things Illinois does here: set wages, provide benefits, administer payroll, withhold taxes, set minimum qualifications, specify terms of standard contracts, develop individualized service plans, fund orientation and training, facilitate annual reviews, and resolve certain grievances. That combination of functions places the petitioners so securely on one side of the boundary between public employees and mere recipients of public funding as to justify deferral of line-drawing angst to another case.

[5] As the opinion's quadruple repetition of the words "appear" and "apparently" suggests, *ante*, at 640–641, the majority is mostly guessing as to in-home caregivers' eligibility for various state programs.

for a whole host of reasons, do not determine whether the State is acting as an employer for purposes of the First Amendment. *E. g.*, *Umbehr*, 518 U. S., at 679. The true issue is whether Illinois has a sufficient stake in, and control over, the petitioners' terms and conditions of employment to implicate *Abood*'s rationales and trigger its application. And once more, that question has a clear answer: As I have shown, Illinois negotiates all workforce-wide terms of the caregivers' employment as part of its effort to promote labor stability and effectively administer its Rehabilitation Program. See *supra*, at 662–664. As contrasted to that all-important fact, whether Illinois incurs vicarious liability for caregivers' torts, see *ante*, at 641, or grants them certain statutory benefits like health insurance, see *ante*, at 640, is beside the point. And still more so because the State and the SEIU can *bargain* over most such matters; for example, as I have noted, the two have reached agreement on providing state-funded health coverage, see *supra*, at 662–664.

Further, the majority claims, "the scope of bargaining" that the SEIU may conduct for caregivers is "circumscribed" because the customer has authority over individualized employment matters like hiring and firing. *Ante*, at 641–643. But (at the risk of sounding like a broken record) so what? Most States limit the scope of permissible bargaining in the public sector—often ruling out of bounds similar, individualized decisions. See R. Kearney & P. Mareschal, Labor Relations in the Public Sector 75–77 (5th ed. 2014) ("The great majority of state statutes" exclude "certain matters from the scope of negotiations," including, for example, personnel decisions respecting "hiring, promotion, and dismissal"); Note, Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1684 (1984) (Many state statutes "explicitly limit[] the scope of bargaining, typically by excluding decisions on personnel management"). Here, the scope of collective bargaining—over wages and benefits, as well as basic duties and qualifications—more than suffices to implicate the state in-

terests justifying *Abood*. Those are the matters, after all, most likely to concern employees generally and thus most likely to affect the nature and quality of the State's workforce. The idea that *Abood* applies only if a union can bargain with the State over every issue comes from nowhere and relates to nothing in that decision—and would revolutionize public labor law.

Finally, the majority places weight on an idiosyncrasy of Illinois law: that a regulation requires uniform wages for all personal assistants. See *ante*, at 643. According to the majority, that means *Abood*'s free-rider rationale "has little force in the situation now before us": Even absent the duty of fair representation (requiring the union to work on behalf of all employees, members and non-members alike, see *infra*, at 678–679), the union could not bargain one employee's wages against another's. *Ante*, at 644.[6] But that idea is doubly wrong. First, the Illinois regulation applies only to wages. It does not cover, for example, the significant health benefits that the SEIU has obtained for in-home caregivers, or any other benefits for which it may bargain in the future. Nor does the regulation prevent preferential participation in the grievance process, which governs all disputes between Illinois and caregivers arising from the terms of their agreement. See n. 2, *supra*. And second, even if the regulation covered everything subject to collective bargaining, the majority's reasoning is a non-sequitur. All the regulation would do then is serve as suspenders to the duty of fair representation's belt: That Illinois has *two* ways to ensure that the results of collective bargaining redound to the benefit of all employees serves to compound, rather than mitigate, the union's free-rider problem.

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[6] The majority also suggests in this part of its opinion that even if the union had latitude to demand higher wages only for its own supporters, it would not do so. See *ante*, at 645, n. 18. But why not? A rational union, in the absence of any legal obligation to the contrary, would almost surely take that approach to bargaining.

As far as I can tell, that covers the majority's reasons for distinguishing this case from *Abood*. And even when considered in combination, as the majority does, they do not succeed. What makes matters still worse is the perverse result of the majority's decision: It penalizes the State for giving disabled persons some control over their own care. If Illinois had structured the program, as it could have, to centralize every aspect of the employment relationship, no question could possibly have arisen about *Abood*'s application. Nothing should change because the State chose to respect the dignity and independence of program beneficiaries by allowing them to select and discharge, as well as supervise day-to-day, their own caregivers. A joint employer remains an employer, and here, as I have noted, Illinois kept authority over all workforce-wide terms of employment—the very issues most likely to be the subject of collective bargaining. The State thus should also retain the prerogative—as part of its effort to "ensure efficient and effective delivery of personal care services"—to require all employees to contribute fairly to their bargaining agent. App. to Pet. for Cert. 45a (Exec. Order No. 2003–8).

II

Perhaps recognizing the difficulty of plausibly distinguishing this case from *Abood*, the petitioners raised a more fundamental question: the continued viability of *Abood* as to *all* public employees, even what the majority calls "full-fledged" ones. *Ante*, at 627. That issue occupied the brunt of the briefing and argument in this Court. See, *e. g.*, Brief for Petitioners 16–24; Brief for Respondent SEIU 15–44; Brief for Respondent Quinn 15–29; Brief for United States as *Amicus Curiae* 14–28; Tr. of Oral Arg. 5–21, 32–39, 42–47, 50–60. The majority declines the petitioners' request to overturn precedent—and rightly so: This Court does not have anything close to the special justification necessary to overturn *Abood*. Still, the majority cannot restrain itself

from providing a critique of that decision, suggesting that it might have resolved the case differently in the first instance. That dicta is off-base: *Abood* corresponds precisely to this Court's overall framework for assessing public employees' First Amendment claims. To accept that framework, while holding *Abood* at arm's length, is to wish for a *sui generis* rule, lacking in justification, applying exclusively to union fees.

A

This Court's view of *stare decisis* makes plain why the majority cannot—and did not—overturn *Abood*. That doctrine, we have stated, is a "foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). It "promotes the evenhanded, predictable, and consistent development of legal principles [and] fosters reliance on judicial decisions." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). As important, it "contributes to the actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). For all those reasons, this Court has always held that "any departure" from precedent "demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

And *Abood* is not just any precedent: It is entrenched in a way not many decisions are. Over nearly four decades, we have cited *Abood* favorably numerous times, and we have repeatedly affirmed and applied its core distinction between the costs of collective bargaining (which the government can demand its employees share) and those of political activities (which it cannot). See, *e. g.*, *Locke* v. *Karass*, 555 U. S. 207, 213–214 (2009); *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519 (1991); *Teachers* v. *Hudson*, 475 U. S. 292, 301–302 (1986); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–457 (1984). Reviewing those decisions, this Court recently—and unanimously—called the *Abood* rule "a general First Amendment

principle." *Locke*, 555 U. S., at 213–215. And indeed, the Court has relied on that rule in deciding cases involving compulsory fees outside the labor context—which today's majority reaffirms as good law, see *ante*, at 655–656. See, *e. g.*, *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 9–17 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 230–232 (2000) (public university student fees); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 471–473 (1997) (commercial advertising assessments). Not until two years ago, in *Knox* v. *Service Employees*, 567 U. S. 298 (2012), did the Court so much as whisper (there without the benefit of briefing or argument, see *id.*, at 323–328 (SOTOMAYOR, J., concurring in judgment)), that it had any misgivings about *Abood*.

Perhaps still more important, *Abood* has created enormous reliance interests. More than 20 States have enacted statutes authorizing fair-share provisions, and on that basis public entities of all stripes have entered into multi-year contracts with unions containing such clauses. "*Stare decisis* has added force," we have held, when overturning a precedent would require "States to reexamine [and amend] their statutes." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202–203 (1991). And on top of that, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U. S., at 828. Here, governments and unions across the country have entered into thousands of contracts involving millions of employees in reliance on *Abood*. Reliance interests do not come any stronger.

The majority's criticisms of *Abood* do not remotely defeat those powerful reasons for adhering to the decision. The special justifications needed to reverse an opinion must go beyond demonstrations (much less assertions) that it was wrong; that is the very point of *stare decisis*. And the majority's critique extends no further. It is mostly just a catalog of errors *Abood* supposedly committed—reproaches that

could have been leveled as easily 40 years ago as today. Only the idea that *Abood* did not "anticipate" or "foresee" the difficulties of distinguishing between collective bargaining and political activities, see *ante*, at 637, might be thought different. But in fact, *Abood* predicted precisely those issues. See 431 U. S., at 236 ("There will, of course, be difficult problems in drawing lines between collective-bargaining . . . and ideological activities"). It simply disagreed with today's majority about whether in this context, as in many others, lines that are less than pristine are still worth using. And in any event, the majority much overstates the difficulties of classifying union expenditures. The Court's most recent decision on the subject unanimously resolved the single issue that had divided lower courts. See *Locke*, 555 U. S., at 217–221. So it is not surprising that the majority fails to offer any concrete examples of thorny classification problems. If the kind of hand-wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U. S. Reports.

And the majority says nothing to the contrary: It does not pretend to have the requisite justifications to overrule *Abood*. Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so. Yet they will also know that the majority could not, even after receiving full-dress briefing and argument, come up with reasons anywhere near sufficient to reverse the decision. Much has gone wrong in today's ruling, but this has not: Save for an unfortunate hiving off of ostensibly "partial-public" employees, *ante*, at 646, *Abood* remains the law.

B

And even apart from *stare decisis*, that result is as it should be; indeed, it is the only outcome that makes sense in the context of our caselaw. In numerous cases decided over

many decades, this Court has addressed the government's authority to adopt measures limiting expression in the capacity not of sovereign but of employer. *Abood* fits—fits hand-in-glove—with all those cases, in both reasoning and result. Were that rule not in place, our law respecting public employees' speech rights would contain a serious anomaly—a different legal standard (and not a good one) applying exclusively to union fees.

This Court has long acknowledged that the government has wider constitutional latitude when it is acting as employer than as sovereign. See *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 598 (2008) ("[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate . . . and the government acting . . . to manage [its] internal operation" (internal quotation marks omitted)). "Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with other citizens. *NASA*, 562 U. S., at 148. We have explained that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated" in the public workplace—that the government must have the ability to decide how to manage its employees in order to best provide services to the public. *Engquist*, 553 U. S., at 598. In effect, we have tried to place the government-qua-employer in a similar (though not identical) position to the private employer, recognizing that both face comparable challenges in maintaining a productive workforce. The result is that a public employee "must accept certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006). "[A]lthough government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context." *Engquist*, 553 U. S., at 600.

Further, this Court has developed and applied those principles in numerous cases involving First Amendment claims.

"Government employers, like private employers," we have explained, "need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti*, 547 U. S., at 418. Accordingly, we have devised methods for distinguishing between speech restrictions reflecting the kind of concerns private employers often hold (which are constitutional) and those exploiting the employment relationship to restrict employees' speech as private citizens (which are not). Most notably, the Court uses a two-step test originating in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). First, if the expression at issue does not relate to "a matter of public concern," the employee "has no First Amendment cause of action." *Garcetti*, 547 U. S., at 418. Second, even if the speech addresses a matter of public concern, a court is to determine whether the government "had an adequate justification" for its action, *ibid.*, by balancing "the interests of the [employee] as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U. S., at 568.

Abood is of a piece with all those decisions; and indeed, its core analysis mirrors *Pickering*'s. The *Abood* Court recognized that fair-share provisions function as prerequisites to employment, assessed to cover the costs of representing employees in collective bargaining. Private employers, *Abood* noted, often established such employment conditions, to ensure adequate funding of an exclusive bargaining agent, and thus to promote labor stability. *Abood* acknowledged (contrary to the majority's statement, see *ante*, at 636) certain "differences in the nature of collective bargaining in the public and private sectors." 431 U. S., at 227; see *id.*, at 227–229. But the Court concluded that the government, acting as employer, should have the same prerogative as a private business in deciding how best to negotiate with its employees over such matters as wages and benefits. See *id.*, at 229

("[T]here can be no principled basis for" distinguishing between a public and private employer's view that a fair-share clause will promote "labor stability"). At the same time, the Court recognized the need for some mechanism to ensure that the government could not leverage its power as employer to impinge on speech its employees undertook as citizens on matters of public import. See *id.*, at 234–236.

The Court struck the appropriate balance by drawing a line, corresponding to *Pickering*'s, between fees for collective bargaining and those for political activities. On the one side, *Abood* decided, speech within the employment relationship about pay and working conditions pertains mostly to private concerns and implicates the government's interests as employer; thus, the government could compel fair-share fees for collective bargaining. On the other side, speech in political campaigns relates to matters of public concern and has no bearing on the government's interest in structuring its workforce; thus, compelled fees for those activities are forbidden. In that way, the law surrounding fair-share provisions coheres with the law relating to public employees' speech generally. Or, said otherwise, an anomaly in the government's regulation of its workforce would arise in *Abood*'s absence: Public employers could then pursue all policies, except this single one, reasonably designed to manage personnel and enhance the effectiveness of their programs.

The majority's critique of *Abood* principally goes astray by deeming all this irrelevant. This Court, the majority insists, has never "seen *Abood* as based on *Pickering* balancing." *Ante*, at 652. But to rely on *Abood*'s failure to cite *Pickering* more often, as the majority does, see *ante*, at 652, n. 26, is to miss the essential point. Although stemming from different historic antecedents, the two decisions addressed variants of the same issue: the extent of the government's power to adopt employment conditions affecting expression. And as just discussed, the two gave strikingly

parallel answers, providing a coherent framework to adjudicate the constitutionality of those regulations.

To the extent the majority engages with that framework, its analysis founders at the first step, in assessing the First Amendment value of the speech at issue here. A running motif of the majority opinion is that collective bargaining in the public sector raises significant questions about the level of government spending. *Ante*, at 636 and n. 7, 653–654 and nn. 28–29. By financing the SEIU's collective bargaining over wages and benefits, the majority suggests, in-home caregivers—whether they wish to or not—take one side in a debate about those issues.

But that view of the First Amendment interests at stake blinks decades' worth of this Court's precedent. Our decisions (tracing from *Pickering* as well as *Abood*) teach that internal workplace speech about public employees' wages, benefits, and such—that is, the prosaic stuff of collective bargaining—does not become speech of "public concern" just because those employment terms may have broader consequence. To the contrary, we have made clear that except in narrow circumstances we will not allow an employee to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Borough of Duryea* v. *Guarnieri*, 564 U. S. 379, 391 (2011); see *Umbehr*, 518 U. S., at 675 (public employees' "speech on merely private employment matters is unprotected"). Indeed, even *Abood*'s original detractors conceded that an employee's interest in expressing views, within the workplace context, about "narrowly defined economic issues [like] salaries and pension benefits" is "relatively insignificant" and "weak." 431 U. S., at 263, n. 16 (Powell, J., concurring in judgment). (Those Justices saved their fire for teachers' speech relating to education policy. See *ibid.*) And nowhere has the Court ever suggested, as the majority does today, see *ante*, at 653–654 and n. 28, that if a certain dollar amount is at stake (but how

much, exactly?), the constitutional treatment of an employee's expression becomes any different.

Consider an analogy, not involving union fees: Suppose an employee violates a government employer's work rules by demanding, at various inopportune times and places, higher wages for both himself and his co-workers (which, of course, will drive up public spending). The government employer disciplines the employee, and he brings a First Amendment claim. Would the Court consider his speech a matter of public concern under *Pickering*? I cannot believe it would, and indeed the petitioners' own counsel joins me in that view. He maintained at oral argument that such speech would concern merely an "internal proprietary matter," thus allowing the employer to take disciplinary action. Tr. of Oral Arg. 6, 10. If the majority thinks otherwise, government entities across the country should prepare themselves for unprecedented limitations on their ability to regulate their workforces. But again, I doubt they need to worry, because this Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern. (And on the off-chance that both the petitioners and I are wrong on that score, I am doubly confident that the government would prevail under *Pickering*'s balancing test.)

I can see no reason to treat the expressive interests of workers objecting to payment of union fees, like the petitioners here, as worthy of greater consideration. The subject matter of the speech is the same: wages and benefits for public employees. Or to put the point more fully: In both cases (mine and the real one), the employer is sanctioning employees for choosing either to say or not to say something respecting their terms and conditions of employment. Of course, in my hypothetical, the employer is stopping the employee from speaking, whereas in this or any other case involving union fees, the employer is forcing the employee to

support such expression. But I am sure the majority would agree that that difference does not make a difference—in other words, that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988). Hence, in analyzing the kind of expression involved in this case, *Abood* corresponds to *Pickering* (and vice versa)—with each permitting a government to regulate such activity in aid of managing its workforce to provide public services.

Perhaps, though, the majority's skepticism about *Abood* comes from a different source: its failure to fully grasp the government's interest in bargaining with an adequately funded exclusive bargaining representative. One of the majority's criticisms of *Abood*, stated still more prominently in *Knox*, 567 U. S., at 311, goes something as follows. *Abood* (so the majority says) wrongly saw a government's interest in bargaining with an exclusive representative as "inextricably linked" with a fair-share agreement. *Ante*, at 649; see *ante*, at 638. A State, the majority (a bit grudgingly) acknowledges, may well have reasons to bargain with a single agent for all employees; and without a fair-share agreement, that union's activities will benefit employees who do not pay dues. Yet "[s]uch free-rider arguments," the majority avers, "are generally insufficient to overcome First Amendment objections." *Ante*, at 627 (quoting *Knox*, 567 U. S., at 311). In the majority's words: "A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions." *Ante*, at 651.

But *Abood* and a host of our other opinions have explained and relied on an essential distinction between unions and special-interest organizations generally. See, *e. g.*, *Abood*, 431 U. S., at 221–222 and n. 15; *Communications Workers* v. *Beck*, 487 U. S. 735, 750 (1988); *Machinists* v. *Street*, 367 U. S.

740, 762 (1961). The law compels unions to represent—and represent fairly—every worker in a bargaining unit, regardless whether they join or contribute to the union. That creates a collective action problem of far greater magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers. In such a circumstance, not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain their support. Hence arises the legal rule countenancing fair-share agreements: It ensures that a union will receive adequate funding, notwithstanding its legally imposed disability—and so that a government wishing to bargain with an exclusive representative will have a viable counterpart.

As is often the case, JUSTICE SCALIA put the point best:

> "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The 'compelling state interest' that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of 'free-riding' nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the 'free riders' [in unions] . . . is that . . . the law *requires* the union to carry [them]—indeed, requires the union to go *out of its way* to benefit [them], even at the expense of its other interests. . . . [T]he free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree." *Lehnert*, 500 U. S., at 556 (opinion concurring in judgment in part and dissenting in part).

And in other parts of its opinion, the majority itself mimics the point, thus recognizing the core rationale of *Abood*: What justifies the agency fee, the majority notes, is "the fact that the State compels the union to promote and protect the interests of nonmembers." *Ante*, at 643; see *ante*, at 645, n. 18. Exactly right; indeed, that is as clear a one-sentence account of *Abood*'s free-rider rationale as appears in this Court's decisions.

Still, the majority too quickly says, it has no worries in this case: Given that Illinois's caregivers voted to unionize, "it may be presumed that a high percentage of [them] became union members and are willingly paying union dues." *Ante*, at 651. But in fact nothing of the sort may be so presumed, given that union supporters (no less than union detractors) have an economic incentive to free ride. See *supra*, at 678 and this page. The federal workforce, on which the majority relies, see *ante*, at 649, provides a case in point. There many fewer employees pay dues than have voted for a union to represent them.[7] And why, after all, should that endemic free riding be surprising? Does the majority think that public employees are immune from basic principles of economics? If not, the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions.

This case in fact offers a prime illustration of how a fair-share agreement may serve important government interests. Recall that Illinois decided that collective bargaining with an exclusive representative of in-home caregivers would en-

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[7] See, *e. g.*, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014) ("[T]he largest federal union, the American Federation of Government Employees (AFGE), represented approximately 650,000 bargaining unit members in 2012, but less than half of them were dues-paying members. All told, out of the approximately 1.9 million full-time federal wage system (blue-collar) and General Schedule (white-collar) employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues").

able it to provide improved services through its Rehabilitation Program. See *supra*, at 663–664. The State thought such bargaining would enable it to attract a better and more stable workforce to serve disabled patients, preventing their institutionalization and thereby decreasing total state expenditures. The majority does not deny the State's legitimate interest in choosing to negotiate with an exclusive bargaining agent, in service of administering an effective program. See *ante*, at 650–651. But the majority does deny Illinois the means it reasonably deemed appropriate to effectuate that policy—a fair-share provision ensuring that the union has the funds necessary to carry out its responsibilities on behalf of in-home caregivers. The majority does so against the weight of all precedent, and based on "empirical assumption[s]," *ante*, at 638, lacking any foundation. *Abood* got this matter right; the majority gets it wrong: Illinois has a more than sufficient interest, in managing its workforce and administering the Rehabilitation Program, to require employees to pay a fair share of a union's costs of collective bargaining.

III

For many decades, Americans have debated the pros and cons of right-to-work laws and fair-share requirements. All across the country and continuing to the present day, citizens have engaged in passionate argument about the issue and have made disparate policy choices. The petitioners in this case asked this Court to end that discussion for the entire public sector, by overruling *Abood* and thus imposing a right-to-work regime for all government employees. The good news out of this case is clear: The majority declined that radical request. The Court did not, as the petitioners wanted, deprive every state and local government, in the management of their employees and programs, of the tool that many have thought necessary and appropriate to make collective bargaining work.

The bad news is just as simple: The majority robbed Illinois of that choice in administering its in-home care program. For some 40 years, *Abood* has struck a stable balance—consistent with this Court's general framework for assessing public employees' First Amendment claims—between those employees' rights and government entities' interests in man aging their workforces. The majority today misapplies *Abood*, which properly should control this case. Nothing separates, for purposes of that decision, Illinois's personal assistants from any other public employees. The balance *Abood* struck thus should have defeated the petitioners' demand to invalidate Illinois's fair-share agreement. I respectfully dissent.

Syllabus

BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* HOBBY LOBBY STORES, INC., ET AL.

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

No. 13–354. Argued March 25, 2014—Decided June 30, 2014*

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. §§ 2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A).

At issue here are regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act (ACA), which, as relevant here, requires specified employers' group health plans to furnish "preventive care and screenings" for women without "any cost sharing requirements," 42 U. S. C. § 300gg–13(a)(4). Congress did not specify what types of preventive care must be covered; it authorized the Health Resources and Services Administration, a component of HHS, to decide. *Ibid.* Nonexempt employers are generally required to provide coverage for the 20 contraceptive methods approved by the Food and Drug Administration, including the 4 that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate. HHS has also effectively exempted religious nonprofit organizations with religious objections to providing coverage for contraceptive services. Under this accommodation, the insurance issuer must exclude contraceptive coverage from the employer's plan and provide plan participants with separate payments for contraceptive

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*Together with No. 13–356, *Conestoga Wood Specialties Corp. et al.* v. *Burwell, Secretary of Health and Human Services, et al.*, on certiorari to the United States Court of Appeals for the Third Circuit.

services without imposing any cost-sharing requirements on the employer, its insurance plan, or its employee beneficiaries.

In these cases, the owners of three closely held for-profit corporations have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. In separate actions, they sued HHS and other federal officials and agencies (collectively HHS) under RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for the four objectionable contraceptives. In No. 13–356, the District Court denied the Hahns and their company—Conestoga Wood Specialties—a preliminary injunction. Affirming, the Third Circuit held that a for-profit corporation could not "engage in religious exercise" under RFRA or the First Amendment, and that the mandate imposed no requirements on the Hahns in their personal capacity. In No. 13–354, the Greens, their children, and their companies—Hobby Lobby Stores and Mardel—were also denied a preliminary injunction, but the Tenth Circuit reversed. It held that the Greens' businesses are "persons" under RFRA, and that the corporations had established a likelihood of success on their RFRA claim because the contraceptive mandate substantially burdened their exercise of religion and HHS had not demonstrated a compelling interest in enforcing the mandate against them; in the alternative, the court held that HHS had not proved that the mandate was the "least restrictive means" of furthering a compelling governmental interest.

Held: As applied to closely held corporations, the HHS regulations imposing the contraceptive mandate violate RFRA. Pp. 705–736.

(a) RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby Lobby, and Mardel. Pp. 705–719.

(1) HHS argues that the companies cannot sue because they are for-profit corporations, and that the owners cannot sue because the regulations apply only to the companies, but that would leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations. RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice. It employed the familiar legal fiction of including corporations within RFRA's definition of "persons," but the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting the free-exercise rights of closely held corpora-

tions thus protects the religious liberty of the humans who own and control them. Pp. 705–707.

(2) HHS and the dissent make several unpersuasive arguments. Pp. 707–717.

(i) Nothing in RFRA suggests a congressional intent to depart from the Dictionary Act definition of "person," which "include[s] corporations, . . . as well as individuals." 1 U. S. C. § 1. The Court has entertained RFRA and free-exercise claims brought by nonprofit corporations. See, *e. g.*, *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418. And HHS's concession that a nonprofit corporation can be a "person" under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of "person" includes natural persons and nonprofit corporations, but not for-profit corporations. Pp. 707–709.

(ii) HHS and the dissent nonetheless argue that RFRA does not cover Conestoga, Hobby Lobby, and Mardel because they cannot "exercise . . . religion." They offer no persuasive explanation for this conclusion. The corporate form alone cannot explain it because RFRA indisputably protects nonprofit corporations. And the profit-making objective of the corporations cannot explain it because the Court has entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants. *Braunfeld* v. *Brown*, 366 U. S. 599. Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the "exercise of religion" that this Court set out in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877. Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law. States, including those in which the plaintiff corporations were incorporated, authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners' religious principles. Pp. 709–713.

(iii) Also flawed is the claim that RFRA offers no protection because it only codified pre-*Smith* Free Exercise Clause precedents, none of which squarely recognized free-exercise rights for for-profit corporations. First, nothing in RFRA as originally enacted suggested that its definition of "exercise of religion" was meant to be tied to pre-*Smith* interpretations of the First Amendment. Second, if RFRA's original text were not clear enough, the RLUIPA amendment surely dispels any doubt that Congress intended to separate the definition of the phrase from that in First Amendment case law. Third, the pre-*Smith* case of *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617, suggests, if anything, that for-profit corporations can exercise religion.

Finally, the results would be absurd if RFRA, a law enacted to provide very broad protection for religious liberty, merely restored this Court's pre-*Smith* decisions in ossified form and restricted RFRA claims to plaintiffs who fell within a category of plaintiffs whose claims the Court had recognized before *Smith*. Pp. 713–717.

(3) Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because of the difficulty of ascertaining the "beliefs" of large, publicly traded corporations, but HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. That disputes among the owners of corporations might arise is not a problem unique to this context. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes. Pp. 717–719.

(b) HHS's contraceptive mandate substantially burdens the exercise of religion. Pp. 719–726.

(1) It requires the Hahns and Greens to engage in conduct that seriously violates their sincere religious belief that life begins at conception. If they and their companies refuse to provide contraceptive coverage, they face severe economic consequences: about $475 million per year for Hobby Lobby, $33 million per year for Conestoga, and $15 million per year for Mardel. And if they drop coverage altogether, they could face penalties of roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel. P. 720.

(2) *Amici* supporting HHS argue that the $2,000 per-employee penalty is less than the average cost of providing insurance, and therefore that dropping insurance coverage eliminates any substantial burden imposed by the mandate. HHS has never argued this, and the Court does not know its position with respect to the argument. But even if the Court reached the argument, it would find it unpersuasive: It ignores the fact that the plaintiffs have religious reasons for providing health-insurance coverage for their employees, and it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Pp. 720–723.

(3) HHS argues that the connection between what the objecting parties must do and the end that they find to be morally wrong is too attenuated because it is the employee who will choose the coverage and

contraceptive method she uses. But RFRA's question is whether the mandate imposes a substantial burden on the objecting parties' ability to conduct business in accordance with *their religious beliefs*. The belief of the Hahns and Greens implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable. In fact, this Court considered and rejected a nearly identical argument in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707. The Court's "narrow function . . . is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction," *id.*, at 716, and there is no dispute here that it does. *Tilton* v. *Richardson*, 403 U. S. 672, 689; and *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 248–249, distinguished. Pp. 723–726.

(c) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is a compelling governmental interest, but the Government has failed to show that the contraceptive mandate is the least restrictive means of furthering that interest. Pp. 726–736.

(1) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA. Pp. 726–728.

(2) The Government has failed to satisfy RFRA's least-restrictive-means standard. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion. The Government could, *e. g.*, assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers' religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to for-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs' religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion, and it still serves HHS's stated interests. Pp. 728–732.

(3) This decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, *e. g.*, for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice. *United States* v. *Lee*, 455 U. S. 252, which upheld the payment of Social Security taxes despite an employer's religious objection, is not

analogous. It turned primarily on the special problems associated with a national system of taxation; and if *Lee* were a RFRA case, the fundamental point would still be that there is no less restrictive alternative to the categorical requirement to pay taxes. Here, there is an alternative to the contraceptive mandate. Pp. 732–736.

No. 13–354, 723 F. 3d 1114, affirmed; No. 13–356, 724 F. 3d 377, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 736. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to all but Part III–C–1, *post*, p. 739. BREYER and KAGAN, JJ., filed a dissenting opinion, *post*, p. 772.

Paul D. Clement argued the cause for petitioners in No. 13–356 and for respondents in No. 13–354. With him on the brief in No. 13–354 were *S. Kyle Duncan*, *Eric C. Rassbach*, *Luke W. Goodrich*, *Hannah C. Smith*, *Mark L. Rienzi*, *Lori H. Windham*, and *Adèle Auxier Keim.* On the brief in No. 13–356 were *David A. Cortman*, *Kevin H. Theriot*, *Rory T. Gray*, *Jordan W. Lorence*, *Steven H. Aden*, *Gregory S. Baylor*, *Matthew S. Bowman*, *Charles W. Proctor III*, and *Randall L. Wenger.*

Solicitor General Verrilli argued the cause for the federal parties in both cases. With him on the briefs were *Assistant Attorney General Delery*, *Deputy Solicitor General Gershengorn*, *Deputy Solicitor General Kneedler*, *Joseph R. Palmore*, *Mark B. Stern*, and *Alisa B. Klein.*†

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†Briefs of *amici curiae* urging reversal in No. 13–354 and affirmance in No. 13–356 were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Kathleen A. Kenealy*, Chief Assistant Attorney General, *Julie Weng-Gutierrez*, Senior Assistant Attorney General, *Joshua N. Sondheimer*, Deputy Attorney General, and *Craig J. Konnoth*, Deputy Solicitor General, by *Martha Coakley*, Attorney General of Massachusetts, and *Jonathan B. Miller*, *Joshua D. Jacobson*, and *Michelle L. Leung*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *George Jepsen* of Connecticut, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *David M. Louie*

JUSTICE ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA or Act), 107 Stat. 1488,

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of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *Peter F. Kilmartin* of Rhode Island, *Ellen F. Rosenblum* of Oregon, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for the American College of Obstetricians and Gynecologists et al. by *Bruce H. Schneider* and *Jennifer Blasdell*; for the American Jewish Committee et al. by *Marc D. Stern*; for the Brennan Center for Justice at N. Y. U. School of Law by *Wendy R. Weiser*, *Burt Neuborne*, *Norman Dorsen*, and *Helen Hershkoff*; for the Center for Inquiry et al. by *Edward Tabash* and *Ronald A. Lindsay*; for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, *David H. Gans*, and *Brianne J. Gorod*; for Corporate and Criminal Law Professors by *Ryan M. Malone*; for the Guttmacher Institute et al. by *Walter Dellinger*, *Anton Metlitsky*, *Anna-Rose Mathieson*, and *Dawn Johnsen*; for the Jewish Social Policy Action Network by *Hope S. Freiwald*, *Seth Kreimer*, *Judah Labovitz*, and *Jeffrey Ivan Pasek*; for Lambda Legal Defense and Education Fund, Inc., et al. by *Thomas W. Ude, Jr.*, *Camilla B. Taylor*, and *Jennifer C. Pizer*; for the National Health Law Program et al. by *Martha Jane Perkins*; for the National League of Cities et al. by *Dennis J. Herrera*, *Therese M. Stewart*, *Christine Van Aken*, *Mollie M. Lee*, and *Lisa Soronen*; for the National Women's Law Center et al. by *Charles E. Davidow*, *Marcia D. Greenberger*, *Judith G. Waxman*, *Emily J. Martin*, and *Gretchen Borchelt*; for the Ovarian Cancer National Alliance et al. by *Jessica L. Ellsworth*; for Religious Organizations by *Ayesha N. Khan* and *Gregory M. Lipper*; for the U. S. Women's Chamber of Commerce et al. by *Michael J. Gottlieb*; for Julian Bond et al. by *Brigitte Amiri*, *Louise Melling*, *Steven R. Shapiro*, *Daniel Mach*, *Heather L. Weaver*, and *Witold J. Walczak*; for Frederick Mark Gedicks et al. by *Mr. Gedicks*, *pro se*, *Catherine Weiss*, and *Natalie J. Kraner*; for Lawrence O. Gostin et al. by *Ruth N. Borenstein*, *Marc A. Hearron*, *Julie Rikelman*, *Julianna S. Gonen*, and *Aram Schvey*; for Sen. Patty Murray et al. by *Catherine E. Stetson*; and for 91 Members of the United States House of Representatives by *Carl Micarelli*.

Briefs of *amici curiae* urging affirmance in No. 13–354 and reversal in No. 13–356 were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, by *Michael DeWine*, Attorney General of Ohio, and *Eric E. Murphy*, State Solicitor, and by the Attor-

42 U. S. C. § 2000bb *et seq.*, permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sin-

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neys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Greg Abbott* of Texas, *Sean D. Reyes* of Utah, *Patrick Morrisey* of West Virginia, and *J. B. Van Hollen* of Wisconsin; for the American Freedom Law Center by *Robert Joseph Muise* and *David Eliezer Yerushalmi*; for the Association of American Physicians and Surgeons, Inc., et al. by *David P. Felsher* and *Andrew L. Schlafly*; for the Beverly Lahaye Institute et al. by *Catherine W. Short*; for the Breast Cancer Prevention Institute et al. by *Nikolas T. Nikas*, *Dorinda C. Bordlee*, and *Patrick T. Gillen*; for the Center for Constitutional Jurisprudence et al. by *John Eastman*, *Anthony T. Caso*, and *Edwin Meese III*; for the Christian Booksellers Association et al. by *Michael W. McConnell*; for the Christian Legal Society et al. by *Douglas Laycock* and *Kimberlee Wood Colby*; for the Church of the Lukumi Babalu Aye, Inc., et al. by *Alexander Dushku*; for the Council for Christian Colleges & Universities et al. by *Matthew T. Nelson* and *John J. Bursch*; for the C12 Group, LLC, by *Mark D. Davis*; for Democrats for Life of America et al. by *Thomas C. Berg* and *Sandra P. Hagood*; for Drury Development Corp. et al. by *Denise M. Burke* and *Mailee R. Smith*; for Electric Mirror, LLC, et al. by *Scott J. Ward*, *Greorge R. Grange II*, *Timothy R. Obitts*, and *Patrick D. Purtill*; for the Ethics and Public Policy Center by *Daniel P. Collins* and *Enrique Schaerer*; for the Family Research Council by *Erik S. Jaffee*; for the Judicial Education Project by *Carrie Severino* and *Jonathan Keim*; for the Knights of Columbus by *Kevin P. Martin*, *William M. Jay*, and *John A. Marrella*; for the Liberty Institute by *Kelly J. Shackelford*, *Jeffrey C. Mateer*, and *Hiram S. Sasser III*; for Liberty, Life, and Law Foundation et al. by *Deborah J. Dewart* and *Thomas Brejcha*; for the National Association of Evangelicals by *Timothy Belz* and *Carl H. Esbeck*; for the National Jewish Commission on Law and Public Affairs et al. by *Nathan Lewin*, *Alyza D. Lewin*, and *Dennis Rapps*; for Pacific Legal Foundation et al. by *Timothy Sandefur* and *Manuel S. Klausner*; for The Rutherford Institute by *D. Alicia Hickok* and *John W. Whitehead*; for Texas Black Americans for Life et al. by *Lawrence J. Joyce*; for the

cerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion

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Thomas More Law Center by *Richard Thompson* and *Erin Elizabeth Mersino*; for Women's Public Policy Groups et al. by *David R. Langdon* and *Rita M. Dunaway*; for Women Speak for Themselves by *Helen M. Alvaré*; for David Boyle by *Mr. Boyle*, *pro se*; for Daniel H. Branch by *Mr. Branch*, *pro se*; for Sen. Ted Cruz et al. by *Sen. Cruz*, *pro se*; for Joseph B. Scarnati III et al. by *Jason P. Gosselin*; and for 9 Academic Institutions et al. by *W. Cole Durham, Jr.*

Briefs of *amici curiae* were filed in both cases for the American Center for Law & Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Jordan A. Sekulow*, *Colby M. May*, *Walter M. Weber*, *Francis J. Manion*, *Geoffrey R. Surtees*, *Edward L. White III*, and *Erik M. Zimmerman*; for Azusa Pacific University et al. by *Stuart J. Lark*; for the Cato Institute by *Kevin T. Baine*, *Emmet T. Flood*, *C. J. Mahoney*, and *Ilya Shapiro*; for Constitutional Law Scholars by *Nathan S. Chapman*; for the Eagle Forum Education & Legal Defense Fund, Inc., by *Lawrence J. Joseph*; for the Foundation for Moral Law by *John Eidsmoe*; for Freedom X et al. by *William J. Becker, Jr.*; for Historians et al. by *Jonathan Massey*; for the Independent Women's Forum by *Erin Morrow Hawley*; for the International Conference of Evangelical Chaplain Endorsers by *Arthur A. Schulcz, Sr.*; for J. E. Dunn Construction Group, Inc., et al. by *Scott W. Gaylord*; for John A. Ryan Institute for Catholic Social Thought by *Teresa Stanton Collett*; for Liberty University et al. by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister*; for Massachusetts Citizens for Life, Inc., et al. by *Dwight G. Duncan*; for Reproductive Research Audit by *Edward H. Trent*; for the United States Conference of Catholic Bishops et al. by *Noel J. Francisco*, *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, and *Michael F. Moses*; for Westminster Theological Seminary by *Kenneth R. Wynne* and *David E. Wynne*; for Sen. Orrin G. Hatch et al. by *Brendan M. Walsh*, *John D. Adams*, and *Matthew A. Fitzgerald*; for 38 Protestant Theologians et al. by *Jay T. Thompson* and *Miles Coleman*; and for 67 Catholic Theologians et al. by *D. John Sauer*.

Marci A. Hamilton filed a brief for the Freedom from Religion Foundation et al. as *amici curiae* urging reversal in No. 13–354.

Briefs of *amici curiae* urging affirmance in No. 13–354 were filed for the State of Oklahoma by *E. Scott Pruitt*, Attorney General, and *Patrick R. Wyrick*, Solicitor General; for the American Civil Rights Union by *Peter J. Ferrara*; for the Catholic Medical Association by *James E. Zucker*

unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regula-

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and *April L. Farris*; for Judicial Watch, Inc., by *Paul J. Orfanedes* and *Meredith L. Di Liberto*; for National Religious Broadcasters by *Craig L. Parshall*; and for 88 Members of Congress by *Robert K. Kelner.*

Herbert W. Titus, William J. Olson, John S. Miles, Jeremiah L. Morgan, and *Michael Connelly* filed a brief for Eberle Communications Group, Inc., et al. as *amici curiae* urging reversal in No. 13–356.

Ronald A. Fein, John C. Bonifaz, Ben T. Clements, and *Jeffrey D. Clements* filed a brief for Free Speech for People et al. as *amici curiae* urging affirmance in No. 13–356.

Marc A. Greendorfer filed a brief for Tri Valley Law, PC, as *amicus curiae* in No. 13–356.

tions satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all Food and Drug Administration (FDA)-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious be-

liefs." *Post*, at 739–740 (opinion of GINSBURG, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose "disadvantages . . . on others" or that require "the general public [to] pick up the tab." *Post*, at 740. And we certainly do not hold or suggest that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby." *Ibid.*[1] The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

A

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U. S.,

[1] See also *post*, at 745–746 ("The exemption sought by Hobby Lobby and Conestoga . . . would deny [their employees] access to contraceptive coverage that the ACA would otherwise secure").

at 408–409. And in *Yoder*, the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years. 406 U. S., at 210–211, 234–236.

In *Smith*, however, the Court rejected "the balancing test set forth in *Sherbert*." 494 U. S., at 883. *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause. 494 U. S., at 875.

This Court then reversed, observing that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U. S., at 888. The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne* v. *Flores*, 521 U. S. 507, 514 (1997).

Congress responded to *Smith* by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U. S. C. § 2000bb(a)(2); see also § 2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." § 2000bb–1(a).[2] If the Government substantially burdens a

[2] The Act defines "government" to include any "department" or "agency" of the United States. § 2000bb–2(1).

person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b).[3]

As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work,[4] but in attempting to regulate the States and their subdivisions, Congress relied on its power under § 5 of the Fourteenth Amendment to enforce the First Amendment. 521 U. S., at 516–517. In *City of Boerne*, however, we held that Congress had overstepped its § 5 authority because "[t]he stringent test RFRA demands" "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.*, at 533–534. See also *id.*, at 532.

Following our decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq.* That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 715–716 (2005). And, what is most relevant for present purposes,

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[3] In *City of Boerne* v. *Flores*, 521 U. S. 507 (1997), we wrote that RFRA's "least restrictive means requirement" "was not used in the pre-*Smith* jurisprudence RFRA purported to codify." *Id.*, at 535. On this understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.

[4] See, *e. g.*, *Hankins* v. *Lyght*, 441 F. 3d 96, 108 (CA2 2006); *Guam* v. *Guerrero*, 290 F. 3d 1210, 1220 (CA9 2002).

RLUIPA amended RFRA's definition of the "exercise of religion." See § 2000bb–2(4) (importing RLUIPA definition). Before RLUIPA, RFRA's definition made reference to the First Amendment. See § 2000bb–2(4) (1994 ed.) (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g).[5]

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act (ACA), 124 Stat. 119. ACA generally requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." 26 U. S. C. § 5000A(f)(2); §§ 4980H(a), (c)(2). Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA's

[5] The principal dissent appears to contend that this rule of construction should apply only when defining the "exercise of religion" in an RLUIPA case, but not in a RFRA case. See *post*, at 748–749, n. 10. That argument is plainly wrong. Under this rule of construction, the phrase "exercise of religion," as it appears in RLUIPA, must be interpreted broadly, and RFRA states that the same phrase, as used in RFRA, means "religious exercis[e] as defined in [RLUIPA]." 42 U. S. C. § 2000bb–2(4). It necessarily follows that the "exercise of religion" under RFRA must be given the same broad meaning that applies under RLUIPA.

group-health-plan requirements, the employer may be required to pay $100 per day for each affected "individual." §§ 4980D(a)–(b). And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees. §§ 4980H(a), (c)(1).

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." 42 U. S. C. § 300gg–13(a)(4). Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. *Ibid.* The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require. See 77 Fed. Reg. 8725–8726 (2012).

In August 2011, based on the institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines. See *id.*, at 8725–8726, and n. 1; online at http://hrsa.gov/womensguidelines (all Internet materials as visited June 26, 2014, and available in Clerk of Court's case file). The guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing," for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling." 77 Fed. Reg. 8725 (internal quotation marks omitted). Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhib-

iting its attachment to the uterus. See Brief for HHS in No. 13–354, pp. 9–10, n. 4;[6] FDA, Birth Control: Medicines to Help You.[7]

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." 45 CFR § 147.131(a) (2013). That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." Treas. Reg. § 1.6043–3, 26 CFR § 1.6043–3 (2013). See 45 CFR § 147.131(a) (citing 26 U. S. C. §§ 6033(a)(3)(A)(i), (iii)). In its guidelines, the HRSA exempted these organizations from the requirement to cover contraceptive services. See http://hrsa.gov/womensguidelines.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. See 45 CFR § 147.131(b); 78 Fed. Reg. 39874 (2013). An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections." 45 CFR § 147.131(b). To qualify for this accommodation, an employer must certify that it is such an organization. § 147.131(b)(4). When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contra-

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[6] We will use "Brief for HHS" to refer to the Brief for Petitioners in No. 13–354 and the Brief for Respondents in No. 13–356. The federal parties are the Departments of HHS, Treasury, and Labor, and the Secretaries of those Departments.

[7] Online at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm. The owners of the companies involved in these cases and others who believe that life begins at conception regard these four methods as causing abortions, but federal regulations, which define pregnancy as beginning at implantation, see, *e. g.*, 62 Fed. Reg. 8611 (1997); 45 CFR § 46.202(f) (2013), do not so classify them.

ceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. § 147.131(c).[8] Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed. Reg. 39877.[9]

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of ACA's requirements, including the contraceptive mandate. 42 U. S. C. §§ 18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all. 26 U. S. C. § 4980H(c)(2).

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[8] In the case of self-insured religious organizations entitled to the accommodation, the third-party administrator of the organization must "provide or arrange payments for contraceptive services" for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. 78 Fed. Reg. 39893 (to be codified in 26 CFR § 54.9815–2713A(b)(2)). The regulations establish a mechanism for these third-party administrators to be compensated for their expenses by obtaining a reduction in the fee paid by insurers to participate in the federally facilitated exchanges. See 78 Fed. Reg. 39893 (to be codified in 26 CFR § 54.9815–2713A(b)(3)). HHS believes that these fee reductions will not materially affect funding of the exchanges because "payments for contraceptive services will represent only a small portion of total [exchange] user fees." 78 Fed. Reg. 39882.

[9] In a separate challenge to this framework for religious nonprofit organizations, the Court recently ordered that, pending appeal, the eligible organizations be permitted to opt out of the contraceptive mandate by providing written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators. See *Little Sisters of the Poor* v. *Sebelius*, 571 U. S. 1171 (2014).

All told, the contraceptive mandate "presently does not apply to tens of millions of people." *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F. 3d 1114, 1143 (CA10 2013). This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. Brief for HHS in No. 13–354, at 53; Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits, 2013 Annual Survey 43, 221.[10] The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers. See The White House, Health Reform for Small Businesses: The Affordable Care Act Increases Choice and Saving Money for Small Businesses 1.[11]

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it."[12]

Fifty years ago, Norman Hahn started a woodworking business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania law as a for-profit corporation. The Hahns exercise sole ownership

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[10] While the Government predicts that this number will decline over time, the total number of Americans working for employers to whom the contraceptive mandate does not apply is still substantial, and there is no legal requirement that grandfathered plans ever be phased out.

[11] Online at http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

[12] Mennonite Church USA, Statement on Abortion, online at http://www.mennoniteusa.org/resource-center/resources/statements-and-resolutions/statement-on-abortion/.

of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and chief executive officer (CEO).

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." *Conestoga Wood Specialties Corp.* v. *Sebelius*, 917 F. Supp. 2d 394, 402 (ED Pa. 2013). To that end, the company's mission, as they see it, is to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles." *Ibid.* (internal quotation marks omitted). The company's "Vision and Values Statements" affirms that Conestoga endeavors to "[e]nsur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage." App. in No. 13–356, p. 94.

As explained in Conestoga's board-adopted "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." *Conestoga Wood Specialties Corp.* v. *Secretary of HHS*, 724 F. 3d 377, 382, and n. 5 (CA3 2013) (internal quotation marks omitted). It is therefore "against [their] moral conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God to which they are held accountable." *Ibid.* (internal quotation marks omitted). The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients. *Id.*, at 382.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg.[13] These include two forms of emergency con-

[13] The Hahns and Conestoga also claimed that the contraceptive mandate violates the Fifth Amendment and the Administrative Procedure Act, 5 U. S. C. § 553, but those claims are not before us.

traception commonly called "morning after" pills and two types of intrauterine devices.[14]

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs." *Ibid.* The District Court denied a preliminary injunction, see 917 F. Supp. 2d, at 419, and the Third Circuit affirmed in a divided opinion, holding that "for-profit, secular corporations cannot engage in religious exercise" within the meaning of RFRA or the First Amendment. 724 F. 3d, at 381. The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS "[m]andate does not impose any requirements on the Hahns" in their personal capacity. *Id.*, at 389.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. 723 F. 3d, at 1122. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David's sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. *Ibid.* Mardel is also organized as a for-profit corporation under Oklahoma law.

Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. *Ibid.* David serves as the CEO of Hobby Lobby, and his

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[14] See, *e. g.*, WebMD Health News, New Morning-After Pill Ella Wins FDA Approval, online at http://www.webmd.com/sex/birth-control/news/20100813/new-morning-after-pill-ella-wins-fda-approval.

three children serve as the president, vice president, and vice CEO. See Brief for Respondents in No. 13–354, p. 8.[15]

Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." App. in No. 13–354, pp. 134–135 (complaint). Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. 723 F. 3d, at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. *Ibid.*; App. in No. 13–354, at 136–137. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *Ibid.* (internal quotation marks omitted).

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. 723 F. 3d, at 1122. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. *Id.*, at 1125. Although their group-health-insurance plan predates the enactment of ACA, it is not a grandfathered plan because Hobby Lobby elected not to retain grandfathered status before the contraceptive mandate was proposed. *Id.*, at 1124.

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contra-

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[15] The Greens operate Hobby Lobby and Mardel through a management trust, of which each member of the family serves as trustee. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F. 3d 1114, 1122 (CA10 2013). The family provided that the trust would also be governed according to their religious principles. *Ibid.*

ceptive mandate under RFRA and the Free Exercise Clause.[16] The District Court denied a preliminary injunction, see 870 F. Supp. 2d 1278 (WD Okla. 2012), and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens' two for-profit businesses are "persons" within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. 723 F. 3d, at 1140–1147. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between "compromis[ing] their religious beliefs" and paying a heavy fee—either "close to $475 million more in taxes every year" if they simply refused to provide coverage for the contraceptives at issue, or "roughly $26 million" annually if they "drop[ped] health-insurance benefits for all employees." *Id.*, at 1141.

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens' businesses and, in the alternative, that HHS had failed to prove that enforcement of the mandate was the "least restrictive means" of furthering the Government's asserted interests. *Id.*, at 1143–1144 (emphasis deleted; internal quotation marks omitted). After concluding that the companies had "demonstrated irreparable harm," *id.*, at 1146, the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test, *id.*, at 1147.[17]

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[16] They also raised a claim under the Administrative Procedure Act, 5 U. S. C. § 553.

[17] Given its RFRA ruling, the court declined to address the plaintiffs' free-exercise claim or the question whether the Greens could bring RFRA claims as individual owners of Hobby Lobby and Mardel. Four judges, however, concluded that the Greens could do so, see 723 F. 3d, at 1156

We granted certiorari *sub nom. Sebelius* v. *Hobby Lobby Stores, Inc.*, 571 U. S. 1067 (2013).

III

A

RFRA prohibits the "Government [from] substantially burden[ing] *a person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. §§ 2000bb–1(a), (b) (emphasis added). The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS's argument would have dramatic consequences.

Consider this Court's decision in *Braunfeld* v. *Brown*, 366 U. S. 599 (1961) (plurality opinion). In that case, five Orthodox Jewish merchants who ran small retail businesses in Philadelphia challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. Because of their faith, these merchants closed their shops on Saturday, and they argued that requiring them to remain shut on Sunday threatened them with financial ruin. The Court entertained their claim (although it ruled against them on the merits),

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(Gorsuch, J., concurring); *id.*, at 1184 (Matheson, J., concurring in part and dissenting in part), and three of those judges would have granted plaintiffs a preliminary injunction, see *id.*, at 1156 (Gorsuch, J., concurring).

and if a similar claim were raised today under RFRA against a jurisdiction still subject to the Act (for example, the District of Columbia, see 42 U. S. C. § 2000bb–2(2)), the merchants would be entitled to be heard. According to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.[18] Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of RFRA's text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When

[18] As discussed, n. 3, *supra*, in *City of Boerne* we stated that RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-*Smith* decisions. Although the author of the principal dissent joined the Court's opinion in *City of Boerne*, she now claims that the statement was incorrect. *Post*, at 749–750. For present purposes, it is unnecessary to adjudicate this dispute. Even if RFRA simply restored the *status quo ante*, there is no reason to believe, as HHS and the dissent seem to suggest, that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases. See *infra*, at 714–717.

rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

In holding that Conestoga, as a "for-profit, secular corporation," lacks RFRA protection, the Third Circuit wrote as follows:

> "'General business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees*, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.'" 724 F. 3d, at 385 (emphasis added).

All of this is true—but quite beside the point. Corporations, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all.

B

1

As we noted above, RFRA applies to "a person's" exercise of religion, 42 U. S. C. §§ 2000bb–1(a), (b), and RFRA itself does not define the term "person." We therefore look to the Dictionary Act, which we must consult "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U. S. C. § 1.

Under the Dictionary Act, "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as

individuals." *Ibid.*; see *FCC* v. *AT&T Inc.*, 562 U. S. 397, 404–405 (2011) ("We have no doubt that 'person,' in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear"). Thus, unless there is something about the RFRA context that "indicates otherwise," the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. We have entertained RFRA and free-exercise claims brought by nonprofit corporations, see *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418 (2006) (RFRA); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012) (Free Exercise); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993) (Free Exercise), and HHS concedes that a nonprofit corporation can be a "person" within the meaning of RFRA. See Brief for HHS in No. 13–354, at 17; Reply Brief in No. 13–354, pp. 7–8.[19]

This concession effectively dispatches any argument that the term "person" as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term "person" includes *some* but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.[20] Cf.

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[19] Cf. Brief for Federal Petitioners in *O Centro*, O. T. 2004, No. 04–1084, p. II (stating that the organizational respondent was "a New Mexico Corporation"); Brief for Federal Respondent in *Hosanna-Tabor*, O. T. 2011, No. 10–553, p. 3 (stating that the petitioner was an "ecclesiastical corporation").

[20] Not only does the Government concede that the term "persons" in RFRA includes nonprofit corporations, it goes further and appears to concede that the term might also encompass other artificial entities, namely,

Clark v. *Martinez*, 543 U. S. 371, 378 (2005) ("To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one").

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious "autonomy . . . often furthers individual religious freedom as well." *Post*, at 752 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 342 (1987) (Brennan, J., concurring in judgment)). But this principle applies equally to for-profit corporations: Furthering their religious freedom also "furthers individual religious freedom." In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.[21]

If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U. S. 599, we enter-

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general partnerships and unincorporated associations. See Brief for HHS in No. 13–354, at 28, 40.

[21] Although the principal dissent seems to think that Justice Brennan's statement in *Amos* provides a ground for holding that for-profit corporations may not assert free-exercise claims, that was not Justice Brennan's view. See *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617, 642 (1961) (dissenting opinion); *infra*, at 715–717.

tained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. As the Court explained in a later case, the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." *Smith*, 494 U. S., at 877. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that "operates so as to make the practice of . . . religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion. *Braunfeld*, *supra*, at 605; see *United States* v. *Lee*, 455 U. S. 252, 257 (1982) (recognizing that "compulsory participation in the social security system interferes with [Amish employers'] free exercise rights").

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim,[22] why can't Hobby Lobby, Conestoga, and Mardel do the same?

Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money.[23] This argu-

[22] It is revealing that the principal dissent cannot even bring itself to acknowledge that *Braunfeld* was correct in entertaining the merchants' claims. See *post*, at 756 (dismissing the relevance of *Braunfeld* in part because "[t]he free exercise claim asserted there was promptly rejected on the merits").

[23] See, *e. g.*, *Conestoga Wood Specialities Corp.* v. *Secretary, HHS*, 724 F. 3d 377, 385 (CA3 2013) ("We do not see how a for-profit, 'artificial being,' . . . that was created to make money," could exercise religion); *Grote* v. *Sebelius*, 708 F. 3d 850, 857 (CA7 2013) (Rovner, J. dissenting) ("So far as it appears, the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere"); *Autocam Corp.* v. *Sebelius*, 730 F. 3d 618, 626 (CA7 2013) ("Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as 'persons' under RFRA"); see also 723 F. 3d, at 1171–1172 (Briscoe, C. J., concurring in part and dissenting in part) ("[T]he specific purpose for which

ment flies in the face of modern corporate law. "Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business." 1 J. Cox & T. Hazen, Treatise on the Law of Corporations § 4:1, p. 224 (3d ed. 2010) (emphasis added); see 1A W. Fletcher, Cyclopedia of the Law of Corporations § 102 (C. Jones rev. ed. 2010). While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue

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[a corporation] is created matters greatly to how it will be categorized and treated under the law" and "it is undisputed that Hobby Lobby and Mardel are for-profit corporations focused on selling merchandise to consumers").

The principal dissent makes a similar point, stating that "for-profit corporations are different from religious nonprofits in that they use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers." *Post*, at 756 (internal quotation marks and brackets omitted). The first half of this statement is a tautology; for-profit corporations do indeed differ from nonprofits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek "to perpetuate the religious values shared," in these cases, by their owners. Conestoga's Vision and Values Statement declares that the company is dedicated to operating "in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business." App. in No. 13–356, p. 94. Similarly, Hobby Lobby's statement of purpose proclaims that the company "is committed to . . . Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles." App. in No. 13–354, p. 135. The dissent also believes that history is not on our side because even Blackstone recognized the distinction between "'ecclesiastical and lay'" corporations. *Post*, at 756. What Blackstone illustrates, however, is that dating back to 1765, there was no sharp divide among corporations in their capacity to exercise religion; Blackstone recognized that even what he termed "lay" corporations might serve "the promotion of piety." 1 W. Blackstone, Commentaries on the Laws of England 458–459 (1765). And whatever may have been the case at the time of Blackstone, modern corporate law (and the law of the States in which these three companies are incorporated) allows for-profit corporations to "perpetuat[e] religious values."

profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.[24] In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corpora-

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[24] See, *e. g.*, M. Sanders, Joint Ventures Involving Tax-Exempt Organizations 555 (4th ed. 2013) (describing Google.org, which "advance[s] its charitable goals" while operating as a for-profit corporation to be able to "invest in for-profit endeavors, lobby for policies that support its philanthropic goals, and tap Google's innovative technology and workforce" (internal quotation marks and alterations omitted)); cf. 26 CFR § 1.501(c)(3)–1(c)(3).

tion," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.[25]

In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue "any lawful purpose" or "act," including the pursuit of profit in conformity with the owners' religious principles. 15 Pa. Cons. Stat. § 1301 (2001) ("Corporations may be incorporated under this subpart for any lawful purpose or purposes"); Okla. Stat., Tit. 18, §§ 1002(A), 1005(B) (West 2012) ("[E]very corporation, whether profit or not for profit" may "be incorporated or organized . . . to conduct or promote any lawful business or purposes"); see also § 1006(A)(3); Brief for State of Oklahoma as *Amicus Curiae* in No. 13–354.

3

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the "exercise of religion" within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

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[25] See Benefit Corp Information Center, online at http://www.benefitcorp.net/state-by-state-legislative-status; *e. g.*, Va. Code Ann. §§ 13.1–787, 13.1–626, 13.1–782 (2011) ("A benefit corporation shall have as one of its purposes the purpose of creating a general public benefit," and "may identify one or more specific public benefits that it is the purpose of the benefit corporation to create. . . . This purpose is in addition to [the purpose of engaging in any lawful business]." "'Specific public benefit' means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation . . . "); S. C. Code Ann. §§ 33–38–300 (2013 Cum. Supp.), 33–3–101 (2006), 33–38–130 (2013 Cum. Supp.) (similar).

First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase "exercise of religion under the First Amendment" was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment. When first enacted, RFRA defined the "exercise of religion" to mean "the exercise of religion under the First Amendment"—not the exercise of religion as recognized only by then-existing Supreme Court precedents. 42 U. S. C. § 2000bb–2(4) (1994 ed.). When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so. See, *e. g.*, Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. § 2254(d)(1) (authorizing habeas relief from a state-court decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

Second, if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior reference to the First Amendment, see 42 U. S. C. § 2000bb–2(4) (2000 ed.) (incorporating § 2000cc–5), and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases. Moreover, as discussed, the amendment went further, providing that the exercise of religion "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g). It is simply not possible to read these provisions as restricting the concept of the "exercise of religion" to those practices specifically addressed in our pre-*Smith* decisions.

Third, the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617

(1961), the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked "standing" to assert a free-exercise claim,[26] but not one Member of the Court expressed agreement with that argument. The plurality opinion for four Justices rejected the First Amendment claim on the merits based on the reasoning in *Braunfeld*, and reserved decision on the question whether the corporation had "standing" to raise the claim. See 366 U. S., at 631. The three dissenters, Justices Douglas, Brennan, and Stewart, found the law unconstitutional as applied to the corporation and the other challengers and thus implicitly recognized their right to assert a free-exercise claim. See *id.*, at 642 (Brennan, J., joined by Stewart, J., dissenting); *McGowan* v. *Maryland*, 366 U. S. 420, 578–579 (1961) (Douglas, J., dissenting as to related cases including *Gallagher*). Finally, Justice Frankfurter's opinion, which was joined by Justice Harlan, upheld the Massachusetts law on the merits but did not question or reserve decision on the issue of the right of the corporation or any of the other challengers to be heard. See *McGowan*, *supra*, at 521–522. It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected simply because in *Gallagher*—the only pre-*Smith* case in which the issue was raised—a majority of the Justices did not find it necessary to decide whether the kosher market's corporate status barred it from raising a free-exercise claim.

Finally, the results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless

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[26] See Brief for Appellants in *Gallagher*, O. T. 1960, No. 11, pp. 16, 28–31 (arguing that corporation "has no 'religious belief' or 'religious liberty,' and had no standing in court to assert that its free exercise of religion was impaired").

that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*. For example, we are not aware of any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident noncitizen. Are such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before *Smith*?

Presumably in recognition of the weakness of this argument, both HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. By contrast, HHS contends, statutes like Title VII, 42 U. S. C. § 2000e–19(A), expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. See Brief for HHS in No. 13–356, p. 26. In making this argument, however, HHS did not call to our attention the fact that some federal statutes *do* exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. See, *e. g.*, 42 U. S. C. § 300a–7(b)(2); § 238n(a).[27] If Title VII and similar

[27] The principal dissent points out that "the exemption codified in § 238n(a) was not enacted until three years after RFRA's passage." *Post*, at 753, n. 15. The dissent takes this to mean that RFRA did not, in fact, "ope[n] all statutory schemes to religion-based challenges by for-profit corporations" because if it had "there would be no need for a statute-specific, post-RFRA exemption of this sort." *Post*, at 754, n. 15.

This argument fails to recognize that the protection provided by § 238n(a) differs significantly from the protection provided by RFRA. Section 238n(a) flatly prohibits discrimination against a covered healthcare facility for refusing to engage in certain activities related to abortion. If a covered healthcare facility challenged such discrimination under RFRA, by contrast, the discrimination would be unlawful only if a court concluded, among other things, that there was a less restrictive means of achieving any compelling government interest.

In addition, the dissent's argument proves too much. Section 238n(a) applies evenly to "any health care entity"—whether it is a religious non-

laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a corporation. HHS goes so far as to raise the specter of "divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric." Brief for HHS in No. 13–356, at 30.

These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.[28]

HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious

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profit entity or a for-profit entity. There is no dispute that RFRA protects religious nonprofit corporations, so if § 238n(a) were redundant as applied to for-profit corporations, it would be equally redundant as applied to nonprofits.

[28] To qualify for RFRA's protection, an asserted belief must be "sincere"; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. Cf., *e. g.*, *United States* v. *Quaintance*, 608 F. 3d 717, 718–719 (CA10 2010).

belief moved Congress to exclude for-profit corporations from RFRA's protection. On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims. RLUIPA applies to "institutionalized persons," a category that consists primarily of prisoners, and by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented.[29] Nevertheless, after our decision in *City of Boerne*, Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases. And if, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations, see Reply Brief in No. 13–354, at 7–8, what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?

HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about the conduct of business. 3 Treatise on the Law of Corporations § 14:11. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. See, *e. g.*, *ibid.*; 1 *id.*, § 3:2; Del. Code

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[29] See, *e. g.*, *Ochs* v. *Thalacker*, 90 F. 3d 293, 296 (CA8 1996); *Green* v. *White*, 525 F. Supp. 81, 83–84 (ED Mo. 1981); *Abate* v. *Walton*, 1996 WL 5320, *5 (CA9, Jan. 5, 1996); *Winters* v. *State*, 549 N. W. 2d 819–820 (Iowa 1996).

Ann., Tit. 8, § 351 (2011) (providing that certificate of incorporation may provide how "the business of the corporation shall be managed"). Courts will turn to that structure and the underlying state law in resolving disputes.

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.[30]

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. 42 U. S. C. § 2000bb–1(a). We have little trouble concluding that it does.

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[30] The principal dissent attaches significance to the fact that the "Senate voted down [a] so-called 'conscience amendment,' which would have enabled any employer or insurance provider to deny coverage based on its asserted religious beliefs or moral convictions." *Post*, at 744. The dissent would evidently glean from that vote an intent by the Senate to prohibit for-profit corporate employers from refusing to offer contraceptive coverage for religious reasons, regardless of whether the contraceptive mandate could pass muster under RFRA's standards. But that is not the only plausible inference from the failed amendment—or even the most likely. For one thing, the text of the amendment was "written so broadly that it would allow any employer to deny any health service to any American for virtually any reason—*not just for religious objections*." 158 Cong. Rec. 2626 (2012) (emphasis added). Moreover, the amendment would have authorized a blanket exemption for religious or moral objectors; it would not have subjected religious-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of a requirement on religious adherents, but also the government's interest and how narrowly tailored the requirement is. It is thus perfectly reasonable to believe that the amendment was voted down because it extended more broadly than the pre-existing protections of RFRA. And in any event, even if a rejected amendment to a bill could be relevant in other contexts, it surely cannot be relevant here, because any "Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law *explicitly excludes* such application by reference to [RFRA]." 42 U. S. C. § 2000bb–3(b) (emphasis added). It is not plausible to find such an explicit reference in the meager legislative history on which the dissent relies.

A

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13–354, at 9, n. 4, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. 26 U. S. C. § 4980D. For Hobby Lobby, the bill could amount to $1.3 million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of $2,000 per employee each year. § 4980H. These penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.

B

Although these totals are high, *amici* supporting HHS have suggested that the $2,000 per-employee penalty is actually less than the average cost of providing health insurance,

see Brief for Religious Organizations 22, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, see *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981); *Bell* v. *Wolfish*, 441 U. S. 520, 532, n. 13 (1979); *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960), and there are strong reasons to adhere to that practice in these cases. HHS, which presumably could have compiled the relevant statistics, has never made this argument—not in its voluminous briefing or at oral argument in this Court nor, to our knowledge, in any of the numerous cases in which the issue now before us has been litigated around the country. As things now stand, we do not even know what the Government's position might be with respect to these *amici*'s intensely empirical argument.[31] For this same reason, the plaintiffs have never had an opportunity to respond to this novel claim that—contrary to their longstanding practice and that of most large employers—they would be better off discarding their employer insurance plans altogether.

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees. See App. to Pet. for Cert. in No. 13–356, p. 11g; App. in No. 13–354, at 139.

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[31] Indeed, one of HHS's stated reasons for establishing the religious accommodation was to "encourag[e] eligible organizations to *continue* to offer health coverage." 78 Fed. Reg. 39882 (emphasis added).

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers. See *id.*, at 153.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. 26 U. S. C. § 106(a). Likewise, employers can deduct the cost of providing health insurance, see § 162(a)(1), but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.[32]

[32] Attempting to compensate for dropped insurance by raising wages would also present administrative difficulties. In order to provide full compensation for employees, the companies would have to calculate the value to employees of the convenience of retaining their employer-provided coverage and thus being spared the task of attempting to find and sign up for a comparable plan on an exchange. And because some but not all of the companies' employees may qualify for subsidies on an exchange, it would be nearly impossible to calculate a salary increase that would accurately restore the *status quo ante* for all employees.

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. Brief for HHS in 13–354, at 31–34; *post*, at 760. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.[33] *Post*, at 760–761.

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[33] This argument is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the very same religious objections as the Hahns and Greens and their companies. The connection between what these religious employers would be required to do if not exempted (provide insurance coverage for particular contraceptives) and the ultimate event that they find morally wrong (destruction of an embryo) is exactly the same. Nevertheless, as discussed, HHS and the Labor and Treasury Departments authorized the exemption from the contraceptive mandate of group health plans of certain religious employers, and later expanded the exemption to include certain nonprofit organizations with religious objections to contraceptive coverage. 78 Fed. Reg. 39871. When this was done, the Government made clear that its objective was to "protec[t]" these religious objectors "from having to contract, arrange,

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[34] Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. See, *e. g.*, *Smith*, 494 U. S., at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim"); *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989); *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 450 (1969).

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pay, or refer for such coverage." *Ibid.* Those exemptions would be hard to understand if the plaintiffs' objections here were not substantial.

[34] See, *e. g.*, Oderberg, The Ethics of Co-operation in Wrongdoing, in Modern Moral Philosophy 203–228 (A. O'Hear ed. 2004); T. Higgins, Man as Man: The Science and Art of Ethics 353, 355 (1949) ("The general principles governing cooperation" in wrongdoing—*i. e.*, "physical activity (or its omission) by which a person assists in the evil act of another who is the principal agent"—"present troublesome difficulties in application"); 1 H. Davis, Moral and Pastoral Theology 341 (1935) (Cooperation occurs "when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does").

Moreover, in *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707 (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. In *Thomas*, a Jehovah's Witness was initially employed making sheet steel for a variety of industrial uses, but he was later transferred to a job making turrets for tanks. *Id.*, at 710. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that he found morally objectionable (helping to make the weapons themselves). This Court, however, held that "it is not for us to say that the line he drew was an unreasonable one." *Id.*, at 715.[35]

Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," *id.*, at 716, and there is no dispute that it does.

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. See *Tilton* v. *Richardson*, 403 U. S. 672, 689 (1971) (plurality opinion); *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 248–249 (1968). But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers

[35] The principal dissent makes no effort to reconcile its view about the substantial-burden requirement with our decision in *Thomas*.

never articulated a *religious* objection to the subsidies. As we put it in *Tilton*, they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." 403 U. S., at 689 (plurality opinion); see *Allen*, *supra*, at 249 ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion"). Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. § 2000bb–1(b).

A

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting "public health" and "gender equality." Brief for HHS in No. 13–354, at 46, 49. RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U. S., at 430–431 (quoting § 2000bb–1(b)). This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting spe-

cific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. *Id.*, at 431.

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. See Brief for HHS in No. 13–354, at 14–15, 49; see Brief for HHS in No. 13–356, at 10, 48. Under our cases, women (and men) have a constitutional right to obtain contraceptives, see *Griswold* v. *Connecticut*, 381 U. S. 479, 485–486 (1965), and HHS tells us that "[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services," Brief for HHS in No. 13–354, at 50 (internal quotation marks omitted).

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required "to comply with a subset of the Affordable Care Act's health reform provisions" that provide what HHS has described as "particularly significant protections." 75 Fed. Reg. 34540 (2010). But the contraceptive mandate is expressly excluded from this subset. *Ibid.*

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i. e.*, whether HHS has shown that the contraceptive mandate is "the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b)(2).

B

The least-restrictive-means standard is exceptionally demanding, see *City of Boerne*, 521 U. S., at 532, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§ 2000bb–1(a), (b) (requiring the Government to "demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest" (emphasis added)).

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see § 2000bb–1(b)(2), that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. See Birth Control: Medicines To Help You, online at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor

has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office's most recent forecasts, ACA's insurance-coverage provisions will cost the Federal Government more than $1.3 trillion through the next decade. See CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014, p. 2.[36] If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.

HHS contends that RFRA does not permit us to take this option into account because "RFRA cannot be used to require creation of entirely new programs." Brief for HHS in No. 13–354, at 15.[37] But we see nothing in RFRA that sup-

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[36] Online at http://cbo.gov/publication/45231.

[37] In a related argument, HHS appears to maintain that a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties. Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals. It is certainly true that in applying RFRA "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005) (applying RLUIPA). That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. Otherwise, for example, the Government could decide that all supermarkets must sell

ports this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. § 2000cc–3(c) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise"). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. See *supra*, at 698–699, and nn. 8–9.

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alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants). By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless. In any event, our decision in these cases need not result in any detrimental effect on any third party. As we explain, see *infra*, at 733–734, the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections.

Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§147.131(b)(4), (c)(1); 26 CFR §§54.9815–2713A(a)(4), (b). If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries." 45 CFR §147.131(c)(2); 26 CFR §54.9815–2713A(c)(2).[38]

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.[39] At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.[40]

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[38] HHS has concluded that insurers that insure eligible employers opting out of the contraceptive mandate and that are required to pay for contraceptive coverage under the accommodation will not experience an increase in costs because the "costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health." 78 Fed. Reg. 39877. With respect to self-insured plans, the regulations establish a mechanism for the eligible employers' third-party administrators to obtain a compensating reduction in the fee paid by insurers to participate in the federally facilitated exchanges. HHS believes that this system will not have a material effect on the funding of the exchanges because the "payments for contraceptive services will represent only a small portion of total [federally facilitated exchange] user fees." *Id.*, at 39882; see 26 CFR §54.9815–2713A(b)(3).

[39] See n. 9, *supra*.

[40] The principal dissent faults us for being "noncommital" in refusing to decide a case that is not before us here. See *post*, at 767. The less restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address.

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none.[41] Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal logistical and administrative obstacles," *post*, at 765 (internal quotation marks omitted), because their employers' insurers would be responsible for providing information and coverage, see, *e. g.*, 45 CFR §§ 147.131(c)–(d); cf. 26 CFR §§ 54.9815–2713A(b), (d). Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,'" *post*, at 765, because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed "scarcely what Congress contemplated." *Post*, at 765–766.

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction.[42] HHS points to no evidence that insurance plans

[41] In the principal dissent's view, the Government has not had a fair opportunity to address this accommodation, *post*, at 767, n. 27, but the Government itself apparently believes that when it "provides an exception to a general rule for secular reasons (or for only certain religious reasons), [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests," Brief for United States as *Amicus Curiae* in *Holt* v. *Hobbs*, No. 13–6827, p. 10, now pending before the Court.

[42] Cf. 42 U. S. C. § 1396s (federal "[p]rogram for distribution of pediatric vaccines" for some uninsured and underinsured children).

in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post*, at 769–770. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the work force without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit

employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these cases are quite different. Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation. We noted that "[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." 455 U. S., at 260. Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." *Ibid.* We observed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Ibid.*; see *O Centro*, 546 U. S., at 435.

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. And contrary to the principal dissent's characterization, the employers' contributions do not necessarily funnel into "undifferentiated

funds." *Post*, at 760. The accommodation established by HHS requires issuers to have a mechanism by which to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 45 CFR § 147.131(c)(2)(ii). Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.[43]

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. See *post*, at 769–772. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith*. 494 U. S., at 888–889 (applying the *Sherbert* test to all free-exercise claims "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"). But Congress, in enacting RFRA, took the position that "the compelling interest test as set forth in prior Federal court

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[43] HHS highlights certain statements in the opinion in *Lee* that it regards as supporting its position in these cases. In particular, HHS notes the statement that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U. S., at 261. *Lee* was a free-exercise, not a RFRA, case, and the statement to which HHS points, if taken at face value, is squarely inconsistent with the plain meaning of RFRA. Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.

rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U. S. C. § 2000bb(a)(5). The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

* * *

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

The judgment of the Tenth Circuit in No. 13–354 is affirmed; the judgment of the Third Circuit in No. 13–356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

It seems to me appropriate, in joining the Court's opinion, to add these few remarks. At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. 42 U. S. C. § 2000bb *et seq.* It is to ensure that interests in religious freedom are protected. *Ante*, at 694–695; *post*, at 746–747 (GINSBURG, J., dissenting).

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. See *Cantwell* v. *Connecticut*, 310 U. S.

296, 303 (1940). It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations. They claim protection under RFRA, the federal statute discussed with care and in detail in the Court's opinion.

As the Court notes, under our precedents, RFRA imposes a "'stringent test.'" *Ante,* at 695 (quoting *City of Boerne* v. *Flores*, 521 U. S. 507, 533 (1997)). The Government must demonstrate that the application of a substantial burden to a person's exercise of religion "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b).

As to RFRA's first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee. *Ante*, at 727; see, *e. g.*, Brief for HHS in No. 13–354, pp. 14–15. There are many medical conditions for which pregnancy is contraindicated. See, *e. g.*, *id.*, at 47. It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees. *Ante*, at 728.

But the Government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-

implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases. *Ante*, at 699, and n. 9, 730–731.

The means the Government chose is the imposition of a direct mandate on the employers in these cases. *Ante*, at 698–699. But in other instances the Government has allowed the same contraception coverage in issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. See *ante*, at 699, and n. 9, 730–731. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs. See *ante*, at 731.

On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.

The parties who were the plaintiffs in the District Courts argue that the Government could pay for the methods that are found objectionable. Brief for Respondents in No. 13–354, p. 58. In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. *Ante*, at 728–730. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional govern-

ment constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government's interest, and in fact the mechanism for doing so is already in place. *Ante*, at 730–731.

"[T]he American community is today, as it long has been, a rich mosaic of religious faiths." *Town of Greece* v. *Galloway*, 572 U. S. 565, 628 (2014) (KAGAN, J., dissenting). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. *Ante*, at 733.

For these reasons and others put forth by the Court, I join its opinion.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law

(saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See *ante*, at 705–736. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." *Ante*, at 734. And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i. e.*, the general public, can pick up the tab. See *ante*, at 728–731.[1]

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. See *infra*, at 744–746. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA or Act), 42 U. S. C. § 2000bb *et seq.*, dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

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[1] The Court insists it has held none of these things, for another less restrictive alternative is at hand: extending an existing accommodation, currently limited to religious nonprofit organizations, to encompass commercial enterprises. See *ante*, at 692–693. With that accommodation extended, the Court asserts, "women would still be entitled to all [Food and Drug Administration]-approved contraceptives without cost sharing." *Ante*, at 693. In the end, however, the Court is not so sure. In stark contrast to the Court's initial emphasis on this accommodation, it ultimately declines to decide whether the highlighted accommodation is even lawful. See *ante*, at 731 ("We do not decide today whether an approach of this type complies with RFRA . . . .").

I

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 856 (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court's resolution of these cases.

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary.[2] Particular services were to be recommended by the U. S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, however; it left out preventive services that "many women's health advocates and medical professionals believe are critically important." 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women's Health Amendment, which added to the ACA's

[2] See 42 U. S. C. §300gg–13(a)(1)–(3) (group health plans must provide coverage, without cost sharing, for (1) certain "evidence-based items or services" recommended by the U. S. Preventive Services Task Force; (2) immunizations recommended by an advisory committee of the Centers for Disease Control and Prevention; and (3) "with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration").

minimum coverage requirements a new category of preventive services specific to women's health.

Women paid significantly more than men for preventive care, the amendment's proponents noted; in fact, cost barriers operated to block many women from obtaining needed care at all. See, *e. g.*, *id.*, at 29070 (statement of Sen. Feinstein) ("Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men."); *id.*, at 29302 (statement of Sen. Mikulski) ("copayments are [often] so high that [women] avoid getting [preventive and screening services] in the first place"). And increased access to contraceptive services, the sponsors comprehended, would yield important public health gains. See, *e. g.*, *id.*, at 29768 (statement of Sen. Durbin) ("This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured] . . . . This expanded access will reduce unintended pregnancies.").

As altered by the Women's Health Amendment's passage, the ACA requires new insurance plans to include coverage without cost sharing of "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]," a unit of HHS. 42 U. S. C. § 300gg–13(a)(4). Thus charged, the HRSA developed recommendations in consultation with the Institute of Medicine (IOM). See 77 Fed. Reg. 8725–8726 (2012).[3] The IOM convened a group of independent experts, including "specialists in disease prevention [and] women's health"; those experts prepared a report evaluating the efficacy of a number of preventive services. IOM, Clinical Preventive Services for Women: Closing the Gaps 2 (2011) (hereinafter IOM Report). Consistent with the findings of "[n]umerous health profes-

[3] The IOM is an arm of the National Academy of Sciences, an organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 460, n. 11 (1989) (internal quotation marks omitted).

sional associations" and other organizations, the IOM experts determined that preventive coverage should include the "full range" of FDA-approved contraceptive methods. *Id.*, at 10. See also *id.*, at 102–110.

In making that recommendation, the IOM's report expressed concerns similar to those voiced by congressional proponents of the Women's Health Amendment. The report noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. See, *e. g.*, *id.*, at 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving . . . medical tests and treatments and to filling prescriptions for themselves and their families."); *id.*, at 103–104, 107 (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, pulmonary hypertension, and Marfan syndrome, and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); *id.*, at 103 (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face "increased odds of preterm birth and low birth weight").

In line with the IOM's suggestions, the HRSA adopted guidelines recommending coverage of "[a]ll [FDA-]approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[4] Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations requiring group health plans to include coverage of the contraceptive services recommended in the HRSA guidelines, subject

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[4] HRSA, HHS, Women's Preventive Services Guidelines, available at http://www.hrsa.gov/womensguidelines/ (all Internet materials as visited June 27, 2014, and available in Clerk of Court's case file), reprinted in App. to Brief for Petitioners in No. 13–354, pp. 43a–44a. See also 77 Fed. Reg. 8725–8726 (2012).

to certain exceptions, described *infra*, at 763–764.[5] This opinion refers to these regulations as the contraceptive coverage requirement.

B

While the Women's Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called "conscience amendment," which would have enabled any employer or insurance provider to deny coverage based on its asserted "religious beliefs or moral convictions." 158 Cong. Rec. 1415 (2012); see *id.*, at 2622–2634 (debate and vote).[6] That amendment, Senator Mikulski observed, would have "pu[t] the personal opinion of employers and insurers over the practice of medicine." *Id.*, at 2450. Rejecting the "conscience amendment," Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga[7] might assert is foreclosed by this Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). In *Smith*, two members of the Native American Church were dismissed from their jobs and denied unemployment benefits because they ingested peyote at, and as an essential element of, a

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[5] 45 CFR § 147.130(a)(1)(iv) (2013) (HHS); 29 CFR § 2590.715–2713(a)(1)(iv) (2013) (Labor); 26 CFR § 54.9815–2713(a)(1)(iv) (2013) (Treasury).

[6] Separating moral convictions from religious beliefs would be of questionable legitimacy. See *Welsh* v. *United States*, 398 U. S. 333, 357–358 (1970) (Harlan, J., concurring in result).

[7] As the Court explains, see *ante*, at 700–705, these cases arise from two separate lawsuits, one filed by Hobby Lobby, its affiliated business (Mardel), and the family that operates these businesses (the Greens); the other filed by Conestoga and the family that owns and controls that business (the Hahns). Unless otherwise specified, this opinion refers to the respective groups of plaintiffs as Hobby Lobby and Conestoga.

religious ceremony. Oregon law forbade the consumption of peyote, and this Court, relying on that prohibition, rejected the employees' claim that the denial of unemployment benefits violated their free exercise rights. The First Amendment is not offended, *Smith* held, when "prohibiting the exercise of religion . . . is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision." *Id.*, at 878; see *id.*, at 878–879 ("an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). The ACA's contraceptive coverage requirement applies generally, it is "otherwise valid," it trains on women's well-being, not on the exercise of religion, and any effect it has on such exercise is incidental.

Even if *Smith* did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.[8]

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' em-

[8] See *Wisconsin* v. *Yoder*, 406 U. S. 205, 230 (1972) ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985) (invalidating state statute requiring employers to accommodate an employee's Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees). Notably, in construing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc *et seq.*, the Court has cautioned that "adequate account" must be taken of "the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005); see *id.*, at 722 ("an accommodation must be measured so that it does not override other significant interests"). A balanced approach is all the more in order when the Free Exercise Clause itself is at stake, not a statute designed to promote accommodation to religious beliefs and practices.

ployees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure. See *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 32 Cal. 4th 527, 565, 85 P. 3d 67, 93 (2004) ("We are unaware of any decision in which . . . [the U. S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."). In sum, with respect to free exercise claims no less than free speech claims, "'[y]our right to swing your arms ends just where the other man's nose begins.'" Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919).

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means" to further a "compelling governmental interest." 42 U. S. C. § 2000bb–1(a), (b)(2). In RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 424 (2006).

RFRA's purpose is specific and written into the statute itself. The Act was crafted to "restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U. S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." § 2000bb(b)(1).[9] See

[9] Under *Sherbert* and *Yoder*, the Court "requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that inter-

also §2000bb(a)(5) ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."); *ante*, at 736 (agreeing that the pre-*Smith* compelling interest test is "workable" and "strike[s] sensible balances").

The legislative history is correspondingly emphatic on RFRA's aim. See, *e. g.*, S. Rep. No. 103–111, p. 12 (1993) (hereinafter Senate Report) (RFRA's purpose was "only to overturn the Supreme Court's decision in *Smith*," not to "unsettle other areas of the law."); 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was "designed to restore the compelling interest test for deciding free exercise claims."). In line with this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." Senate Report 8. See also H. R. Rep. No. 103–88, pp. 6–7 (1993) (hereinafter House Report) (same). In short, the Act reinstates the law as it was prior to *Smith*, without "creat[ing] . . . new rights for any religious practice or for any potential litigant." 139 Cong. Rec. 26178 (statement of Sen. Kennedy). Given the Act's moderate purpose, it is hardly surprising that RFRA's enactment in 1993 provoked little controversy. See Brief for Senator Murray et al. as *Amici Curiae* 8 (hereinafter Senators Brief) (RFRA was approved by a 97-to-3 vote in the Senate and a voice vote in the House of Representatives).

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence. See *ante*, at 695, n. 3, 696, 706, 714–716. To support its conception of RFRA as a measure detached from this Court's decisions, one that sets a new course, the Court points first to the Religious Land

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est." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 894 (1990) (O'Connor, J., concurring in judgment).

Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. § 2000cc *et seq.*, which altered RFRA's definition of the term "exercise of religion." RFRA, as originally enacted, defined that term to mean "the exercise of religion under the First Amendment to the Constitution." § 2000bb–2(4) (1994 ed.). See *ante*, at 695–696. As amended by RLUIPA, RFRA's definition now includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000bb–2(4) (2012 ed.) (cross-referencing § 2000cc–5). That definitional change, according to the Court, reflects "an obvious effort to effect a complete separation from First Amendment case law." *Ante*, at 696.

The Court's reading is not plausible. RLUIPA's alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise. See *Rasul* v. *Myers*, 563 F. 3d 527, 535 (CADC 2009) (Brown, J., concurring) ("There is no doubt that RLUIPA's drafters, in changing the definition of 'exercise of religion,' wanted to broaden the scope of the kinds of practices protected by RFRA, not increase the universe of individuals protected by RFRA."); H. R. Rep. No. 106–219, p. 30 (1999). See also *Gilardi* v. *United States Dept. of Health and Human Servs.*, 733 F. 3d 1208, 1211 (CADC 2013) (RFRA, as amended, "provides us with no helpful definition of 'exercise of religion.'"); *Henderson* v. *Kennedy*, 265 F. 3d 1072, 1073 (CADC 2001) ("The [RLUIPA] amendments did not alter RFRA's basic prohibition that the '[g]overnment shall not substantially burden a person's exercise of religion.'").[10]

[10] RLUIPA, the Court notes, includes a provision directing that "[t]his chapter [*i. e.*, RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution." 42 U. S. C. § 2000cc–3(g); see *ante*, at

Next, the Court highlights RFRA's requirement that the government, if its action substantially burdens a person's religious observance, must demonstrate that it chose the least restrictive means for furthering a compelling interest. "[B]y imposing a least-restrictive-means test," the Court suggests, RFRA "went beyond what was required by our pre-*Smith* decisions." *Ante*, at 706, n. 18 (citing *City of Boerne* v. *Flores*, 521 U. S. 507 (1997)). See also *ante*, at 695, n. 3. But as RFRA's statements of purpose and legislative history make clear, Congress intended only to restore, not to scrap or alter, the balancing test as this Court had applied it pre-*Smith*. See *supra*, at 746–747. See also Senate Report 9 (RFRA's "compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*."); House Report 7 (same).

The Congress that passed RFRA correctly read this Court's pre-*Smith* case law as including within the "compelling interest test" a "least restrictive means" requirement. See, *e. g.*, Senate Report 5 ("Where [a substantial] burden is placed upon the free exercise of religion, the Court ruled [in *Sherbert*], the Government must demonstrate that it is the least restrictive means to achieve a compelling governmental interest."). And the view that the pre-*Smith* test included a "least restrictive means" requirement had been aired in testimony before the Senate Judiciary Committee by experts on religious freedom. See, *e. g.*, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 78–79 (1993) (statement of Prof. Douglas Laycock).

Our decision in *City of Boerne*, it is true, states that the least restrictive means requirement "was not used in the pre-*Smith* jurisprudence RFRA purported to codify." See *ante*, at 695, n. 3, 706, n. 18. As just indicated, however, that statement does not accurately convey the Court's pre-

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695–696, 714. RFRA incorporates RLUIPA's definition of "exercise of religion," as RLUIPA does, but contains no omnibus rule of construction governing the statute in its entirety.

Smith jurisprudence. See *Sherbert* v. *Verner*, 374 U. S. 398, 407 (1963) ("[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights."); *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). See also Berg, The New Attacks on Religious Freedom Legislation and Why They Are Wrong, 21 Cardozo L. Rev. 415, 424 (1999) ("In *Boerne*, the Court erroneously said that the least restrictive means test 'was not used in the pre-*Smith* jurisprudence.' ").[11]

C

With RFRA's restorative purpose in mind, I turn to the Act's application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among "person[s]" who "exercise . . . religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest?

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[11] The Court points out that I joined the majority opinion in *City of Boerne* and did not then question the statement that "least restrictive means . . . was not used [pre-*Smith*]." *Ante*, at 706, n. 18. Concerning that observation, I remind my colleagues of Justice Jackson's sage comment: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." *Massachusetts* v. *United States*, 333 U. S. 611, 639–640 (1948) (dissenting opinion).

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

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RFRA's compelling interest test, as noted, see *supra*, at 746, applies to government actions that "substantially burden *a person's exercise of religion*." 42 U. S. C. § 2000bb–1(a) (emphasis added). This reference, the Court submits, incorporates the definition of "person" found in the Dictionary Act, 1 U. S. C. § 1, which extends to "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See *ante*, at 707–709. The Dictionary Act's definition, however, controls only where "context" does not "indicat[e] otherwise." § 1. Here, context does so indicate. RFRA speaks of "a person's *exercise of religion*." 42 U. S. C. § 2000bb–1(a) (emphasis added). See also §§ 2000bb–2(4), 2000cc–5(7)(a).[12] Whether a corporation qualifies as a "person" capable of exercising religion is an inquiry one cannot answer without reference to the "full body" of pre-*Smith* "free-exercise caselaw." *Gilardi*, 733 F. 3d, at 1212. There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Ex-

[12] As earlier explained, see *supra*, at 748, RLUIPA's amendment of the definition of "exercise of religion" does not bear the weight the Court places on it. Moreover, it is passing strange to attribute to RLUIPA any purpose to cover entities other than "religious assembl[ies] or institution[s]." 42 U. S. C. § 2000cc(a)(1). But cf. *ante*, at 714. That law applies to land-use regulation. § 2000cc(a)(1). To permit commercial enterprises to challenge zoning and other land-use regulations under RLUIPA would "dramatically expand the statute's reach" and deeply intrude on local prerogatives, contrary to Congress' intent. Brief for National League of Cities et al. as *Amici Curiae* 26.

ercise Clause or RFRA.[13] The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819). Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, no desires." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 466 (2010) (opinion concurring in part and dissenting in part).

The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations.[14] "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community," and "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 342 (1987) (Brennan, J., concurring in judgment). The Court's "special solicitude to the

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[13] The Court regards *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617 (1961), as "suggest[ing] . . . that for-profit corporations possess [free-exercise] rights." *Ante*, at 714. See also *ante*, at 709, n. 21. The suggestion is barely there. True, one of the five challengers to the Sunday closing law assailed in *Gallagher* was a corporation owned by four Orthodox Jews. The other challengers were human individuals, not artificial, law-created entities, so there was no need to determine whether the corporation could institute the litigation. Accordingly, the plurality stated it could pretermit the question "whether appellees ha[d] standing" because *Braunfeld* v. *Brown*, 366 U. S. 599 (1961), which upheld a similar closing law, was fatal to their claim on the merits. *Id*, at 631.

[14] See, *e. g.*, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012); *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418 (2006); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Jimmy Swaggart Ministries* v. *Board of Equalization of Cal.*, 493 U. S. 378 (1990).

rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 189 (2012), however, is just that. No such solicitude is traditional for commercial organizations.[15] Indeed, until today,

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[15] Typically, Congress has accorded to organizations religious in character religion-based exemptions from statutes of general application. *E. g.*, 42 U. S. C. § 2000e–1(a) (Title VII exemption from prohibition against employment discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities"); 42 U. S. C. § 12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990). It can scarcely be maintained that RFRA enlarges these exemptions to allow Hobby Lobby and Conestoga to hire only persons who share the religious beliefs of the Greens or Hahns. Nor does the Court suggest otherwise. Cf. *ante*, at 716–717.

The Court does identify two statutory exemptions it reads to cover for-profit corporations, 42 U. S. C. §§ 300a–7(b)(2) and 238n(a), and infers from them that "Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations," *ante*, at 717. The Court's inference is unwarranted. The exemptions the Court cites cover certain medical personnel who object to performing or assisting with abortions. Cf. *ante*, at 716, n. 27 ("the protection provided by § 238n(a) differs significantly from the protection provided by RFRA"). Notably, the Court does not assert that these exemptions have in fact been afforded to for-profit corporations. See § 238n(c) ("health care entity" covered by exemption is a term defined to include "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions"); Tozzi, Whither Free Exercise: *Employment Division* v. *Smith* and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence? 48 J. Catholic Legal Studies 269, 296, n. 133 (2009) ("Catholic physicians, but not necessarily hospitals, . . . may be able to invoke [§ 238n(a)] . . . ."); cf. S. 137, 113th Cong., 1st Sess., 2–3 (2013) (as introduced) (Abortion Non-Discrimination Act of 2013, which would amend the definition of "health care entity" in § 238n to include "hospital[s]," "health insurance plan[s]," and other health care facilities). These provisions are revealing in a way that detracts from one of the Court's main arguments. They show that Congress is not content to rest on the Dictionary Act when it wishes to ensure that particular entities are among those eligible for a religious accommodation.

Moreover, the exemption codified in § 238n(a) was not enacted until three years after RFRA's passage. See Omnibus Consolidated Rescis-

religious exemptions had never been extended to any entity operating in "the commercial, profit-making world." *Amos*, 483 U. S., at 337.[16]

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. See 42 U. S. C. §§ 2000e(b), 2000e–1(a), 2000e–2(a); cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 80–81 (1977) (Title VII requires reasonable accommodation of an employee's religious exercise, but such accommodation must not come "at the expense of othe[r] [employees]"). The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention.[17] One can only wonder why the Court shuts this key difference from sight.

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sions and Appropriations Act of 1996, § 515, 110 Stat. 1321–245. If, as the Court believes, RFRA opened all statutory schemes to religion-based challenges by for-profit corporations, there would be no need for a statute-specific, post-RFRA exemption of this sort.

[16] That is not to say that a category of plaintiffs, such as resident aliens, may bring RFRA claims only if this Court expressly "addressed their [free-exercise] rights before *Smith*." *Ante*, at 716. Continuing with the Court's example, resident aliens, unlike corporations, are flesh-and-blood individuals who plainly count as persons sheltered by the First Amendment, see *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 271 (1990) (citing *Bridges* v. *Wixon*, 326 U. S. 135, 148 (1945)), and *a fortiori*, RFRA.

[17] I part ways with JUSTICE KENNEDY on the context relevant here. He sees it as the employers' "exercise [of] their religious beliefs within the context of their own closely held, for-profit corporations." *Ante*, at 737 (concurring opinion). See also *ante*, at 733 (opinion of the Court) (similarly concentrating on religious faith of employers without reference to the different beliefs and liberty interests of employees). I see as the relevant context the employers' asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers' religious beliefs.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations. See *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F. 3d 1114, 1169 (CA10 2013) (Briscoe, C. J., concurring in part and dissenting in part) (legislative record lacks "any suggestion that Congress foresaw, let alone intended, that RFRA would cover for-profit corporations"). See also Senators Brief 10–13 (none of the cases cited in House or Senate Judiciary Committee Reports accompanying RFRA, or mentioned during floor speeches, recognized the free exercise rights of for-profit corporations).

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. See *ante*, at 709–713. See also *ante*, at 738 (KENNEDY, J., concurring) (criticizing the Government for "distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation").[18] Again, the Court

[18] According to the Court, the Government "concedes" that "nonprofit corporation[s]" are protected by RFRA. *Ante*, at 708. See also *ante*, at 709, 712, 718. That is not an accurate description of the Government's position, which encompasses only "churches," "*religious* institutions," and "*religious* non-profits." Brief for Respondents in No. 13–356, p. 28 (emphasis added). See also Reply Brief in No. 13–354, p. 8 ("RFRA incorporates the long-standing and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.").

forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court's side. Recognition of the discrete characters of "ecclesiastical and lay" corporations dates back to Blackstone, see 1 W. Blackstone, Commentaries on the Laws of England 458 (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code, see *Terrett* v. *Taylor*, 9 Cranch 43, 49 (1815) (describing religious corporations); *Trustees of Dartmouth College*, 4 Wheat., at 645 (discussing "eleemosynary" corporations, including those "created for the promotion of religion"). To reiterate, "for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]." *Gilardi*, 733 F. 3d, at 1242 (Edwards, J., concurring in part and dissenting in part) (emphasis deleted).

Citing *Braunfeld* v. *Brown*, 366 U. S. 599 (1961), the Court questions why, if "a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can't . . . do the same?" *Ante*, at 710 (footnote omitted). See also *ante*, at 705–706. But even accepting, *arguendo*, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court's conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation. In any event, *Braunfeld* is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits.

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Al-

though the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.[19] Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA "person[s]," to gain an exemption, they must demonstrate

[19] The Court does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public. No need to speculate on that, the Court says, for "it seems unlikely" that large corporations "will often assert RFRA claims." *Ante,* at 717. Perhaps so, but as Hobby Lobby's case demonstrates, such claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse. "Closely held" is not synonymous with "small." Hobby Lobby is hardly the only enterprise of sizable scale that is family owned or closely held. For example, the family-owned candy giant Mars, Inc., takes in $33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than $136 billion in revenues and employs some 140,000 persons. See Forbes, America's Largest Private Companies 2013, available at http://www.forbes.com/largest-private-companies/.

Nor does the Court offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations. The Court is satisfied that "[s]tate corporate law provides a ready means for resolving any conflicts," *ante*, at 718, but the authorities cited in support of that proposition are hardly helpful. See Del. Code Ann., Tit. 8, § 351 (2011) (certificates of incorporation may specify how the business is managed); 1 J. Cox & T. Hazen, Treatise on the Law of Corporations § 3:2 (3d ed. 2010) (section entitled "Selecting the state of incorporation"); 3 *id.*, § 14:11, p. 48 (observing that "[d]espite the frequency of dissension and deadlock in close corporations, in some states neither legislatures nor courts have provided satisfactory solutions"). And even if a dispute settlement mechanism is in place, how is the arbiter of a religion-based intracorporate controversy to resolve the disagreement, given this Court's instruction that "courts have no business addressing [whether an asserted religious belief] is reasonable," *ante,* at 724?

that the contraceptive coverage requirement "substantially burden[s] [their] exercise of religion." 42 U. S. C. § 2000bb–1(a). Congress no doubt meant the modifier "substantially" to carry weight. In the original draft of RFRA, the word "burden" appeared unmodified. The word "substantially" was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See 139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court's pre-*Smith* case law, "does not require the Government to justify every action that has some effect on religious exercise." *Ibid.*

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." *Ante*, at 724.[20] I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. See *Thomas*, 450 U. S., at 715 (courts are not to question where an individual "dr[aws] the line" in defining which practices run afoul of her religious beliefs). See also 42 U. S. C. §§ 2000bb–1(a), 2000bb–2(4), 2000cc–5(7)(A).[21] But those beliefs, however

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[20] The Court dismisses the argument, advanced by some *amici*, that the $2,000-per-employee tax charged to certain employers that fail to provide health insurance is less than the average cost of offering health insurance, noting that the Government has not provided the statistics that could support such an argument. See *ante*, at 720–722. The Court overlooks, however, that it is not the Government's obligation to prove that an asserted burden is *in*substantial. Instead, it is incumbent upon plaintiffs to demonstrate, in support of a RFRA claim, the substantiality of the alleged burden.

[21] The Court levels a criticism that is as wrongheaded as can be. In no way does the dissent "tell the plaintiffs that their beliefs are flawed." *Ante*, at 724. Right or wrong in this domain is a judgment no Member of

deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake. *Kaemmerling* v. *Lappin*, 553 F. 3d 669, 679 (CADC 2008).

That distinction is a facet of the pre-*Smith* jurisprudence RFRA incorporates. *Bowen* v. *Roy*, 476 U. S. 693 (1986), is instructive. There, the Court rejected a free exercise challenge to the Government's use of a Native American child's Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father's religious belief that "use of [his daughter's Social Security] number may harm [her] spirit," the Court concluded that the Government's internal uses of that number "place[d] [no] restriction on what [the father] may believe or what he may do." *Id.*, at 699. Recognizing that the father's "religious views may not accept" the position that the challenged uses concerned only the Government's internal affairs, the Court explained that "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Id.*, at 700–701, n. 6. See also *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989) (distinguishing between, on the one hand, "question[s] [of] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," and, on the other, "whether the alleged burden imposed [by the challenged government action] is a substantial

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this Court, or any civil court, is authorized or equipped to make. What the Court must decide is not "the plausibility of a religious claim," *ibid.* (internal quotation marks omitted), but whether accommodating that claim risks depriving others of rights accorded them by the laws of the United States. See *supra*, at 745–746; *infra*, at 765–766.

one"). Inattentive to this guidance, today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see *supra*, at 741–744, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." *Grote* v. *Sebelius*, 708 F. 3d 850, 865 (CA7 2013) (Rovner, J., dissenting). It is doubtful that Congress, when it specified that burdens must be "substantia[l]," had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan

will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. See IOM Report 102–107. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 14–15. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain. Brief for Ovarian Cancer National Alliance et al. as *Amici Curiae* 4, 6–7, 15–16; 78 Fed. Reg. 39872 (2013); IOM Report 107.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective and significantly more expensive than other contraceptive methods. See *id.*, at 105.[22] Moreover, the Court's

[22] IUDs, which are among the most reliable forms of contraception, generally cost women more than $1,000 when the expenses of the office visit and insertion procedure are taken into account. See Eisenberg, McNicholas, & Peipert, Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents, 52 J. Adolescent Health S59, S60 (2013). See also Winner et al., Effectiveness of Long-Acting Reversible Contraception, 366 New Eng. J. Medicine 1998, 1999 (2012).

reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38–39 (counsel for Hobby Lobby acknowledged that his "argument . . . would apply just as well if the employer said 'no contraceptives' " (internal quotation marks added)).

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. See *ante,* at 728.[23] It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage, Brief for Guttmacher Institute et al. as *Amici Curiae* 16; that almost one-third of women would change their contraceptive method if costs were not a factor, Frost & Darroch, Factors Associated With Contraceptive Choice and Inconsistent Method Use, United States, 2004, 40 Perspectives on Sexual & Reproductive Health 94, 98 (2008); and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be, Gariepy, Simon, Patel, Creinin, & Schwarz, The Impact of Out-of-Pocket Expense on IUD Utilization Among Women With Private Insurance, 84 Contraception e39, e40 (2011). See also Eisenberg, McNicholas, & Peipert, Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents, 52 J. Adolescent Health S60 (2013) (recent study found that women who face out-of-pocket IUD costs in excess of $50 were "11-times less likely to obtain an IUD than women who had to pay less than $50"); Postlethwaite, Trussell, Zoolakis, Shabear, & Petitti, A Comparison of Contraceptive Procurement Pre- and

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[23] Although the Court's opinion makes this assumption grudgingly, see *ante,* at 726–728, one Member of the majority recognizes, without reservation, that "the [contraceptive coverage] mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees." *Ante,* at 737 (opinion of KENNEDY, J.).

Post-Benefit Change, 76 Contraception 360, 361–362 (2007) (when one health system eliminated patient cost sharing for IUDs, use of this form of contraception more than doubled).

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions. See *ante*, at 726–728.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, *e. g.*, Family and Medical Leave Act of 1993, 29 U. S. C. § 2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U. S. C. § 630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now governs employers with 20 or more employees); Americans With Disabilities Act of 1990, 42 U. S. C. § 12111(5)(A) (applicable to employers with 15 or more employees); Title VII, 42 U. S. C. § 2000e(b) (originally exempting employers with fewer than 25 employees, see *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 505, n. 2 (2006), the statute now governs employers with 15 or more employees).

The ACA's grandfathering provision, 42 U. S. C. § 18011, allows a phasing-in period for compliance with a number of the ACA's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. See 45 CFR § 147.140(g). Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby's counsel explained that the "grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like

the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing." App. in No. 13–354, pp. 39–40. Counsel acknowledged that, "just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time." *Id.*, at 40.[24] The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Foundation & Health Research & Educ. Trust, Employer Benefits 2013 Annual Survey 7, 196. In short, far from ranking as a categorical exemption, the grandfathering provision is "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F. 3d, at 1241 (Edwards, J., concurring in part and dissenting in part).

The Court ultimately acknowledges a critical point: RFRA's application "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Ante*, at 729, n. 37 (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005); emphasis added). No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. Cf. *supra*, at 745–746; *Prince* v. *Massachusetts*, 321 U. S. 158, 177 (1944) (Jackson, J., dissenting) ("[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

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After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage

[24] Hobby Lobby's *amicus* National Religious Broadcasters similarly states that, "[g]iven the nature of employers' needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the 'grandfather' exclusion is *de minimis* and transitory at best." Brief for National Religious Broadcasters in No. 13–354, p. 28.

requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well-being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets. See *supra*, at 745–746, 764.[25]

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Ante*, at 728. The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." 78 Fed. Reg. 39888. Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Con-

[25] As the Court made clear in *Cutter*, the government's license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause. 544 U. S., at 720–722. "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U. S., at 606, a "rich mosaic of religious faiths," *Town of Greece* v. *Galloway*, 572 U. S. 565, 628 (2014) (KAGAN, J., dissenting). Consequently, one person's right to free exercise must be kept in harmony with the rights of her fellow citizens, and "some religious practices [must] yield to the common good." *United States* v. *Lee*, 455 U. S. 252, 259 (1982).

gress contemplated. *Ibid.* Moreover, Title X of the Public Health Service Act, 42 U. S. C. § 300 *et seq.*, "is the nation's only dedicated source of federal funding for safety net family planning services." Brief for National Health Law Program et al. as *Amici Curiae* 23. "Safety net programs like Title X are not designed to absorb the unmet needs of . . . insured individuals." *Id.*, at 24. Note, too, that Congress declined to write into law the preferential treatment Hobby Lobby and Conestoga describe as a less restrictive alternative. See *supra*, at 744.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, see *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 303 (1985), or according women equal pay for substantially similar work, see *Dole* v. *Shenandoah Baptist Church*, 899 F. 2d 1389, 1392 (CA4 1990)? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?[26] Because the Court cannot easily answer that question, it proposes something else: extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. See *ante*, at 692–693, 698–699, 730–732. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." *Ante*, at 731. I have already discussed the "special solicitude" generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial

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[26] Cf. *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656, 666 (2004) (in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine "whether the challenged regulation is the least restrictive means among *available*, effective alternatives" (emphasis added)).

enterprises comprising employees of diverse faiths. See *supra*, at 752–755.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. "We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims." *Ante*, at 731. Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable,[27] counsel responded: "We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that." Tr. of Oral Arg. 86–87.

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. See Brief for Petitioners in No. 13–356, p. 64. A tax credit, of course, is one variety of "let the government pay." In addition to departing from the existing employer-based system of health insurance, Conestoga's alternative would require a woman to reach into her own

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[27] On brief, Hobby Lobby and Conestoga barely addressed the extension solution, which would bracket commercial enterprises with nonprofit religion-based organizations for religious accommodations purposes. The hesitation is understandable, for challenges to the adequacy of the accommodation accorded religious nonprofit organizations are currently *sub judice*. See, *e. g.*, *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 6 F. Supp. 3d 1225 (Colo. 2013), injunction pending appeal granted, 571 U. S. 1171 (2014). At another point in today's decision, the Court refuses to consider an argument neither "raised below [nor] advanced in this Court by any party," giving Hobby Lobby and Conestoga "[no] opportunity to respond to [that] novel claim." *Ante*, at 721. Yet the Court is content to decide these cases (and these cases only) on the ground that HHS could make an accommodation never suggested in the parties' presentations. RFRA cannot sensibly be read to "requir[e] the government to . . . refute each and every conceivable alternative regulation," *United States* v. *Wilgus*, 638 F. 3d 1274, 1289 (CA10 2011), especially where the alternative on which the Court seizes was not pressed by any challenger.

pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish, *i. e.*, comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States* v. *Lee*, 455 U. S. 252 (1982). Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer's share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee's religious beliefs, the burden was not unconstitutional. *Id.*, at 260–261. See also *id.*, at 258 (recognizing the important governmental interest in providing a "nationwide . . . comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees").[28] The Government urges that *Lee* should control the challenges brought by Hobby Lobby and Conestoga. See Brief for Respondents in No. 13–356, p. 18. In contrast, today's Court dismisses *Lee* as a tax case. See *ante*, at 733–734. Indeed, it was a tax case and the Court in *Lee* homed in on "[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation." 455 U. S., at 259.

But the *Lee* Court made two key points one cannot confine to tax cases. "When followers of a particular sect enter into

[28] As a sole proprietor, Lee was subject to personal liability for violating the law of general application he opposed. His claim to a religion-based exemption would have been even thinner had he conducted his business as a corporation, thus avoiding personal liability.

commercial activity as a matter of choice," the Court observed, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity." *Id.*, at 261. The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would "operat[e] to impose the employer's religious faith on the employees." *Ibid.*[29] No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door,[30] at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby

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[29] Congress amended the Social Security Act in response to *Lee*. The amended statute permits Amish sole proprietors and partnerships (but not Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes only for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U. S. C. § 3127(a)(2), (b)(1). Thus, employers with sincere religious beliefs have no right to a religion-based exemption that would deprive employees of Social Security benefits without the employee's consent—an exemption analogous to the one Hobby Lobby and Conestoga seek here.

[30] Cf. *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 299 (1985) (disallowing religion-based exemption that "would undoubtedly give [the commercial enterprise seeking the exemption] and similar organizations an advantage over their competitors").

Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, *e. g.*, *Newman* v. *Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (SC 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), aff'd in relevant part and rev'd in part on other grounds, 377 F. 2d 433 (CA4 1967), aff'd and modified on other grounds, 390 U. S. 400 (1968); *In re State ex rel. McClure*, 370 N. W. 2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), appeal dism'd, 478 U. S. 1015 (1986); *Elane Photography, LLC* v. *Willock*, 2013–NMSC–040, 309 P. 3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), cert. denied, 572 U. S. 1046 (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine . . . the plausibility of a religious claim"? *Ante*, at 724.

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus);

and vaccinations (Christian Scientists, among others)? [31] According to counsel for Hobby Lobby, "each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test." Tr. of Oral Arg. 6. Not much help there for the lower courts bound by today's decision.

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." *Ante*, at 733. But the Court has assumed, for RFRA purposes, that the interest in women's health and well-being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment.

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," *Lee*, 455 U. S., at 263, n. 2 (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." *Ibid.* The Court, I fear, has ventured into a minefield, cf. *Spencer* v. *World Vision, Inc.*, 633 F. 3d

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[31] Religious objections to immunization programs are not hypothetical. See *Phillips* v. *New York*, 27 F. Supp. 3d 310 (EDNY 2014) (dismissing free exercise challenges to New York's vaccination practices); Liberty Counsel, Compulsory Vaccinations Threaten Religious Freedom (2007), available at http://www.lc.org/media/9980/attachments/memo_vaccination.pdf.

723, 730 (CA9 2011) (O'Scannlain, J., concurring), by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engage[d] primarily in carrying out that religious purpose," and not "engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts." See *id.*, at 748 (Kleinfeld, J., concurring).

* * *

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

JUSTICE BREYER and JUSTICE KAGAN, dissenting.

We agree with JUSTICE GINSBURG that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III–C–1 of JUSTICE GINSBURG's dissenting opinion.

WILLIAMS *v.* JOHNSON, ACTING WARDEN

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

No. 13–9085. Decided July 1, 2014

Certiorari granted; 720 F. 3d 1212, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for consideration of petitioner's Sixth Amendment claim under the standard set forth in 28 U. S. C. § 2254(d).

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 773 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 9 THROUGH
OCTOBER 2, 2014

JUNE 9, 2014

Dismissal Under Rule 46

No. 13–448. PICARD *v.* JPMORGAN CHASE & CO. ET AL. C. A. 2d Cir. Certiorari dismissed as to respondent JPMorgan Chase & Co. under this Court's Rule 46.1. Reported below: 721 F. 3d 54.

Certiorari Dismissed

No. 13–9573. HARPER *v.* TEXAS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–9818. WARD *v.* MICHIGAN PAROLE BOARD. Sup. Ct. Mich. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 13A1177. BP EXPLORATION & PRODUCTION INC. ET AL. *v.* LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL. C. A. 5th Cir. Application to recall and stay the mandate, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. D–2775. IN RE DISCIPLINE OF RICE. Kenneth Bromley Rice, of Kennewick, Wash., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2776. IN RE DISCIPLINE OF BELK. William I. Belk, of Charlotte, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2777. IN RE DISCIPLINE OF NOSAL. Chester W. Nosal, of Palm Beach Gardens, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2778. IN RE DISCIPLINE OF COOK. Robert M. Cook, of Yuma, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2779. IN RE DISCIPLINE OF NUSBAUM. Harvey Malcolm Nusbaum, of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2780. IN RE DISCIPLINE OF KAHL. Jeffrey David Kahl, of Nottingham, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2781. IN RE DISCIPLINE OF BERRY. Steven Gene Berry, of Bethesda, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 13M128. ALI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 13M129. LAFONTAINE *v.* IOWA FALLS POLICE DEPARTMENT. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 126, Orig. KANSAS *v.* NEBRASKA ET AL. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein see, *e. g.*, 571 U. S. 1122.]

No. 13–8636. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [572 U. S. 1057] denied.

No. 13–8709. Beach-Mathura *v.* Miami-Dade County Public Schools et al. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [572 U. S. 1059] denied.

No. 13–8752. Ellis *v.* Benedetti et al. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [572 U. S. 1057] denied.

No. 13–8832. Sulieman *v.* Fisher. Ct. App. Mich. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [572 U. S. 1086] denied.

No. 13–9477. Love *v.* Midfirst Bank. Super. Ct. N. J., App. Div.;

No. 13–9487. Scott *v.* UPS Supply Chain Solutions. C. A. 3d Cir.;

No. 13–9507. Collie *v.* South Carolina Commission on Lawyer Conduct. Sup. Ct. S. C.;

No. 13–9516. Herriott *v.* Herriott. Ct. App. Cal., 2d App. Dist.; and

No. 13–9708. Simmons *v.* Austin. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 30, 2014, 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. 13–10089. In re Miller. Petition for writ of habeas corpus denied.

No. 13–1303. In re Maxwell; and

No. 13–9592. In re Balele. Petitions for writs of mandamus denied.

Certiorari Denied

No. 12–960. Akamai Technologies, Inc., et al. *v.* Limelight Networks, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 692 F. 3d 1301.

No. 13–637. Derr *v.* Maryland. Ct. App. Md. Certiorari denied. Reported below: 434 Md. 88, 73 A. 3d 254.

No. 13–644. Cooper *v.* Maryland. Ct. App. Md. Certiorari denied. Reported below: 434 Md. 209, 73 A. 3d 1108.

No. 13–856. SONIC-CALABASAS A, INC. *v.* MORENO. Sup. Ct. Cal. Certiorari denied. Reported below: 57 Cal. 4th 1109, 311 P. 3d 184.

No. 13–906. MAHONEY, ADMINISTRATIVE LAW JUDGE, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT *v.* DONOVAN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 721 F. 3d 633.

No. 13–1037. WFC HOLDINGS CORP. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 3d 736.

No. 13–1038. CUNNINGHAM *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 622 Pa. 543, 81 A. 3d 1.

No. 13–1045. PUBLISHERS BUSINESS SERVICES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 555.

No. 13–1051. ACCENTURE, L. L. P. *v.* WELLOGIX, INC. C. A. 5th Cir. Certiorari denied. Reported below: 716 F. 3d 867.

No. 13–1082. JOHNSON *v.* CITY OF MURRAY, UTAH, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 801.

No. 13–1147. HUDACK ET AL. *v.* SIGGARD; and
No. 13–1209. HUDACK ET AL. *v.* SIGGARD ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 13–1180. PHILIP MORRIS USA INC. *v.* BARBANELL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BARBANELL, DECEASED. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 100 So. 3d 152.

No. 13–1185. LORILLARD TOBACCO CO. *v.* MROZEK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MILLER. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 106 So. 3d 479.

No. 13–1186. R. J. REYNOLDS TOBACCO CO. *v.* MACK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MACK. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 134 So. 3d 956.

No. 13–1188. R. J. Reynolds Tobacco Co. *v.* Kirkland. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 136 So. 3d 604.

No. 13–1189. R. J. Reynolds Tobacco Co. *v.* Koballa. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 99 So. 3d 630.

No. 13–1190. R. J. Reynolds Tobacco Co. *v.* Smith, as Personal Representative of the Estate of Smith. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 131 So. 3d 18.

No. 13–1191. R. J. Reynolds Tobacco Co. *v.* Townsend, as Personal Representative for the Estate of Townsend. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 118 So. 3d 844.

No. 13–1192. R. J. Reynolds Tobacco Co. et al. *v.* Sury, as Personal Representative of the Estate of Sury. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 118 So. 3d 849.

No. 13–1197. Germalic *v.* Ysursa, Idaho Secretary of State. C. A. 9th Cir. Certiorari denied.

No. 13–1200. Watkins et al. *v.* Kajima International, Inc., et al. C. A. 6th Cir. Certiorari denied.

No. 13–1203. Singh *v.* Carnival Corp. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 683.

No. 13–1205. Korber et al. *v.* Federal Republic of Germany et al. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 3d 1009.

No. 13–1208. Patel et al. *v.* Wells Fargo Bank et al. C. A. 9th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 777.

No. 13–1210. DiFrancesco *v.* McSwain et al. Super. Ct. Pa. Certiorari denied. Reported below: 69 A. 3d 1285.

No. 13–1217. Yang Kong *v.* Holder, Attorney General. C. A. 2d Cir. Certiorari denied. Reported below: 543 Fed. Appx. 64.

No. 13–1220. BRANNAN *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 901.

No. 13–1223. SOUTHERN REHABILITATION GROUP, PLLC, ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 3d 670.

No. 13–1224. NIGG ET AL. *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 766.

No. 13–1230. SELIG *v.* FEDERAL AVIATION ADMINISTRATION. C. A. 3d Cir. Certiorari denied.

No. 13–1233. A. S. U. I. HEALTHCARE AND DEVELOPMENT CENTER ET AL. *v.* CHAPMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 562 Fed. Appx. 182.

No. 13–1237. WALCZAK *v.* CHICAGO BOARD OF EDUCATION. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 3d 1013.

No. 13–1250. BENDALL ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–1276. ABU-SHAWISH *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 576.

No. 13–1310. NATH *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–1312. BACA *v.* RODRIGUEZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 676.

No. 13–1321. DOYLE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 149 So. 3d 30.

No. 13–1322. RUPERT *v.* BOND; and
No. 13–1328. RUPERT *v.* BOND ET AL. Ct. App. Ore. Certiorari denied. Reported below: 258 Ore. App. 534, 311 P. 3d 527.

No. 13–1329. HASKINS *v.* NICHOLSON, FORMER SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 960.

No. 13–1340. RE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 3d 1121.

No. 13–1350. GALDERMA LABORATORIES, L. P., ET AL. *v.* TOLMAR, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 737 F. 3d 731.

No. 13–1360. FERGUSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–8045. FREEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 60 A. 3d 434.

No. 13–8553. ROCKWELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 13–8804. ELLIS *v.* GIBSON, ACTING SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 528 Fed. Appx. 1001.

No. 13–8905. BLAKELY *v.* WARDS ET AL. C. A. 4th Cir. Certiorari denied.

No. 13–8980. HOLMES *v.* TENDERLOIN HOUSING CLINIC, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 526 Fed. Appx. 749.

No. 13–9130. PADILLA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 622 Pa. 449, 80 A. 3d 1238.

No. 13–9478. BRYANT *v.* GIPSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9481. BUTLER *v.* AMERICAN FOODS GROUP, LLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 725.

No. 13–9496. N. W. *v.* MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES. Sup. Ct. Mont. Certiorari denied. Reported below: 373 Mont. 421, 318 P. 3d 691.

No. 13–9500. KURTZ *v.* JEANES, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 927.

No. 13–9503. COPES *v.* CLEM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 168.

No. 13–9506. SUAREZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 13–9508. WILLIAMS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 13–9509. WEBSTER *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 532 Fed. Appx. 824.

No. 13–9512. HENRY *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 3d 1073.

No. 13–9527. TAYLOR *v.* VISINSKY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 534 Fed. Appx. 110.

No. 13–9528. WAUGH *v.* ANHEUSER-BUSCH INBEV ET AL. C. A. D. C. Cir. Certiorari denied.

No. 13–9532. SMART *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–9536. SHEPPARD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 3. Certiorari denied.

No. 13–9537. COLLIER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 3d 429, 5 N. E. 3d 5.

No. 13–9539. MBUGUA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9546. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 24 So. 3d 671.

No. 13–9554. DENHOF *v.* MICHIGAN; and DENHOF *v.* BULLER. Ct. App. Mich. Certiorari denied.

No. 13–9555. ECKARDT *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 657.

No. 13–9556. GRANT *v.* TRAMMELL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 727 F. 3d 1006.

No. 13–9575. MCELVAIN *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 13–9576. CHAO HO LIN ET AL. *v.* CHI CHU WU. C. A. 10th Cir. Certiorari denied.

No. 13–9591. BURTON *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 451.

No. 13–9644. BROWN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 416 S. W. 3d 302.

No. 13–9670. LINEHAN *v.* JESSON, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN SERVICES. Ct. App. Minn. Certiorari denied.

No. 13–9671. LOTT *v.* KMART CORP. C. A. 6th Cir. Certiorari denied.

No. 13–9707. MASSEY, AKA BALL *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 131 So. 3d 1213.

No. 13–9726. JACKSON *v.* TRACY, ACTING CHIEF ADMINISTRATOR, GILA RIVER INDIAN COMMUNITY DEPARTMENT OF REHABILITATION AND SUPERVISION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 643.

No. 13–9742. WADDLETON *v.* JACKSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 255.

No. 13–9760. BELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 13–9764. MORRIS *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied. Reported below: 739 F. 3d 740.

No. 13–9814. SIMS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 134 So. 3d 300.

No. 13–9815. KLEIN *v.* OHIO. Ct. App. Ohio, 3d App. Dist., Union County. Certiorari denied. Reported below: 2013-Ohio-2387.

No. 13–9826. LYONS *v.* STODDARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9855. BRASCOM *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 13–9875. JONES *v.* OHIO. Ct. App. Ohio, 12th App. Dist., Butler County. Certiorari denied. Reported below: 2013-Ohio-654.

No. 13–9898. ALFRED *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9902. PARODY *v.* BROWN, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 294 Ga. 240, 751 S. E. 2d 793.

No. 13–9906. AYELE *v.* EDUCATIONAL CREDIT MANAGEMENT CORP. C. A. 1st Cir. Certiorari denied.

No. 13–9917. BATES *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 13–9945. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–9948. SHERIFI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 3d 104.

No. 13–9964. BROWN *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 563 Fed. Appx. 821.

No. 13–9974. GIPSON *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 549 Fed. Appx. 979.

No. 13–10015. JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 913.

No. 13–10017. GLOVER *v.* FOX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 592.

No. 13–10022. CRUZ-RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–10027. ADAMS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 3d 40.

No. 13–10033. STALLWORTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–10052. SERRATO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 742 F. 3d 461.

No. 13–10053. MUSGROVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 199.

No. 13–10054. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 521.

No. 13–10056. ANCONA *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 142 Conn. App. 907, 64 A. 3d 1290.

No. 13–10057. BOZA-SEAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 755.

No. 13–10058. ASKEW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–10062. PETERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 3d 93.

No. 13–10063. MONTALVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 761.

No. 13–10065. MANASSE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–10071. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 345.

No. 13–10075. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 13–10077. CAMPBELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 439 S. W. 3d 925.

No. 13–10087. MUHAMMAD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 747 F. 3d 1234.

No. 13–10088. NORRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–10091. POOLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–10096. ROYBAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 3d 621.

No. 13–10099. JIMENEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–10102. PAXSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 301.

No. 13–10106. RIVAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 895.

No. 13–10108. LYONS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 3d 702.

No. 13–10113. VALDES-VEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 3d 1074.

No. 13–10114. CORREA-HUERTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 376.

No. 13–10119. SPEIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 554 Fed. Appx. 119.

No. 13–10133. WEIDENBURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 298.

No. 13–10134. BAKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–10137. CHAIREZ-OLLARZABAL *v.* UNITED STATES (Reported below: 556 Fed. Appx. 329); and MEDRANO-SANCHEZ *v.* UNITED STATES (556 Fed. Appx. 333). C. A. 5th Cir. Certiorari denied.

No. 13–10140. WILKENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 742 F. 3d 354.

No. 13–130. THURBER *v.* AETNA LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 712 F. 3d 654.

No. 13–1056. BROWN, GOVERNOR OF CALIFORNIA, ET AL. *v.* ARMSTRONG ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 732 F. 3d 955.

No. 13–1187. R. J. REYNOLDS TOBACCO CO. *v.* BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BROWN, DECEASED. Dist. Ct. App. Fla., 4th Dist. Motion of Washington Legal Foun-

dation for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 70 So. 3d 707.

No. 13–1193. R. J. Reynolds Tobacco Co. *v.* Walker, as Personal Representative of the Estate of Walker, et al. C. A. 11th Cir. Motion of Washington Legal Foundation for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 734 F. 3d 1278.

No. 13–6892. Tagoe, aka Roberts *v.* District of Columbia Department of Employment Services et al. Ct. App. D. C. Motion of petitioner to add additional question to petition for writ of certiorari denied. Certiorari denied. Reported below: 62 A. 3d 1283.

Rehearing Denied

No. 13–8052. Jackson *v.* United States, 571 U. S. 1219;

No. 13–8107. McFadden *v.* Smith et al., 572 U. S. 1004;

No. 13–8301. Blank *v.* Tabera et al., 572 U. S. 1005;

No. 13–8487. Stephenson *v.* John Smith Enterprises, dba McDonald's Corp., 572 U. S. 1023;

No. 13–8587. Cabrera *v.* Department of Justice et al., 572 U. S. 1038;

No. 13–8730. Simpson *v.* Hamilton County Board of Commissioners et al., 572 U. S. 1067;

No. 13–8806. Delarm *v.* California, 572 U. S. 1050;

No. 13–8828. Davis *v.* Cavazos, Warden, et al., 572 U. S. 1068;

No. 13–8846. Prince *v.* Chow, Chapter 7 Trustee, 572 U. S. 1068;

No. 13–9031. Daniels *v.* Jarvis, Warden, 572 U. S. 1052;

No. 13–9135. Caldwell *v.* Phelps, Warden, et al., 572 U. S. 1072; and

No. 13–9154. Yandal *v.* United States, 572 U. S. 1073. Petitions for rehearing denied.

No. 12–1255. Desposito *v.* United States, 569 U. S. 995. Motion for leave to file petition for rehearing denied.

No. 13–960. In re Taylor, 572 U. S. 1059. Petition for rehearing denied. Justice Alito took no part in the consideration or decision of this petition.

June 16, 2014

Dismissal Under Rule 46

No. 13–10171. Bucklew *v.* Lombardi, Director, Missouri Department of Corrections. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.

Certiorari Granted—Vacated and Remanded

No. 13–576. Nomura Home Equity Loan, Inc., et al. *v.* National Credit Union Administration Board, as Liquidating Agent of U. S. Central Federal Credit Union et al. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *CTS Corp.* v. *Waldburger*, *ante*, p. 1. Reported below: 727 F. 3d 1246.

Certiorari Dismissed

No. 13–9604. Nixon *v.* United States District Court for the Northern District of Texas. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–9816. Jones *v.* United States Postal Service. 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*). Reported below: 554 Fed. Appx. 333.

Miscellaneous Orders

No. D–2759. In re Disbarment of Malinski. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. D–2760. In re Disbarment of Daly. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. D–2761. In re Disbarment of Cormier. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. D–2763. In re Disbarment of Craft. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. D–2764. In re Disbarment of Ahaghotu. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. D–2765. In re Disbarment of Edelson. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. D–2766. In re Disbarment of Smiekel. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. D–2767. In re Disbarment of Wittner. Disbarment entered. [For earlier order herein, see 571 U. S. 1193.]

No. D–2769. In re Disbarment of Simon. Disbarment entered. [For earlier order herein, see 572 U. S. 1013.]

No. 13M130. Rodriguez *v.* Colorado. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 13–817. Kellogg Brown & Root Services, Inc. *v.* Harris, Co-Administratrix of the Estate of Maseth, Deceased, et al. C. A. 3d Cir.; and

No. 13–1241. KBR, Inc., et al. *v.* Metzgar et al. C. A. 4th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 13–9254. Riley *v.* Delaware. Sup. Ct. Del. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [572 U. S. 1085] denied.

No. 13–9969. Wagner *v.* Illinois Labor Relations Board et al. App. Ct. Ill., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 7, 2014, 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. 13–10236. In re Prater; and

No. 13–10258. In re Green. Petitions for writs of habeas corpus denied.

No. 13–9621. In re Fish. Petition for writ of mandamus denied.

No. 13–10124. IN RE JONES. Petition for writ of prohibition denied.

Certiorari Granted

No. 13–983. ELONIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U. S. C. § 875(c) requires proof of the defendant's subjective intent to threaten." Reported below: 730 F. 3d 321.

No. 13–1041. PEREZ, SECRETARY OF LABOR, ET AL. *v.* MORTGAGE BANKERS ASSN. ET AL.; and

No. 13–1052. NICKOLS ET AL. *v.* MORTGAGE BANKERS ASSN. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 720 F. 3d 966.

Certiorari Denied

No. 13–897. BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL INSTITUTION *v.* SHAW. C. A. 7th Cir. Certiorari denied. Reported below: 721 F. 3d 908.

No. 13–936. SWIFT TRANSPORTATION CO., INC., ET AL. *v.* VAN DUSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 724.

No. 13–947. CARET ET AL. *v.* UNIVERSITY OF UTAH. C. A. Fed. Cir. Certiorari denied. Reported below: 734 F. 3d 1315.

No. 13–950. PERI & SONS FARMS, INC. *v.* RIVERA RIVERA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 3d 892.

No. 13–1001. RAJARATNAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 719 F. 3d 139.

No. 13–1091. GARDA CL NORTHWEST, INC. *v.* HILL ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 179 Wash. 2d 47, 308 P. 3d 635.

No. 13–1222. BARAKAT *v.* BOARD ON PROFESSIONAL RESPONSIBILITY. Sup. Ct. Del. Certiorari denied. Reported below: 99 A. 3d 639.

No. 13–1225. GRANDOIT *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 13–1231. AMERICAN COMMERCIAL LINES LLC *v.* LAURIN MARITIME AB ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 228.

No. 13–1258. TURNER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF TURNER *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 736 F. 3d 274.

No. 13–1289. C. O. P. COAL DEVELOPMENT CO. *v.* JUBBER, TRUSTEE, ET AL.; and

No. 13–1292. ANR CO., INC., ET AL. *v.* JUBBER, TRUSTEE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 740 F. 3d 548.

No. 13–1293. SPRINKLE *v.* GIBSON, ACTING SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 733 F. 3d 1180.

No. 13–1295. LAHAINA FASHIONS, INC. *v.* BANK OF HAWAII ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 131 Haw. 437, 319 P. 3d 356.

No. 13–1325. CHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 898.

No. 13–1326. YEAGER *v.* AVIAT AIRCRAFT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 730.

No. 13–1331. MICHELOTTI *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 557 Fed. Appx. 956.

No. 13–1336. ARNAUTA *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 125 So. 3d 1028.

No. 13–1338. AMERICAN PETROLEUM & TRANSPORT, INC. *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 3d 185.

No. 13–1347. BEACH *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2013 IL App (3d) 120949–U.

No. 13–1355. PIPPEN *v.* NBC UNIVERSAL MEDIA, LLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 3d 610.

No. 13–1357. FERNANDEZ DE IGLESIAS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 552 Fed. Appx. 973.

No. 13–1364. SHENEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 722.

No. 13–8226. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 516 Fed. Appx. 113.

No. 13–8245. QUICHOCHO *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 13–8346. WILLIAMSON *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 13–8801. HUNG XUAN DONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 323.

No. 13–8900. COOK *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 528 Fed. Appx. 633.

No. 13–8923. JEFFERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 730 F. 3d 537.

No. 13–9150. PEREZ-MEJIA *v.* UNITED STATES (Reported below: 549 Fed. Appx. 305); and CRISPIN, AKA CRISPIN-MORONES *v.* UNITED STATES (555 Fed. Appx. 468). C. A. 5th Cir. Certiorari denied.

No. 13–9151. PREYOR *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 412.

No. 13–9281. GEORGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9568. GILBERT *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 13–9583. FOSTER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 294 Ga. 400, 754 S. E. 2d 78.

No. 13–9584. WRIGHT *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 133 So. 3d 529.

No. 13–9586. WASHINGTON *v.* DENNEY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 13–9596. JOHNSON *v.* CONNOLLY, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 13–9598. KALLUVILAYILL *v.* TEXAS BOARD MEMBERS OF PARDONS AND PAROLES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 282.

No. 13–9612. RICHARDS *v.* MITCHEFF ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 572.

No. 13–9613. JOHNSON *v.* TRAMMELL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 92.

No. 13–9615. MCCLUSKEY *v.* COMMISSIONER OF NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–9617. CASTERLINE *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9618. RODRIGUEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 741 F. 3d 179.

No. 13–9622. PRIETO *v.* PEARSON, WARDEN. Sup. Ct. Va. Certiorari denied. Reported below: 286 Va. 99, 748 S. E. 2d 94.

No. 13–9631. GULBRANDSON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 3d 976.

No. 13–9634. MACK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 175 Wash. App. 1060.

No. 13–9635. GUZMAN *v.* LONG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 560 Fed. Appx. 686.

No. 13–9642. RICHARDSON *v.* SANTIAGO, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9648. SHAREEF *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 13–9654. LaBranche *v.* Becnel, Individually and in Her Capacity as Louisiana 40th Judicial District Judge of St. John the Baptist Parish. C. A. 5th Cir. Certiorari denied. Reported below: 559 Fed. Appx. 290.

No. 13–9659. Alexander *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 2013 WI App 73, 348 Wis. 2d 263, 831 N. W. 2d 824.

No. 13–9667. Corbin *v.* Lamas. Sup. Ct. Pa. Certiorari denied.

No. 13–9677. Burks *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 13–9680. Evans *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 111921–U.

No. 13–9809. Holmes *v.* Roberts et al. C. A. 9th Cir. Certiorari denied.

No. 13–9813. Hamilton *v.* Missouri. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 412 S. W. 3d 333.

No. 13–9830. Brown *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 289.

No. 13–9831. Orozco *v.* McDonald, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 13–9868. Jin Zhao *v.* Warnock. C. A. 2d Cir. Certiorari denied. Reported below: 551 Fed. Appx. 18.

No. 13–9907. Adkins *v.* Dingus, Warden. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 232 W. Va. 677, 753 S. E. 2d 634.

No. 13–9943. Crosby *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 132 So. 3d 232.

No. 13–9960. Jordan *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 130 So. 3d 276.

No. 13–9970. D. H. *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–10013. JOHNSON *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 13–10021. COLLINS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–10040. MANTZ *v.* U. S. BANK N. A. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 13–10064. PHILBERT *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 556 Fed. Appx. 952.

No. 13–10093. CAMPBELL *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 567 Fed. Appx. 287.

No. 13–10117. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 Fed. Appx. 260.

No. 13–10118. WEISCHEDEL *v.* TEWS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–10122. ALEBORD *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 467 Mass. 106, 4 N. E. 3d 248.

No. 13–10126. BLAKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 3d 870.

No. 13–10129. ONTIVEROS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 624.

No. 13–10132. WARNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–10136. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 518.

No. 13–10141. MANLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 560 Fed. Appx. 434.

No. 13–10147. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 197.

No. 13–10153. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 Fed. Appx. 542.

No. 13–10154. ALVAREZ-ALDANA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 225.

No. 13–10155. COPRICH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 3d 322.

No. 13–10157. MARSHALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 3d 492.

No. 13–10166. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 181.

No. 13–10167. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–755. ELMBROOK SCHOOL DISTRICT *v.* DOE, A MINOR, BY DOE'S NEXT BEST FRIEND DOE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 687 F. 3d 840.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Some there are—many, perhaps—who are offended by public displays of religion. Religion, they believe, is a personal matter; if it must be given external manifestation, that should not occur in public places where others may be offended. I can understand that attitude: It parallels my own toward the playing in public of rock music or Stravinsky. And I too am especially annoyed when the intrusion upon my inner peace occurs while I am part of a captive audience, as on a municipal bus or in the waiting room of a public agency.

My own aversion cannot be imposed by law because of the First Amendment. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 790 (1989); *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 210–211 (1975). Certain of this Court's cases, however, have allowed the aversion to religious displays to be enforced directly *through* the First Amendment, at least in public facilities and with respect to public ceremonies—this despite the fact that the First Amendment explicitly favors religion and is, so to speak, agnostic about music.

In the decision below, the en banc Court of Appeals for the Seventh Circuit relied on those cases to condemn a suburban Milwaukee school district's decision to hold high-school gradua-

tions in a church. We recently confronted and curtailed this errant line of precedent in *Town of Greece* v. *Galloway*, 572 U. S. 565 (2014), which upheld under the Establishment Clause the saying of prayers before monthly town-council meetings. Because that case made clear a number of points with which the Seventh Circuit's decision is fundamentally inconsistent, the Court ought, at a minimum, to grant certiorari, vacate the judgment, and remand for reconsideration (GVR).

Endorsement

First, *Town of Greece* abandoned the antiquated "endorsement test," which formed the basis for the decision below.

In this case, at the request of the student bodies of the two relevant schools, the Elmbrook School District decided to hold its high-school graduation ceremonies at Elmbrook Church, a nondenominational Christian house of worship. The students of the first school to move its ceremonies preferred that site to what had been the usual venue, the school's gymnasium, which was cramped, hot, and uncomfortable. The church offered more space, air conditioning, and cushioned seating. No one disputes that the church was chosen only because of these amenities.

Despite that, the Seventh Circuit held that the choice of venue violated the Establishment Clause, primarily because it failed the endorsement test. That infinitely malleable standard asks whether governmental action has the purpose or effect of "endorsing" religion. See *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989). The Seventh Circuit declared that the endorsement test remains part of "the prevailing analytical tool for the analysis of Establishment Clause claims." 687 F. 3d 840, 849 (2012) (internal quotation marks omitted).* And here, "the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state." *Id.*, at 853.

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*More precisely, the court stated that "[t]he three-pronged test set forth by the Supreme Court in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), remains the prevailing analytical tool for the analysis of Establishment Clause claims." 687 F. 3d, at 849 (internal quotation marks and citations omitted). It then explained that the endorsement test has become "a legitimate part of *Lemon*'s second prong." *Id.*, at 850.

In *Town of Greece*, the Second Circuit had also relied on the notion of endorsement. See 681 F. 3d 20, 30 (2012). We reversed the judgment without applying that test. What is more, we strongly suggested approval of a previous opinion "disput[ing] that endorsement could be the proper [Establishment Clause] test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the 'forthrightly religious' Thanksgiving proclamations issued by nearly every President since Washington." 572 U. S., at 579–580 (describing *County of Allegheny*, *supra*, at 670–671 (KENNEDY, J., concurring in judgment in part and dissenting in part)). After *Town of Greece*, the Seventh Circuit's declaration—which controlled its subsequent analysis—that the endorsement test remains part of "the prevailing analytical tool" for assessing Establishment Clause challenges, 687 F. 3d, at 849 (internal quotation marks omitted), misstates the law.

Coercion

Second, *Town of Greece* made categorically clear that mere "[o]ffense . . . does not equate to coercion" in any manner relevant to the proper Establishment Clause analysis. 572 U. S., at 589 (opinion of KENNEDY, J.). "[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views." *Ibid.* See also *id.*, at 610 (THOMAS, J., concurring in part and concurring in judgment) (same).

Here, the Seventh Circuit held that the school district's "decision to use Elmbrook Church for graduations was religiously coercive" under *Lee* v. *Weisman*, 505 U. S. 577 (1992), and *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290 (2000). 687 F. 3d, at 854. *Lee* and *Santa Fe*, however, are inapposite because they concluded (however unrealistically) that students were coerced to engage in school-sponsored prayer. In this case, it is beyond dispute that no religious exercise whatever occurred. At most, respondents complain that they took offense at being in a religious place. See 687 F. 3d, at 848 (plaintiffs asserted that they "'felt uncomfortable, upset, offended, unwelcome, and/or angry' because of the religious setting" of the graduations). Were there any question before, *Town of Greece* made obvious that this is insufficient to state an Establishment Clause violation.

It bears emphasis that the original understanding of the kind of coercion that the Establishment Clause condemns was far narrower than the sort of peer-pressure coercion that this Court has recently held unconstitutional in cases like *Lee* and *Santa Fe*. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee*, *supra*, at 640 (SCALIA, J., dissenting). See also *Town of Greece*, *supra*, at 608–610 (opinion of THOMAS, J.).

As the Supreme Court of Wisconsin explained in a 1916 case challenging the siting of public high-school graduations in local churches:

> "A man may feel constrained to enter a house of worship belonging to a different sect from the one with which he affiliates, but if no sectarian services are carried on, he is not compelled to worship God contrary to the dictates of his conscience, and is not obliged to do so at all." *State ex rel. Conway* v. *District Board of Joint School Dist. No. 6*, 162 Wis. 482, 490, 156 N. W. 477, 480.

History

Last but by no means least, *Town of Greece* left no doubt that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 572 U. S., at 576. Moreover, "if there is any inconsistency between [a 'test' set out in the opinions of this Court] and . . . historic practice . . . , the inconsistency calls into question the validity of the test, not the historic practice." *Id.*, at 603 (ALITO, J., concurring).

In this case, however, the Seventh Circuit's majority opinion said nothing about history at all. And there is good reason to believe that this omission was material. As demonstrated by *Conway*, the Wisconsin case mentioned above, public schools have long held graduations in churches. This should come as no surprise, given that "[e]arly public schools were often held in rented rooms, church halls and basements, or other buildings that resembled Protestant churches." W. Reese, America's Public Schools 39 (2005). An 1821 Illinois law, for example, provided that a meetinghouse erected by a Presbyterian congregation "may serve to have the gospel preached therein, and likewise may be used for a school-house for the township." Ill. Laws p. 153.

We ought to remand this case to the Seventh Circuit to conduct the historical inquiry mandated by *Town of Greece*—or we ought to set the case for argument and conduct that inquiry ourselves.

* * *

It is perhaps the job of school officials to prevent hurt feelings at school events. But that is decidedly not the job of the Constitution. It may well be, as then-Chief Judge Easterbrook suggested, that the decision of the Elmbrook School District to hold graduations under a Latin cross in a Christian church was "unwise" and "offensive." 687 F. 3d, at 869 (dissenting opinion). But *Town of Greece* makes manifest that an establishment of religion it was not.

In addition to being decided incorrectly, this case bears other indicia of what we have come to call "certworthiness." The Seventh Circuit's decision was en banc and prompted three powerful dissents (by then-Chief Judge Easterbrook and Judges Posner and Ripple). And it conflicts with decisions that have long allowed graduation ceremonies to take place in churches, see, *e. g.*, *Miller* v. *Cooper*, 56 N. M. 355, 356–357, 244 P. 2d 520, 520–521 (1952); *Conway*, 162 Wis., at 489–493, 156 N. W., at 479–481, and with decisions upholding other public uses of religious spaces, see, *e. g.*, *Bauchman* v. *West High School*, 132 F. 3d 542, 553–556 (CA10 1997) (sanctioning school-choir performances in venues "dominated by crosses and other religious images"); *Otero* v. *State Election Bd. of Okla.*, 975 F. 2d 738, 740–741 (CA10 1992) (upholding the use of a church as a polling station); *Berman* v. *Board of Elections*, 19 N. Y. 2d 744, 745, 226 N. E. 2d 177 (1967) (same).

According to the prevailing standard, a GVR order is potentially appropriate where "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) (*per curiam*). The Court has found that standard satisfied on numerous occasions where judgments were far less obviously undermined by a subsequent decision of ours.

For these reasons, we should either grant the petition and set the case for argument or GVR in light of *Town of Greece*. I respectfully dissent from the denial of certiorari.

No. 13–990. REPUBLIC OF ARGENTINA *v.* NML CAPITAL, LTD., ET AL.; and

No. 13–991. EXCHANGE BONDHOLDER GROUP *v.* NML CAPITAL, LTD., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions. Reported below: 727 F. 3d 230.

Rehearing Denied

No. 12–794. WHITE, WARDEN *v.* WOODALL, 572 U. S. 415;

No. 13–926. LUTFI *v.* UNITED STATES, 572 U. S. 1035;

No. 13–985. THOMASON *v.* MADISON REAL PROPERTY, LLC, 572 U. S. 1087;

No. 13–987. THOMASON *v.* BAGLEY ET AL., 572 U. S. 1061;

No. 13–1130. HEADIFEN *v.* HARKER, 572 U. S. 1089;

No. 13–8033. MATTHEWS *v.* UNITED STATES, 571 U. S. 1219;

No. 13–8638. MANEY *v.* NEELY, SUPERINTENDENT, PIEDMONT CORRECTIONAL INSTITUTION, 572 U. S. 1065;

No. 13–8679. DRIESSEN *v.* HOME LOAN STATE BANK, 572 U. S. 1067;

No. 13–8713. ROSS *v.* SCHWARZENEGGER, FORMER GOVERNOR OF CALIFORNIA, ET AL., 572 U. S. 1067;

No. 13–8951. RILEY *v.* UNITED STATES, 572 U. S. 1041;

No. 13–9004. TOOLE *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL., 572 U. S. 1092;

No. 13–9018. CURTIS *v.* UNITED STATES, 572 U. S. 1051; and

No. 13–9039. KIDD *v.* UNITED STATES, 572 U. S. 1052. Petitions for rehearing denied.

JUNE 17, 2014

Miscellaneous Orders

No. 13A1231. WINFIELD *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. 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. JUSTICE SOTOMAYOR would grant the application for stay of execution.

No. 13A1251. WELLONS *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. Super. Ct. Fulton 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

No. 13–10340 (13A1193). WINFIELD *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 13–10341 (13A1194). WINFIELD *v.* STEELE, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 13–10589 (13A1249). WINFIELD *v.* STEELE, WARDEN, ET AL. 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. Reported below: 755 F. 3d 629.

No. 13–10590 (13A1250). WELLONS *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 754 F. 3d 1260.

No. 13–10591 (13A1252). WELLONS *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 754 F. 3d 1268.

JUNE 18, 2014

Certiorari Denied

No. 13–10608 (13A1255). HENRY *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 141 So. 3d 557.

JUNE 23, 2014

Certiorari Granted—Vacated and Remanded

No. 13–1066. COAST CANDIDATES PAC ET AL. *v.* OHIO ELECTIONS COMMISSION ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration

in light of *Susan B. Anthony List* v. *Driehaus*, *ante*, p. 149. Reported below: 543 Fed. Appx. 490.

No. 13–9750. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Paroline* v. *United States*, 572 U. S. 434 (2014). Reported below: 540 Fed. Appx. 465.

Certiorari Dismissed

No. 13–9695. POLLY *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. 13–9734. YOUNGBLOOD *v.* KIM. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–10194. ZUNIGA-HERNANDEZ *v.* CHILDRESS, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 548 Fed. Appx. 147.

Miscellaneous Orders

No. D–2762. IN RE DISBARMENT OF YARBROUGH. Disbarment entered. [For earlier order herein, see 571 U. S. 1192.]

No. 13M131. OWENS *v.* MCLAUGHLIN, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 13M132. ROSS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSS *v.* STOOKSBURY. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 13–8590. NIXON *v.* ABBOTT, ATTORNEY GENERAL OF TEXAS, ET AL. Ct. App. Tex., 5th Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [572 U. S. 1056] denied.

No. 13–8591. NIXON *v.* GOLDMAN SACHS MORTGAGE CORP. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [572 U. S. 1057] denied.

No. 13–10121. DeNigris *v.* New York City Health & Hospitals Corp. et al. C. A. 2d Cir.;

No. 13–10177. Ferguson *v.* Gibson, Acting Secretary of Veterans Affairs. C. A. 10th Cir.; and

No. 13–10188. In re Hartman. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 14, 2014, 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. 13–10269. In re Burks; and

No. 13–10305. In re Scott. Petitions for writs of habeas corpus denied.

No. 13–9474. In re Esparza;

No. 13–9729. In re Singh; and

No. 13–10172. In re Sherrill. Petitions for writs of mandamus denied.

No. 13–10271. In re Brown. Petition for writ of mandamus denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 13–9778. In re Koch;

No. 13–9862. In re LaCroix; and

No. 13–10216. In re Mason. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 13–1080. Department of Transportation et al. *v.* Association of American Railroads. C. A. D. C. Cir. Certiorari granted. Reported below: 721 F. 3d 666.

No. 13–1211. Hana Financial, Inc. *v.* Hana Bank et al. C. A. 9th Cir. Certiorari granted. Reported below: 735 F. 3d 1158.

No. 13–9026. Whitfield *v.* United States. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 548 Fed. Appx. 70.

Certiorari Denied

No. 12–1351. Medtronic, Inc. *v.* Stengel et ux. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 3d 1224.

No. 13–838. NATIVE WHOLESALE SUPPLY CO. *v.* IDAHO ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 155 Idaho 337, 312 P. 3d 1257.

No. 13–967. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN.;

No. 13–979. NEW JERSEY THOROUGHBRED HORSEMEN'S ASSN., INC. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN.; and

No. 13–980. SWEENEY, PRESIDENT OF THE NEW JERSEY SENATE, ET AL. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 730 F. 3d 208.

No. 13–1012. VANGELDER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 58 Cal. 4th 1, 312 P. 3d 1045.

No. 13–1053. KAPLAN *v.* MARYLAND INSURANCE COMMISSIONER. Ct. App. Md. Certiorari denied. Reported below: 434 Md. 280, 75 A. 3d 298.

No. 13–1083. RAGOONATH *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 954.

No. 13–1095. GUPTA *v.* MCGAHEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 3d 1062.

No. 13–1098. CENCAST SERVICES, L. P., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 729 F. 3d 1352.

No. 13–1117. NATIVE WHOLESALE SUPPLY CO. *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 13–1126. OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 724 F. 3d 230.

No. 13–1127. VAN HOLLEN, ATTORNEY GENERAL OF WISCONSIN, ET AL. *v.* PLANNED PARENTHOOD OF WISCONSIN, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 3d 786.

No. 13–1133. PETTEWAY ET AL. *v.* HENRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 3d 132.

No. 13–1143. KOOPMAN *v.* MYERS. C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 3d 1190.

No. 13–1242. LONG *v.* JOHNSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 3d 891.

No. 13–1253. CITY OF ALAMOSA, COLORADO *v.* CHURCHILL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BLECK, DECEASED. C. A. 10th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 866.

No. 13–1254. ARABO *v.* GREEKTOWN CASINO, LLC, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 492.

No. 13–1263. SCHAFER ET AL. *v.* MULTIBAND CORP. C. A. 6th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 814.

No. 13–1264. WITMAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 40 A. 3d 188.

No. 13–1283. MORTIMER *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 13–1290. ANTONIO CHELEY *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 542 Fed. Appx. 143.

No. 13–1302. SNOW *v.* CHARTWAY FEDERAL CREDIT UNION ET AL. Ct. App. Utah. Certiorari denied. Reported below: 2013 UT App 175, 306 P. 3d 868.

No. 13–1307. WILSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 130 So. 3d 232.

No. 13–1330. HUBBARD *v.* NORFOLK SOUTHERN RAILWAY CO. Ct. App. Mich. Certiorari denied.

No. 13–1332. PICARDI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 3d 1118.

No. 13–1344. DOE *v.* REPLOGLE ET AL. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 445 S. W. 3d 573.

No. 13–1363. SANBORN *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 530 Fed. Appx. 943.

No. 13–1369. SAVIDGE *v.* DONAHOE, POSTMASTER GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 558 Fed. Appx. 222.

No. 13–1377. SEARCY *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 557 Fed. Appx. 975.

No. 13–1378. UNITED STATES EX REL. BABALOLA ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 3d 157.

No. 13–1381. OYAKHIRE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–1407. DUNKEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 511.

No. 13–8744. VIDAL-MALDONADO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 736 F. 3d 573.

No. 13–9200. HAMAD *v.* GATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 3d 990.

No. 13–9219. SAMSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 927.

No. 13–9231. SHIPLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 450.

No. 13–9553. VALADEZ *v.* CALIFORNIA; and

No. 13–9690. URIBE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied. Reported below: 220 Cal. App. 4th 16, 162 Cal. Rptr. 3d 722.

No. 13–9561. LUI *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 179 Wash. 2d 457, 315 P. 3d 493.

No. 13–9689. LEWIS *v.* DUCART, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 676.

No. 13–9692. YOUNG *v.* SIMPSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9694. PARTHEMORE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–9700. ANDERSON *v.* CITY OF DANVILLE, VIRGINIA, ET AL. Sup. Ct. Va. Certiorari denied.

No. 13–9702. V. M. ET VIR *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–9710. CHAPMAN *v.* BAYLOR UNIVERSITY MEDICAL CENTER ET AL. C. A. 5th Cir. Certiorari denied.

No. 13–9713. KNIGHT *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 128 So. 3d 801.

No. 13–9716. HAMMOCK *v.* JENSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 600.

No. 13–9718. NAFI *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–9720. MCCLAIN *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2012–1766 (La. App. 1 Cir. 6/7/13).

No. 13–9725. SMITH *v.* MANASQUAN SAVINGS BANK ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9730. DAMOND *v.* LEBLANC, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 353.

No. 13–9733. DUNCAN *v.* SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY, ET AL. Ct. App. Cal., 1st App. Dist., Div. 2. Certiorari denied.

No. 13–9735. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 134 So. 3d 468.

No. 13–9739. MENDOZA *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 13–9741. MIKLAS *v.* OHIO. Ct. App. Ohio, 7th App. Dist., Belmont County. Certiorari denied. Reported below: 2013-Ohio-5169.

No. 13–9743. WILLIAMS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 1262.

No. 13–9744. WILLIAMS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 982 N. E. 2d 484.

No. 13–9745. WILLIAMS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 175 Wash. App. 1003.

No. 13–9748. CARTWRIGHT *v.* BRINSON ET AL. Super. Ct. Pa. Certiorari denied.

No. 13–9754. WARE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 181 So. 3d 409.

No. 13–9762. OAKES *v.* HOWELL, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 808.

No. 13–9772. JIRON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 13–9775. MCCOY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9780. CRAWFORD *v.* GROUNDS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9782. MUHAMMAD *v.* HSBC BANK USA, N. A., ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 171 So. 3d 696.

No. 13–9786. GALARZA *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9794. JACKSON *v.* LAVALLEY, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 13–9799. SHULER *v.* HARGRAVE ET AL. C. A. 4th Cir. Certiorari denied.

No. 13–9800. JONES *v.* JACQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 766.

No. 13–9823. PARKER *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 870.

No. 13–9869. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 146 So. 3d 51.

No. 13–9870. SCARNATI *v.* BRENTWOOD BOROUGH POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 556 Fed. Appx. 74.

No. 13–9873. CAPE *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 13–9882. HARRIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 57 Cal. 4th 804, 306 P. 3d 1195.

No. 13–9923. WYLIE *v.* MONTANA. C. A. 9th Cir. Certiorari denied.

No. 13–9927. SPARKS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 13–9947. MARQUEZ *v.* NEW MEXICO BEHAVIORAL HEALTH INSTITUTE. Ct. App. N. M. Certiorari denied.

No. 13–9949. PAILES *v.* HSBC MORTGAGE SERVICES, INC., ET AL. C. A. 1st Cir. Certiorari denied.

No. 13–9968. CHACON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–9992. OGEONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9996. HEARY *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–10004. WARD *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 13–10038. BONIECKI *v.* MCQUADE ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–10046. O'RILEY *v.* WALMART, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–10047. LEWIS *v.* JPMORGAN CHASE BANK, N. A. C. A. 5th Cir. Certiorari denied. Reported below: 559 Fed. Appx. 404.

No. 13–10051. STOUTAMIRE *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–10060. PARRAMORE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 13–10068. WILLIAMS *v.* STARK COUNTY BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 137 Ohio St. 3d 112, 2013-Ohio-4006, 998 N. E. 2d 427.

No. 13–10078. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–10086. JOHNSON *v.* LAMAS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–10095. BURAS *v.* LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS. C. A. 5th Cir. Certiorari denied.

No. 13–10105. WILLIAMS *v.* HARRINGTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–10130. ROGER P. *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 13–10131. NEWBY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–10142. WOODS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 466 Mass. 707, 1 N. E. 3d 762.

No. 13–10149. AYERS *v.* FINK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–10159. CLAY *v.* OHIO DEPARTMENT OF JOB AND FAMILY SERVICES. Ct. App. Ohio, 11th App. Dist. Certiorari denied. Reported below: 2013-Ohio-2817.

No. 13–10164. COOK *v.* KEFFER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 314.

No. 13–10170. GRAVES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 680.

No. 13–10173. GOODALE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 3d 917.

No. 13–10174. GONZALEZ-CAVAZOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 310.

No. 13–10175. GUMULA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 222.

No. 13–10176. GLENEWINKEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–10180. GOLSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 743 F. 3d 44.

No. 13–10182. GAMBILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 168.

No. 13–10184. DIAZ-VEGA, AKA VEGA-DIAZ, AKA MENDEZ-VEGA, AKA SANCHEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 245.

No. 13–10185. CONTRERAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 3d 592.

No. 13–10193. USHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 227.

No. 13–10195. TORRES-TORRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–10199. PENA-DE JESUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–10205. WEST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 752.

No. 13–10207. RAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 904.

No. 13–10213. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–10214. MCDONALD *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 547 Fed. Appx. 23.

No. 13–10215. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 419 Fed. Appx. 907.

No. 13–10218. ARCHULETA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 737 F. 3d 1287.

No. 13–10220. COLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 558 Fed. Appx. 173.

No. 13–10221. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 552.

No. 13–10224. RODRIGUEZ-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 769.

No. 13–10227. SALDANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–10229. PALAFOX-CORTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 740.

No. 13–10237. XAVIER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–10239. RICHMOND *v.* CARAWAY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–10240. ALBARRAN-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 348.

No. 13–10243. MERCADO-SALVADOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–10247. JONES *v.* CARAWAY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–10249. BAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 562 Fed. Appx. 447.

No. 13–10252. LUIS GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–10253. FOSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 305.

No. 13–10263. LOPEZ-PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 260.

No. 13–10264. PHECH HOU ENG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 440.

No. 13–10265. MALCOLM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 304.

No. 13–10266. ASTORGA-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 507.

No. 13–10268. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–10278. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–10280. SAENZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–10281. SMOTHERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 209.

No. 13–10283. ADKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 3d 176.

No. 13–10289. ORTUNO-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 636.

No. 13–10293. RIVERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 236.

No. 13–1057. RYAN *v.* MURDAUGH. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 724 F. 3d 1104.

No. 13–1240. ROBERTS *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 10th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 733 F. 3d 1306.

No. 13–9364. BALLARD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Marc Bookman, of Philadelphia, Pa., is hereby directed to file within 40 days a response to the June 2, 2014, letter filed by Michael Ballard in this matter. Reported below: 622 Pa. 177, 80 A. 3d 380.

No. 13–9787. RILEY *v.* BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 13–9962. CRIM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 553 Fed. Appx. 170.

No. 13–10248. SAVOCA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 13–10279. MONTALVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 13–1011. USPPS, LTD. *v.* AVERY DENNISON CORP. ET AL., 572 U. S. 1088;

No. 13–8124. CARLSON *v.* MINNESOTA DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT ET AL., 572 U. S. 1084;

No. 13–8631. LUCAS *v.* YOUNG, WARDEN, 572 U. S. 1049;

No. 13–8732. GOFORTH ET AL. *v.* DEPARTMENT OF EDUCATION, 572 U. S. 1067;

No. 13–8736. AKBAR, AKA BROWN *v.* MCCALL, WARDEN, 572 U. S. 1090;

No. 13–8775. ECHOLS *v.* BICKELL, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL., 572 U. S. 1091;

No. 13–8807. WILSON *v.* CHANDLER, WARDEN, 572 U. S. 1068;

No. 13–9055. BRADLEY *v.* DELIETO ET AL., 572 U. S. 1093;

No. 13–9066. DUNCAN *v.* BUCHANAN, WARDEN, 572 U. S. 1093;

No. 13–9074. GREEN *v.* ALABAMA ET AL., 572 U. S. 1093;

No. 13–9181. ROBINSON *v.* UNITED STATES, 572 U. S. 1074;

No. 13–9308. MONBO *v.* MORGAN PROPERTIES TRUST ET AL., 572 U. S. 1123;

No. 13–9378. JACOBS *v.* UNITED STATES, 572 U. S. 1094; and

No. 13–9476. JACQUES, AKA POLANCO *v.* UNITED STATES, 572 U. S. 1095. Petitions for rehearing denied.

JUNE 25, 2014

Dismissals Under Rule 46

No. 13–877. ACEBO-LEYVA *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 537 Fed. Appx. 875.

No. 13–1204. GOROMOU *v.* HOLDER, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 721 F. 3d 569.

Miscellaneous Order

No. 13A1237. BROWN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. Application to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit on May 20, 2014, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

JUNE 26, 2014

Miscellaneous Order

No. 13A1260. HERTZ CORP. *v.* SOBEL ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. D. C. Nev. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The order heretofore entered by JUSTICE KENNEDY is vacated.

JUNE 30, 2014

Dismissal Under Rule 46

No. 13–1471. BRESNAN COMMUNICATIONS, LLC *v.* MONTANA DEPARTMENT OF REVENUE. Sup. Ct. Mont. Certiorari dismissed under this Court's Rule 46.1. Reported below: 373 Mont. 29, 315 P. 3d 921.

Certiorari Granted—Vacated and Remanded

No. 13–255. WILDTANGENT, INC. *v.* ULTRAMERCIAL, LLC, ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alice Corp.* v. *CLS Bank Int'l*, *ante*, p. 208. Reported below: 722 F. 3d 1335.

No. 13–888. AMGEN INC. ET AL. *v.* HARRIS ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fifth Third Bancorp* v. *Dudenhoeffer*, *ante*, p. 409. Reported below: 738 F. 3d 1026.

No. 13–1093. GIBSON *v.* KILPATRICK. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lane* v. *Franks*, *ante*, p. 228. Reported below: 734 F. 3d 395.

Certiorari Dismissed

No. 13–9810. FULLER *v.* HUSS 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. 13–9865. MOHSEN *v.* WU, CHAPTER 7 TRUSTEE. 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: 520 Fed. Appx. 557.

No. 13–9881. NIXON *v.* GOLDMAN SACHS MORTGAGE CORP. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–10128. BARBER *v.* CIRCUIT COURT OF MARYLAND, HOWARD COUNTY, 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. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 569 Fed. Appx. 181.

Miscellaneous Orders

No. 13A1112. HAWKINS *v.* UNITED STATES. Application for bail, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 13A1284. WHEATON COLLEGE *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. Application for an injunction pending appellate review having been submitted to JUSTICE KAGAN, and by her referred to the Court, the Court orders: Respondents are temporarily enjoined from enforcing against applicants the contraceptive coverage requirements imposed by the Patient Protection and Affordable Care Act, 42 U. S. C. § 300gg–13(a)(4), and related regulations, pending the receipt of a response and reply and further order of the Court. The response to the application is due Wednesday, July 2, 2014, by 10 a.m. The reply is due Wednesday, July 2, 2014, by 5 p.m. JUSTICE BREYER and JUSTICE SOTOMAYOR dissent.

No. 13M133. ALI *v.* FLORIDA;
No. 13M135. PRIOR PEREIRA *v.* UNITED STATES;
No. 13M137. DENZER *v.* OUBRE, WARDEN; and

No. 13M138. WOOD *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 13M134. DEDMON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 13M136. HEIM *v.* HOLDER, ATTORNEY GENERAL, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 13–956. TEVA PHARMACEUTICALS USA, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY, ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 13–7120. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 572 U. S. 1059.] Motion of petitioner to dispense with printing joint appendix granted.

No. 13–9880. AMEZCUA *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. Sup. Ct. Nev.; and

No. 13–9885. MOBLEY *v.* FLORIDA ET AL. Sup. Ct. Fla. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 21, 2014, 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. 13–10366. IN RE FLYING HORSE;

No. 13–10408. IN RE COOK;

No. 13–10418. IN RE COPELAND; and

No. 13–10463. IN RE ARCHER. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 13–1019. MACH MINING, LLC *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 7th Cir. Certiorari granted. Reported below: 738 F. 3d 171.

No. 13–1034. MELLOULI *v.* HOLDER, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari granted. Reported below: 719 F. 3d 995.

No. 13–1074. UNITED STATES *v.* KWAI FUN WONG. C. A. 9th Cir. Certiorari granted. Reported below: 732 F. 3d 1030.

No. 13–1075. UNITED STATES *v.* JUNE, CONSERVATOR. C. A. 9th Cir. Certiorari granted. Reported below: 550 Fed. Appx. 505.

No. 13–1174. GELBOIM ET AL. *v.* BANK OF AMERICA CORP. ET AL. C. A. 2d Cir. Certiorari granted.

Certiorari Denied

No. 13–448. PICARD *v.* HSBC BANK PLC ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 721 F. 3d 54.

No. 13–498. BIANCHI ET AL. *v.* CHRZANOWSKI. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 3d 734.

No. 13–584. BANCORP SERVICES, LLC *v.* SUN LIFE ASSURANCE COMPANY OF CANADA (U. S.) ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 687 F. 3d 1266.

No. 13–662. BANK OF AMERICA, N. A. *v.* ROSE ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 57 Cal. 4th 390, 304 P. 3d 181.

No. 13–902. TEMBENIS ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 733 F. 3d 1190.

No. 13–913. JANVEY *v.* ALGUIRE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 478.

No. 13–918. ACCENTURE GLOBAL SERVICES, GMBH, ET AL. *v.* GUIDEWIRE SOFTWARE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 728 F. 3d 1336.

No. 13–949. PICKUP ET AL. *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL.; and

No. 13–1281. WELCH ET AL. *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 3d 1208.

No. 13–994. LUNA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 13–999. IBARRA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 445 S. W. 3d 285.

No. 13–1006. EQUIFAX, INC., ET AL. *v.* MISSISSIPPI DEPARTMENT OF REVENUE, FKA MISSISSIPPI STATE TAX COMMISSION. Sup. Ct. Miss. Certiorari denied. Reported below: 125 So. 3d 36.

No. 13–1015. TEVA PHARMACEUTICALS USA, INC. *v.* ROMO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 3d 918.

No. 13–1016. XANODYNE PHARMACEUTICALS, INC. *v.* CORBER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 650.

No. 13–1036. GOMEZ *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 13–1062. RUDOLPH TECHNOLOGIES, INC., ET AL. *v.* INTEGRATED TECHNOLOGY CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 734 F. 3d 1352.

No. 13–1077. KING ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 349.

No. 13–1111. GEORGIA *v.* ROESSER. Sup. Ct. Ga. Certiorari denied. Reported below: 294 Ga. 295, 751 S. E. 2d 297.

No. 13–1124. MINORITY TELEVISION PROJECT, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 3d 1192.

No. 13–1137. JILL STUART (ASIA) LLC *v.* SANEI INTERNATIONAL CO., LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 548 Fed. Appx. 20.

No. 13–1142. PENTAGON CAPITAL MANAGEMENT PLC ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 725 F. 3d 279.

No. 13–1148. ROCKY MOUNTAIN FARMERS UNION ET AL. *v.* COREY, EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, ET AL.;

No. 13–1149. AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSN. ET AL. *v.* COREY, EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, ET AL.; and

No. 13–1308. COREY, EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, ET AL. *v.* ROCKY MOUNTAIN FARMERS UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 3d 1070.

No. 13–1152. TUMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 3d 681.

No. 13–1166. SALAZAR *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 414 S. W. 3d 606.

No. 13–1181. GOOGLE INC. *v.* JOFFE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 3d 920.

No. 13–1194. OMETTO ET AL. *v.* ASA BIOENERGY HOLDING A. G. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 549 Fed. Appx. 41.

No. 13–1201. KALITTA AIR, L. L. C. *v.* CENTRAL TEXAS AIRBORNE SYSTEMS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 832.

No. 13–1212. LAFARGE NORTH AMERICA, INC., ET AL. *v.* ST. BERNARD PARISH, LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 184.

No. 13–1244. DRAKES BAY OYSTER CO. ET AL. *v.* JEWELL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 3d 1073.

No. 13–1279. PINON ET AL. *v.* BANK OF AMERICA, N. A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 3d 1022.

No. 13–1288. ERLICHMAN *v.* STATER BROS. MARKETS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 552.

No. 13–1291. BOOK *v.* MENDOZA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 375.

No. 13–1316. STARR INTERNATIONAL CO., INC., ET AL. *v.* FEDERAL RESERVE BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 3d 37.

No. 13–1317. KRISLOV ET AL. *v.* STEIN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 113806, 999 N. E. 2d 345.

No. 13–1351. McCollum et al. *v.* Aspen Property Management et al. C. A. 4th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 677.

No. 13–1354. Walthour et al. *v.* Chipio Windshield Repair, LLC, et al. C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 3d 1326.

No. 13–1358. Facey *v.* New York City Department of Education. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 3d 547, 963 N. Y. S. 2d 207.

No. 13–1382. Agnew et ux. *v.* E*Trade Securities LLC. Super. Ct. Pa. Certiorari denied. Reported below: 75 A. 3d 546.

No. 13–1386. Sonera Holding B. V. *v.* Cukurova Holding A. S. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 3d 221.

No. 13–1388. Sheppard *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 13–1391. Toribio *v.* Spece et al. C. A. 3d Cir. Certiorari denied. Reported below: 558 Fed. Appx. 227.

No. 13–1392. Wozny *v.* Wisconsin. Ct. App. Wis. Certiorari denied.

No. 13–1394. Edwards *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 747 F. 3d 186.

No. 13–1397. Hoti Enterprises, L. P., et al. *v.* GECMC 2007 C–1 Burnett Street, LLC. C. A. 2d Cir. Certiorari denied. Reported below: 549 Fed. Appx. 43.

No. 13–1400. Kendall *v.* Donahoe, Postmaster General. C. A. 3d Cir. Certiorari denied. Reported below: 543 Fed. Appx. 141.

No. 13–1404. Wall *v.* Alcon Laboratories, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 794.

No. 13–1415. Cohen *v.* Commissioner of Internal Revenue. C. A. D. C. Cir. Certiorari denied. Reported below: 550 Fed. Appx. 10.

No. 13–1423. EXTENDICARE HOMES, INC. *v.* PISANO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF PISANO, DECEASED. Super. Ct. Pa. Certiorari denied. Reported below: 77 A. 3d 651.

No. 13–1439. MONTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 449.

No. 13–8405. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 893.

No. 13–8809. ST. PREUX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 946.

No. 13–9205. PRUITT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 415 S. W. 3d 180.

No. 13–9333. ABAN TERCERO *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 3d 141.

No. 13–9338. GIBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 174.

No. 13–9365. MUNOZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 552.

No. 13–9380. GARZA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 3d 669.

No. 13–9382. FORDE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 233 Ariz. 543, 315 P. 3d 1200.

No. 13–9385. IBARRA CARRANZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9788. COLEMAN *v.* ROCK HILL MUNICIPAL COURT, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 166.

No. 13–9790. GILMORE *v.* GONZALEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9791. HENDERSON *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 286, 753 S. E. 2d 657.

No. 13–9795. FREEMAN ET AL. *v.* SULLIVAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–9796. GRADY *v.* VICKORY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 191.

No. 13–9802. HOLTZ *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 13–9805. M. N. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 133 So. 3d 939.

No. 13–9808. FRATER *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–9811. HILL *v.* MANIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 327.

No. 13–9812. HOLMES *v.* WILLIAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–9822. PRE *v.* GONZALEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 768.

No. 13–9825. KEETON *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9828. BURNEY, AKA AUSTIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 87 A. 3d 374.

No. 13–9829. ARNETT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 13–9833. ALLEN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 69 A. 3d 1291.

No. 13–9834. SIKES *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 13–9843. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 13–9844. RODRIGUEZ *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 13–9845. WRIGHT *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9849. STEWART *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 13–9851. VEGA *v.* DAVEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9856. BARTON *v.* DISTRICT COURT OF TEXAS, HARRIS COUNTY. Ct. Crim. App. Tex. Certiorari denied.

No. 13–9857. MACKEY *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9863. LUIS MURILLO *v.* HARRINGTON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 759.

No. 13–9867. WASHINGTON *v.* SYKES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 174.

No. 13–9874. BLEDSOE *v.* TERRELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–9876. JACKSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–9887. GREISER *v.* WHITTIER TOWERS APARTMENTS ASSN. INC. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 506.

No. 13–9890. FONTAINE *v.* SPORT CITY TOYOTA. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 529.

No. 13–9891. FRANKLIN *v.* ARBOR STATION, LLC, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 831.

No. 13–9893. MORETTO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 127 So. 3d 513.

No. 13–9895. ZAVALA *v.* PEREZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9901. OBADO *v.* MANCHANDA LAW FIRM PLLC ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 39 Misc. 3d 129, 971 N. Y. S. 2d 73.

No. 13–9980. BAKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 13–9988. SALDANA IRACHETA *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 13–9990. PHILLIPS *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 259.

No. 13–9997. HERNANDEZ *v.* GIBSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–10048. LAKE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 176 Wash. App. 1037.

No. 13–10049. DAVIS *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–10050. COBAS *v.* HAAS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–10067. VANG *v.* RICHARDSON, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 13–10084. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied. Reported below: 221 Cal. App. 4th 943, 164 Cal. Rptr. 3d 864.

No. 13–10151. NELSON *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 13–10158. MCNEAL *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–10162. RATLIFF *v.* CITY OF WEST WENDOVER, NEVADA. Dist. Ct. Nev., Elko County. Certiorari denied.

No. 13–10163. ROBINSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 407 S. C. 169, 754 S. E. 2d 862.

No. 13–10168. GILES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 407 S. C. 14, 754 S. E. 2d 261.

No. 13–10169. HARRIS *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 49 Kan. App. 2d xiv, 314 P. 3d 900.

No. 13–10233. BERAS *v.* COAKLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–10238. WESTON *v.* HARRINGTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–10287. HOLLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 743 F. 3d 1152.

No. 13–10297. LOPEZ-ROSAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 709.

No. 13–10299. KEENAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 216.

No. 13–10306. CORTES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–10309. RIVERA-GOMEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–10310. JEANTY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–10314. CUEVAS-VILLALOBOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 628.

No. 13–10318. DEMMONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 672.

No. 13–10323. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 13–10326. THOMAS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–10328. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–10329. BAPTISTE *v.* FOULK, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–10336. ACEVEDO-BECERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 661.

No. 13–10338. SANCHEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 663.

No. 13–10348. HERNANDEZ SANDOVAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 3d 464.

No. 13–10359. MAUSALI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–1485. ARAB BANK, PLC *v.* LINDE ET AL. C. A. 2d Cir. Motions of Hashemite Kingdom of Jordan and Union of Arab Banks for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 706 F. 3d 92.

No. 13–318. O'NEILL ET AL. *v.* AL RAJHI BANK ET AL. (Reported below: 714 F. 3d 118); and O'NEILL ET AL. *v.* ASAT TRUST REG. ET AL. (714 F. 3d 659). C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 13–787. MISSOURI EX REL. KCP&L GREATER MISSOURI OPERATIONS CO. *v.* MISSOURI PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mo., Western Dist. Motion of Edison Electric Institute for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 408 S. W. 3d 153.

No. 13–899. FAMILY DOLLAR STORES, INC. *v.* SCOTT ET AL. C. A. 4th Cir. Motion of Retail Litigation Center, Inc., for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 733 F. 3d 105.

No. 13–1061. MT. SOLEDAD MEMORIAL ASSN. *v.* TRUNK ET AL. C. A. 9th Cir. Certiorari before judgment denied.

Statement of JUSTICE ALITO respecting the denial of the petition for a writ of certiorari before judgment.

This case came before us two years ago, see 567 U. S. 944 (2012), and at that time I issued a statement respecting the denial of certiorari. I noted that although the "Court's Establishment Clause jurisprudence is undoubtedly in need of clarity," certiorari was not yet warranted in this case "[b]ecause no final judgment

has been rendered and it remains unclear precisely what action the Federal Government will be required to take." *Id.*, at 945.

Since that time, the District Court has issued an order requiring the memorial to be removed, but it has stayed that order pending appeal. The Court of Appeals has not yet reviewed that order on appeal. Seeking to bypass that step, petitioner seeks certiorari before judgment. In my view, it has not met the very demanding standard we require in order to grant certiorari at that stage. In light of the stay, any review by this Court can await the decision of the Court of Appeals. I therefore agree with the Court's decision to deny the petition.

No. 13–1146. KINGDOM OF SAUDI ARABIA ET AL. *v.* FEDERAL INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 741 F. 3d 353.

No. 13–1270. E. M. B. R. *v.* S. M. ET UX. Ct. App. Mo., Southern Dist. Motion of Young Center for Immigrant Children's Rights et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 414 S. W. 3d 622.

No. 13–1280. DAVIS ET AL. *v.* PENSION BENEFIT GUARANTY CORPORATION. C. A. D. C. Cir. Motions of Delta Pilots' Pension Preservation Organization (DPS3, Inc.) and Coalition of Airline Pilots Associations et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 734 F. 3d 1161.

No. 13–10304. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 556 Fed. Appx. 178.

No. 13–10325. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 570 Fed. Appx. 293.

Rehearing Denied

No. 13–8221. NHUONG VAN NGUYEN *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY, 572 U. S. 1102;

No. 13–8520. SMITH *v.* DIAZ, WARDEN, 572 U. S. 1049;

No. 13–8710. ENRIQUEZ *v.* TEXAS, 572 U. S. 1090;

No. 13–8780. CAMPBELL *v.* NEVADA, 572 U. S. 1091;

No. 13–8819. MCKEITHER *v.* FOLINO ET AL., 572 U. S. 1068;

No. 13–8872. BARASHKOFF *v.* CITY OF SEATTLE, WASHINGTON, ET AL., 572 U. S. 1103;

No. 13–8873. BOOSE *v.* ILLINOIS, 572 U. S. 1068;

No. 13–8924. SMITH ET UX. *v.* COUNTRYWIDE HOME LOANS, INC., ET AL., 572 U. S. 1104;

No. 13–9128. CARMONA *v.* MACLAREN, WARDEN, 572 U. S. 1122; and

No. 13–9129. DE MEDEIROS *v.* CALIFORNIA, 572 U. S. 1093. Petitions for rehearing denied.

JULY 1, 2014

Certiorari Granted—Vacated and Remanded. (See also No. 13–9085, *ante*, p. 773.)

No. 13–240. SCHLAUD ET AL. *v.* SNYDER, GOVERNOR OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harris* v. *Quinn*, *ante*, p. 616. Reported below: 717 F. 3d 451.

No. 13–482. AUTOCAM CORP. ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Reported below: 730 F. 3d 618;

No. 13–567. GILARDI ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. D. C. Cir. Reported below: 733 F. 3d 1208; and

No. 13–591. EDEN FOODS, INC., ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Reported below: 733 F. 3d 626. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, *ante*, p. 682.

No. 13–578. KOPP *v.* KLEIN ET AL. C. A. 5th Cir. Reported below: 722 F. 3d 327; and

No. 13–830. RINEHART ET AL. *v.* AKERS ET AL. C. A. 2d Cir. Reported below: 722 F. 3d 137. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Fifth Third Bancorp* v. *Dudenhoeffer*, *ante*, p. 409.

No. 13–972. AMBASSADOR SERVICES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Reported below: 544 Fed. Appx. 846; and

No. 13–1103. National Labor Relations Board *v.* Gestamp South Carolina LLC. C. A. 4th Cir. Reported below: 547 Fed. Appx. 164. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *NLRB* v. *Noel Canning*, *ante*, p. 513.

Certiorari Granted

No. 12–1226. Young *v.* United Parcel Service, Inc. C. A. 4th Cir. Certiorari granted. Reported below: 707 F. 3d 437.

No. 13–271. Oneok, Inc., et al. *v.* Learjet, Inc., et al. C. A. 9th Cir. Certiorari granted. Reported below: 715 F. 3d 716.

No. 13–352. B&B Hardware, Inc. *v.* Hargis Industries, Inc., dba Sealtite Building Fasteners et al., et al. C. A. 8th Cir. Certiorari granted. Reported below: 716 F. 3d 1020.

No. 13–1032. Direct Marketing Assn. *v.* Brohl, Executive Director, Colorado Department of Revenue. C. A. 10th Cir. Certiorari granted. Reported below: 735 F. 3d 904.

No. 12–1497. Kellogg Brown & Root Services, Inc., et al. *v.* United States ex rel. Carter. C. A. 4th Cir. Motions of Chamber of Commerce of the United States of America et al. and National Defense Industrial Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 710 F. 3d 171.

No. 13–502. Reed et al. *v.* Town of Gilbert, Arizona, et al. C. A. 9th Cir. Motion of Professor Ashutosh Bhagwat et al. for leave to file brief as *amici curiae* granted. Certiorari granted. Reported below: 707 F. 3d 1057.

No. 13–553. Alabama Department of Revenue et al. *v.* CSX Transportation, Inc. C. A. 11th Cir. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether, in resolving a claim of unlawful tax discrimination under 49 U. S. C. § 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision." Reported below: 720 F. 3d 863.

No. 13–935. Wellness International Network, Ltd., et al. *v.* Sharif. C. A. 7th Cir. Certiorari granted limited to

Questions 1 and 3 presented by the petition. Reported below: 727 F. 3d 751.

Certiorari Denied

No. 12–1178. Rochester Gas & Electric Corp. *v.* National Labor Relations Board et al. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 3d 73.

No. 12–1313. Estate of Salm *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied.

No. 12–1445. Daycon Products Co., Inc. *v.* National Labor Relations Board. C. A. D. C. Cir. Certiorari denied. Reported below: 494 Fed. Appx. 97.

No. 13–671. National Labor Relations Board *v.* Enterprise Leasing Company-Southeast, LLC, et al. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 3d 609.

No. 13–915. Department of Health and Human Services et al. *v.* Gilardi et al. C. A. D. C. Cir. Certiorari denied. Reported below: 733 F. 3d 1208.

No. 13–919. Burwell, Secretary of Health and Human Services, et al. *v.* Newland et al. C. A. 10th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 706.

No. 13–937. Burwell, Secretary of Health and Human Services, et al. *v.* Korte et al. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 3d 654.

No. 13–8363. Johnson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 230.

July 3, 2014

Miscellaneous Order

No. 13A1284. Wheaton College *v.* Burwell, Secretary of Health and Human Services, et al. Application for an injunction having been submitted to Justice Kagan, and by her referred to the Court, the Court orders: If applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive serv-

ices, respondents are enjoined from enforcing against applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, applicant need not use the form prescribed by the Government, Employee Benefits Security Administration (EBSA) Form 700, and need not send copies to health insurance issuers or third-party administrators.

The Courts of Appeals have divided on whether to enjoin the requirement that religious nonprofit organizations use EBSA Form 700. Such division is a traditional ground for certiorari. See this Court's Rule 10(a).

Nothing in this interim order affects the ability of applicant's employees and students to obtain, without cost, the full range of Food and Drug Administration approved contraceptives. The Government contends that applicant's health insurance issuer and third-party administrator are required by federal law to provide full contraceptive coverage regardless of whether applicant completes EBSA Form 700. Applicant contends, by contrast, that the obligations of its health insurance issuer and third-party administrator are dependent on their receipt of notice that applicant objects to the contraceptive coverage requirement. But applicant has already notified the Government—without using EBSA Form 700—that it meets the requirements for exemption from the contraceptive coverage requirement on religious grounds. Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act.

In light of the foregoing, this order should not be construed as an expression of the Court's views on the merits.

JUSTICE SCALIA concurs in the result.

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

The Patient Protection and Affordable Care Act, 124 Stat. 119, through its implementing regulations, requires employer group health insurance plans to cover contraceptive services without cost sharing. Recognizing that people of religious faith may sincerely oppose the provision of contraceptives, the Government has created certain exceptions to this requirement. Churches are categorically exempt. Any religious nonprofit is also exempt, as

long as it signs a form certifying that it is a religious nonprofit that objects to the provision of contraceptive services and provides a copy of that form to its insurance issuer or third-party administrator. The form is simple. The front asks the applicant to attest to the foregoing representations; the back notifies third-party administrators of their regulatory obligations.

The matter before us is an application for an emergency injunction filed by Wheaton College, a nonprofit liberal arts college in Illinois. There is no dispute that Wheaton is entitled to the religious-nonprofit exemption from the contraceptive coverage requirement. Wheaton nonetheless asserts that the exemption itself impermissibly burdens Wheaton's free exercise of its religion in violation of the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*, on the theory that its filing of a self-certification form will make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects. Wheaton has not stated a viable claim under RFRA. Its claim ignores that the provision of contraceptive coverage is triggered not by its completion of the self-certification form, but by federal law.

Even assuming that the accommodation somehow burdens Wheaton's religious exercise, the accommodation is permissible under RFRA because it is the least restrictive means of furthering the Government's compelling interests in public health and women's well-being. Indeed, just earlier this week in *Burwell* v. *Hobby Lobby Stores, Inc.*, *ante*, p. 682, the Court described the accommodation as "a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all [Food and Drug Administration (FDA)]-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." And the Court concluded that the accommodation "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Ibid.* Those who are bound by our decisions usually believe they can take us at our word. Not so today. After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might,

see *ante*, at 739–740 (opinion of GINSBURG, J.), retreats from that position. That action evinces disregard for even the newest of this Court's precedents and undermines confidence in this institution.

Even if one accepts Wheaton's view that the self-certification procedure violates RFRA, that would not justify the Court's action today. The Court grants Wheaton a form of relief as rare as it is extreme: an interlocutory injunction under the All Writs Act, 28 U. S. C. § 1651, blocking the operation of a duly enacted law and regulations, in a case in which the courts below have not yet adjudicated the merits of the applicant's claims and in which those courts have declined requests for similar injunctive relief. Injunctions of this nature are proper only where "the legal rights at issue are indisputably clear." *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1303 (1993) (Rehnquist, C. J., in chambers) (internal quotation marks omitted). Yet the Court today orders this extraordinary relief even though no one could credibly claim Wheaton's right to relief is indisputably clear.

The sincerity of Wheaton's deeply held religious beliefs is beyond refute. But as a legal matter, Wheaton's application comes nowhere near the high bar necessary to warrant an emergency injunction from this Court. For that reason, I respectfully dissent.

I

A

The Affordable Care Act requires certain employer group health insurance plans to cover a number of preventative-health services without cost sharing. These services include "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a provider." 77 Fed. Reg. 8725 (2012) (brackets and internal quotation marks omitted). As a practical matter, the provision ensures that women have access to contraception at no cost beyond their insurance premiums. Employers that do not comply with the mandate are subject to civil penalties.

Recognizing that some religions disapprove of contraceptives, the Government has sought to implement the mandate in a manner consistent with the freedom of conscience. It has categorically exempted any group health plan of a "religious employer,"

as defined by reference to the Tax Code provision governing churches. See 45 CFR § 147.131(a) (2013). And it has extended a further accommodation to religious nonprofits that do not satisfy the categorical exemption. All agree that Wheaton qualifies as a religious nonprofit.

To invoke the accommodation and avoid civil penalties, a religious nonprofit need only file a self-certification form stating (1) that it "opposes providing coverage for some or all of any contraceptive services required to be covered under [the regulation] on account of religious objections," (2) that it "is organized and operates as a nonprofit entity," and (3) that it "holds itself out as a religious organization." § 147.131(b). The form is reprinted in an appendix to this opinion. Any organization that completes the form and provides a copy to its insurance issuer or third-party administrator[1] need not "contract, arrange, pay, or refer for contraceptive coverage" to which it objects. 78 Fed. Reg. 39874 (2013); see 29 CFR §§ 2590.715–2713A(b)(1) and (c)(1) (2013). Instead, the insurance issuer or third-party administrator must provide contraceptive coverage for the organization's employees and may not charge the organization any premium or other fee related to those services. The back of the self-certification form reminds third-party administrators that receipt of the form constitutes notice that they must comply with their regulatory obligations. See Appendix, *infra*.

B

Rather than availing itself of this simple accommodation, Wheaton filed suit, asserting that completing the form and submitting it to its third-party administrator would make it complicit in the provision of contraceptive coverage, in violation of its religious beliefs. On that basis, it sought a preliminary injunction, claiming that the law and regulations at issue violate RFRA, which provides that the Government may not "substantially burden a person's exercise of religion" unless the application of that

[1] Typically, an employer contracts to pay a health insurer to provide coverage; the insurer both covers the cost of medical claims and manages the process for administering those claims. Employers who maintain self-insured plans cover the cost of claims for medical treatment directly. Such employers often contract with third-party administrators to administer the claims process.

burden "is the least restrictive means of furthering [a] compelling governmental interest." 42 U. S. C. §§ 2000bb–1(a) and (b).[2]

The District Court denied a preliminary injunction on the ground that the regulations exempting Wheaton from the contraceptive coverage requirement do not substantially burden its exercise of religion. App. to Emergency Application for Injunction Pending Appellate Review 1–20. Under Circuit precedent, the court reasoned, Wheaton's act of "filling out the form and sending it to the [third-party administrator]" in no way "triggers" coverage of contraception costs. *Id.*, at 9 (internal quotation marks omitted). The Seventh Circuit in turn denied Wheaton's motion for an injunction pending appeal. See Order in No. 14–2396 (June 30, 2014). In doing so, it relied on this Court's pronouncement in *Hobby Lobby* "that the accommodation provision (applicable in this case) 'constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty.'" Order in No. 14–2396.

Wheaton applied to JUSTICE KAGAN, in her capacity as Circuit Justice for the Seventh Circuit, for an emergency injunction against enforcement of the law and regulations pending resolution of its legal challenge. She referred the matter to the Conference, which entered a temporary injunction and called for a response from the Government. See *ante*, p. 943. After receipt of the Government's response, the Court today enters an order granting injunctive relief.

II

A

I disagree strongly with what the Court has done. Wheaton asks us to enjoin the enforcement of a duly enacted law and duly promulgated regulations before the courts below have passed on the merits of its legal challenge. Relief of this nature is extraordinary and reserved for the rarest of cases. With good reason. The only source of authority for this Court to issue an injunction pending review in the lower courts is the All Writs Act, which provides that this Court "may issue all writs necessary or appropriate in aid of [its] . . . jurisdictio[n] and agreeable to the usages and principles of law." 28 U. S. C. § 1651(a). This grant of equi-

[2] Wheaton also raised claims under the First Amendment and the Administrative Procedure Act. Because it does not press those claims in this Court as a basis for injunctive relief, I do not discuss them.

table power is a fail-safe, "to be used 'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers) (some internal quotation marks omitted).

Under our precedents, "[a]n injunction is appropriate only if (1) it is necessary or appropriate in aid of our jurisdiction, and (2) the legal rights at issue are indisputably clear." *Turner Broadcasting System*, 507 U. S., at 1303 (brackets, internal quotation marks, and citation omitted).[3] To understand how high a bar that second prong is, consider that this Court has previously pointed to differences of opinion among lower courts as proof positive that the standard has not been met. See *Lux* v. *Rodrigue*s, 561 U. S. 1306, 1308 (2010) (ROBERTS, C. J., in chambers) (observing that "the courts of appeals appear to be reaching divergent results" respecting the applicant's claim, and that, "[a]ccordingly, . . . it cannot be said that his right to relief is 'indisputably clear'"). Neutral application of this principle would compel the denial of Wheaton's application without any need to examine the merits, for two Courts of Appeals that have addressed similar claims have rejected them. See *University of Notre Dame* v. *Sebelius*, 743 F. 3d 547 (CA7 2014); *Michigan Catholic Conference* v. *Burwell*, 755 F. 3d 372 (CA6 2014).[4] Remarkably, the Court

[3] Indeed, some of my colleagues who act to grant relief in this case have themselves emphasized the exceedingly high burden that an applicant must surmount to obtain an interlocutory injunction under the All Writs Act. See *Lux* v. *Rodrigues*, 561 U. S. 1306, 1307 (2010) (ROBERTS, C. J., in chambers) (an applicant must demonstrate that "the legal rights at issue are indisputably clear" in order to obtain such injunctive relief (internal quotation marks omitted)); *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (unlike a stay of a lower court's order, a request for an injunction against the enforcement of a law "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts'" (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers))).

[4] To be sure, two other Courts of Appeals have recently granted temporary injunctions similar to the one Wheaton seeks here. See Order in *Eternal Word Television Network, Inc.* v. *Secretary of Health and Human Services*, No. 14–12696–CC (CA11, June 30, 2014) (granting injunction pending appeal); Order in *Diocese of Cheyenne* v. *Burwell*, No. 14–8040 (CA10, June 30, 2014) (same). Although denying the injunction in this case would produce a different outcome, the Government could of course move to vacate those injunctions were we to deny this one. Moreover, while uniformity certainly is important, uniform error is not.

uses division among the Circuits as a justification for the issuance of its order, noting that "division is a traditional ground for certiorari." *Ante*, at 959. But a petition for writ of certiorari is not before us. Rather, given the posture of this application—for an emergency injunction under the All Writs Act—division of authority is reason *not* to grant relief.

B

Wheaton's RFRA claim plainly does not satisfy our demanding standard for the extraordinary relief it seeks.

For one thing, the merits of this case are not before this Court for full review; adjudication of the merits is still pending in the District Court. So nothing necessitates intervention in order to "'aid . . . our jurisdiction,'" *Turner Broadcasting System*, 507 U. S., at 1303 (alterations omitted), over any eventual certiorari petition from a decision rendered below. If the Government is allowed to enforce the law, either Wheaton will file the self-certification form or it will not. Either way, there will remain a live controversy that this Court could adjudicate after the case is decided on the merits below. And either way, if Wheaton is correct in its challenge to the law, its rights will be vindicated and it will obtain the relief it seeks.

As to the merits, Wheaton's claim is likely to fail under any standard, let alone the standard that its entitlement to relief be "'indisputably clear,'" *ibid.* Wheaton asserts that filing the self-certification form might ultimately result in the provision of contraceptive services to its employees, thereby burdening its religious exercise. And it points out that if it does not file the form, it will face civil penalties. But it is difficult to understand how these arguments make out a viable RFRA claim.

RFRA requires Wheaton to show that the accommodation process "substantially burden[s] [its] exercise of religion." § 2000bb–1(a). "Congress no doubt meant the modifier 'substantially' to carry weight." *Hobby Lobby*, *ante*, at 758 (GINSBURG, J., dissenting). Wheaton, for religious reasons, categorically opposes the provision of contraceptive services. The Government has given it a simple means to opt out of the contraceptive coverage mandate—and thus avoid any civil penalties for failing to provide contraceptive services—and a simple means to tell its third-party administrator of its claimed exemption.

Yet Wheaton maintains that taking these steps to avail itself of the accommodation would substantially burden its religious exercise. Wheaton is "religiously opposed to emergency contraceptives because they may act by killing a human embryo." Emergency Application for Injunction Pending Appellate Review 11. And it "believes that authorizing its [third-party administrator] to provide these drugs in [its] place makes it complicit in grave moral evil." *Ibid.* Wheaton is mistaken—not as a matter of religious faith, in which it is undoubtedly sincere, but as a matter of law: Not every sincerely felt "burden" is a "substantial" one, and it is for courts, not litigants, to identify which are. See *Hobby Lobby*, *ante*, at 758–759 (GINSBURG, J., dissenting). Any provision of contraceptive coverage by Wheaton's third-party administrator would not result from any action by Wheaton; rather, in every meaningful sense, it would result from the relevant law and regulations. The law and regulations require, in essence, that *some* entity provide contraceptive coverage. A religious nonprofit's choice not to be that entity may leave someone else obligated to provide coverage instead—but the obligation is created by the contraceptive coverage mandate imposed by law, not by the religious nonprofit's choice to opt out of it.[5]

Let me be absolutely clear: I do not doubt that Wheaton genuinely believes that signing the self-certification form is contrary to its religious beliefs. But *thinking* one's religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so.

An analogy used by the Seventh Circuit may help to explain why Wheaton's complicity theory cannot be legally sound:

> "Suppose it is wartime, there is a draft, and a Quaker is called up. Many Quakers are pacifists, and their pacifism is a tenet of their religion. Suppose the Quaker who's been called up tells the selective service system that he's a conscientious objector. The selective service officer to whom he makes this pitch accepts the sincerity of his refusal to bear arms and excuses him. But as the Quaker leaves the selec-

[5] Wheaton notes that the back of the self-certification form provides third-party administrators with notice of their regulatory obligations. See Emergency Application for Injunction Pending Appellate Review 8; see also Appendix, *infra*. That notice is merely an instruction to third-party administrators; it is not a part of any of the representations required on the front of the form. No statement to which Wheaton must assent in any way reflects agreement with, or endorsement of, the notice.

> tive service office, he's told: 'you know this means we'll have to draft someone in place of you'—and the Quaker replies indignantly that if the government does that, it will be violating his religious beliefs. Because his religion teaches that *no one* should bear arms, drafting another person in his place would make him responsible for the military activities of his replacement, and by doing so would substantially burden his own sincere religious beliefs. Would this mean that by exempting him the government had forced him to 'trigger' the drafting of a replacement who was not a conscientious objector, and that the Religious Freedom Restoration Act would require a draft exemption for both the Quaker and his non-Quaker replacement?" *Notre Dame*, 743 F. 3d, at 556.

Here, similarly, the filing of the self-certification form merely indicates to the third-party administrator that a religious nonprofit has chosen to invoke the religious accommodation. If a religious nonprofit chooses not to pay for contraceptive services, it is true that someone else may have a legal obligation to pay for them, just as someone may have to go to war in place of the conscientious objector. But the obligation to provide contraceptive services, like the obligation to serve in the Armed Forces, arises not from the filing of the form but from the underlying law and regulations.

It may be that what troubles Wheaton is that it must participate in *any* process the end result of which might be the provision of contraceptives to its employees. But that is far from a substantial burden on its free exercise of religion.

Even if one were to conclude that Wheaton meets the substantial burden requirement, the Government has shown that application of the burden is "the least restrictive means" to further a "compelling governmental interest," § 2000bb–1(b)(2). The contraceptive coverage requirement plainly furthers compelling interests in public health and women's well-being. See *Hobby Lobby*, *ante*, at 737 (KENNEDY, J., concurring). And it is the "least restrictive means" of furthering those interests. Indeed, as justification for its decision in *Hobby Lobby*—issued just this week—the very Members of the Court that now vote to grant injunctive relief concluded that the accommodation "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Ante*, at 692 (majority opinion); see also *ante*, at 693 ("The effect of the [Department of Health and

Human Services (HHS)]-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing"); *ante*, at 731 ("At a minimum . . . [the accommodation] does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well"); see also *ante*, at 739 (KENNEDY, J., concurring) ("[I]t is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government's interest, and in fact the mechanism for doing so is already in place"). Today's grant of injunctive relief simply does not square with the Court's reasoning in *Hobby Lobby*.

It should by now be clear just how far the Court has strayed in granting Wheaton an interlocutory injunction against the enforcement of the law and regulations before the courts below have adjudicated Wheaton's RFRA claim. To warrant an injunction under the All Writs Act, the Court must have more than a bare desire to suspend the existing state of affairs; Wheaton's entitlement to relief must be indisputably clear. While Wheaton's religious conviction is undoubtedly entitled to respect, it does not come close to affording a basis for relief under the law.

C

The Court's approach imposes an unwarranted and unprecedented burden on the Government's ability to administer an important regulatory scheme. The Executive is tasked with enforcing Congress' mandate that preventative care be available to citizens at no cost beyond that of insurance. In providing the accommodation for which Wheaton is eligible, the Government has done a salutary thing: exempt religious organizations from a requirement that might otherwise burden them. Wheaton objects, however, to the minimally burdensome paperwork necessary for the Government to administer this accommodation. If the Government cannot require organizations to attest to their views by way of a simple self-certification form and notify their third-party administrators of their claimed exemption, how can it

ever identify the organizations eligible for the accommodation and perform the administrative tasks necessary to make the accommodation work? The self-certification form is the *least* intrusive way for the Government to administer the accommodation. All that a religious organization must do is attest to the views that it holds and notify its third-party administrator that it is exempt. The Government rightly accepts that attestation at face value; it does not question whether an organization's views are sincere. It is not at all clear to me how the Government could administer the religious-nonprofit accommodation if Wheaton were to prevail.

The Court has different ideas, however. Stepping into the shoes of HHS, the Court sets out to craft a new administrative regime. Its order grants injunctive relief so long as Wheaton "informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Ante*, at 958–959. And it goes further—"[t]o meet the condition for injunction pending appeal," the Court continues, Wheaton "need not use the [self-certification] form prescribed by the Government . . . and need not send copies to health insurance issuers or third-party administrators." *Ibid.* This Court has no business rewriting administrative regulations. Yet, without pause, the Court essentially does just that.[6]

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[6] This case is crucially unlike *Little Sisters of the Poor* v. *Sebelius*, 571 U. S. 1171, 1172 (2014). There, the Court issued a comparable order "based on all the circumstances of the case"—in particular, the fact that the applicants' third-party administrator was a "church plan" that had no legal obligation or intention to provide contraceptive coverage. See *Little Sisters of the Poor* v. *Sebelius*, 6 F. Supp. 3d 1225, 1239–1241, 1243–1244 (Colo. 2013). As a consequence, whatever the merits of that unusual order, it did not affect any individual's access to contraceptive coverage. Not so here. Wheaton's third-party administrator bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification. See 26 CFR § 54.9815–2713A(b)(2) (2013); 29 CFR § 2510.3–16(b) (2013). Today's injunction thus risks depriving hundreds of Wheaton's employees and students of their legal entitlement to contraceptive coverage. In addition, because Wheaton is materially indistinguishable from other nonprofits that object to the Government's accommodation, the issuance of an injunction in this case will presumably entitle hundreds or thousands of other objectors to the same remedy. The Court has no reason to think that the administrative scheme it foists on the Government today is workable or effective on a national scale.

It is unclear why the Court goes to the lengths it does to rewrite HHS' regulations. Presumably the Court intends to leave to the agency the task of forwarding whatever notification it receives to the respective insurer or third-party administrator. But the Court does not even require the religious nonprofit to identify its third-party administrator, and it neglects to explain how HHS is to identify that entity. Of course, HHS is aware of Wheaton's third-party administrator in this case. But what about other cases? Does the Court intend for HHS to rely on the filing of lawsuits by every entity claiming an exemption, such that the identity of the third-party administrator will emerge in the pleadings or in discovery? Is HHS to undertake the daunting—if not impossible—task of creating a database that tracks every employer's insurer or third-party administrator nationwide? And, putting that aside, why would not Wheaton's claim be exactly the same under the Court's newly fashioned system? Either way, the end result will be that a third-party administrator will provide contraceptive coverage. Surely the Court and Wheaton are not just objecting to the use of one stamp instead of two in order to avail itself of the accommodation.

The Court's actions in this case create unnecessary costs and layers of bureaucracy, and they ignore a simple truth: The Government must be allowed to handle the basic tasks of public administration in a manner that comports with common sense. It is not the business of this Court to ensnare itself in the Government's ministerial handling of its affairs in the manner it does here.

* * *

I have deep respect for religious faith, for the important and selfless work performed by religious organizations, and for the values of pluralism protected by RFRA and the Free Exercise Clause. But the Court's grant of an injunction in this case allows Wheaton's beliefs about the effects of its actions to trump the democratic interest in allowing the Government to enforce the law. In granting an injunction concerning this religious-nonprofit accommodation, the availability of which served as the premise for the Court's decision in *Hobby Lobby*, the Court cannot possibly be applying our longstanding requirement that a party's entitlement to relief be indisputably clear.

Our jurisprudence has over the years drawn a careful boundary between majoritarian democracy and the right of every American

to practice his or her religion freely. We should not use the extraordinary vehicle of an injunction under the All Writs Act to work so fundamental a shift in that boundary. Because Wheaton cannot justify the relief it seeks, I would deny its application for an injunction, and I respectfully dissent from the Court's refusal to do so.

[Appendix to opinion of SOTOMAYOR, J., begins on p. 972.]

APPENDIX*

EBSA FORM 700-- CERTIFICATION
(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____
Signature of the individual listed above

_____
Date

*Source: United States Dept. of Labor, online at http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf (as visited July 2, 2014, and available in Clerk of Court's case file).

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

JULY 10, 2014

Certiorari Denied

No. 14–5080 (14A22). DAVIS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 142 So. 3d 867.

No. 14–5121 (14A31). DAVIS *v.* SCOTT, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 147 So. 3d 521.

JULY 15, 2014

Miscellaneous Order

No. 14–5225 (14A48). IN RE MIDDLETON. 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. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

Certiorari Denied

No. 14–5238 (14A52). MIDDLETON *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

JULY 16, 2014

Miscellaneous Orders

No. 14A64. MIDDLETON *v.* RUSSELL, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied.

No. 14–5247 (14A55). IN RE MIDDLETON. 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. 14–5248 (14A56). MIDDLETON *v.* ROPER, WARDEN. 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. Reported below: 759 F. 3d 833.

No. 14–5271 (14A63). MIDDLETON *v.* ROPER, WARDEN. 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. Reported below: 759 F. 3d 867.

JULY 18, 2014

Miscellaneous Order

No. 14A65. HERBERT, GOVERNOR OF UTAH, ET AL. *v.* EVANS ET AL. Application for stay, presented to JUSTICE SOTOMAYOR,

and by her referred to the Court, granted. Preliminary injunction issued by the United States District Court for the District of Utah, case No. 2:14–cv–00055–DAK, on May 19, 2014, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.

JULY 21, 2014

Miscellaneous Orders

No. 13–1041. PEREZ, SECRETARY OF LABOR, ET AL. *v.* MORTGAGE BANKERS ASSN. ET AL.; and

No. 13–1052. NICKOLS ET AL. *v.* MORTGAGE BANKERS ASSN. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 916.] Motions of petitioners to dispense with printing joint appendix granted.

No. 13–5967. MARTINEZ *v.* ILLINOIS, 572 U. S. 833. Petitioner is requested to file a response to the petition for rehearing within 30 days.

Rehearing Denied

No. 13–957. PARRIS *v.* CUMMINS POWER SOUTH, LLC, 572 U. S. 1061;

No. 13–1079. ACHEAMPONG *v.* BANK OF NEW YORK MELLON ET AL., 572 U. S. 1129;

No. 13–1087. PULVER *v.* BATTELLE MEMORIAL INSTITUTE, 572 U. S. 1116;

No. 13–1199. YOUNGJOHN *v.* WASHINGTON STATE BAR ASSN., 572 U. S. 1150;

No. 13–1215. WHITE *v.* KUBOTEK CORP. ET AL., 572 U. S. 1117;

No. 13–7951. KECKEISSEN *v.* PENNSYLVANIA, 571 U. S. 1216;

No. 13–8541. PAYNE *v.* SHELDON, WARDEN, 572 U. S. 1049;

No. 13–8634. MORIN *v.* UNIVERSITY OF MASSACHUSETTS ET AL., 572 U. S. 1090;

No. 13–8754. SCRIBNER *v.* VIRGINIA, 572 U. S. 1091;

No. 13–8918. RUFFIN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL., 572 U. S. 1104;

No. 13–9007. MILLER *v.* WALT DISNEY COMPANY CHANNEL 7 KABC ET AL., 572 U. S. 1119;

No. 13–9090. BERK ET AL. *v.* MOHR ET AL., 572 U. S. 1093;

No. 13–9121. BENDER *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., 572 U. S. 1122;

No. 13–9142. BOLDRINI *v.* WILSON ET AL., 572 U. S. 1122;

No. 13–9186. CRAIG *v.* VALENZUELA, WARDEN, 572 U. S. 1123;

No. 13–9194. MICHAEL *v.* UNITED STATES, 572 U. S. 1123;
No. 13–9251. ROSS *v.* ILLINOIS, 572 U. S. 1105;
No. 13–9282. HOLLOWAY *v.* BAUMAN, WARDEN, 572 U. S. 1139;
No. 13–9289. FAGNES *v.* KELLER, WARDEN, ET AL., 572 U. S. 1139;
No. 13–9291. HERSHFIELD *v.* KING GEORGE COUNTY, VIRGINIA, 572 U. S. 1093;
No. 13–9301. RUBIO *v.* VAUGHN ET AL., 572 U. S. 1105;
No. 13–9310. FLORES VERA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 572 U. S. 1139;
No. 13–9358. JACOBS *v.* ESTEFAN ET AL., 572 U. S. 1105;
No. 13–9402. SIMS *v.* VIACOM, INC., 572 U. S. 1124;
No. 13–9453. KING *v.* STEVENSON, WARDEN, 572 U. S. 1124;
No. 13–9464. JOHNSON *v.* SUNSHINE HOUSE, INC., 572 U. S. 1154;
No. 13–9495. STRATTON *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL., 572 U. S. 1106;
No. 13–9513. GETZ *v.* DELAWARE, 572 U. S. 1095;
No. 13–9520. IGLESIAS *v.* WAL-MART STORES EAST L. P., 572 U. S. 1107;
No. 13–9579. HERRON *v.* ALABAMA, 572 U. S. 1141; and
No. 13–9587. LEE, AKA THOMPSON *v.* BIGELOW, WARDEN, 572 U. S. 1125. Petitions for rehearing denied.

No. 13–9302. HSIAO-PENG CHENG *v.* SCHLUMBERGER, 572 U. S. 1146. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 13–9491. SPOTTS *v.* UNITED STATES, 572 U. S. 1096. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

JULY 22, 2014

Miscellaneous Order

No. 14A82. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* WOOD. Application to vacate the judgment of the United States Court of Appeals for the Ninth Circuit granting a conditional preliminary injunction, presented to JUSTICE KENNEDY, and by him referred to the Court, granted. The Dis-

trict Judge did not abuse his discretion in denying Wood's motion for a preliminary injunction. The judgment of the Court of Appeals reversing the District Court and granting a conditional preliminary injunction is vacated.

Certiorari Denied

No. 14–5323 (14A83). WOOD *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

JULY 23, 2014

Certiorari Denied

No. 14–5333 (14A93). WOOD *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 759 F. 3d 1117.

AUGUST 1, 2014

Dismissal Under Rule 46

No. 13–10758. IN RE COLLINS. Petition for writ of mandamus dismissed under this Court's Rule 46.

AUGUST 5, 2014

Miscellaneous Order

No. 14A141. WORTHINGTON *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. 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. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

Certiorari Denied

No. 14–5544 (14A135). WORTHINGTON *v.* STEELE, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

August 6, 2014

Dismissal Under Rule 46

No. 13–1529. Masto, Attorney General of Nevada, et al. *v.* Kieren. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.

August 11, 2014

Miscellaneous Orders

No. D–2782. In re Discipline of Bickerstaff. Roderick Kevin Bickerstaff, Sr., of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2783. In re Discipline of Rominger. Karl E. Rominger, of Carlisle, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2784. In re Discipline of Wachholz. Douglas Paul Wachholz, of Reno, Nev., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2785. In re Discipline of Frost. James Albert Frost, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2786. In re Discipline of Bradley. Stephanie Yvonne Bradley, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2787. In re Discipline of Horowitz. Lawrence Ivan Horowitz, of Katonah, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2788. IN RE DISCIPLINE OF RICHBOURG. Robert B. Richbourg, of Tifton, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2789. IN RE DISCIPLINE OF GREENLEAF. Robert J. Greenleaf, of Henderson, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2790. IN RE DISCIPLINE OF AMU. Lanre O. Amu, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2791. IN RE DISCIPLINE OF COOK. Rufus Cook, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2792. IN RE DISCIPLINE OF LIVINGSTON. Richard Bruce Livingston, of Springfield, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2793. IN RE DISCIPLINE OF LODES. Carl F. Lodes, of White Plains, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2794. IN RE DISCIPLINE OF EDELSTEIN. Eric S. Edelstein, of Syosset, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2795. IN RE DISCIPLINE OF DUFFY. James P. Duffy III, of Manhasset, N. Y., is suspended from the practice of law in

this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2796. IN RE DISCIPLINE OF HUDSON. Daryl J. Hudson III, of Glenville, W. Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2797. IN RE DISCIPLINE OF PLOTNER. Jerome Plotner, of Jamaica, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2798. IN RE DISCIPLINE OF BACHMAN. Rik Andrew Bachman, of Fairfield, Conn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 13–9364. BALLARD *v.* PENNSYLVANIA. Sup. Ct. Pa. Letters of June 2, July 8, July 14, and July 16, 2014, received in this case, are referred to the Disciplinary Board of the Supreme Court of Pennsylvania for any investigation or action it finds appropriate.

Rehearing Denied

No. 12–930. SCIALABBA, ACTING DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL. *v.* CUELLAR DE OSORIO ET AL., *ante*, p. 41;

No. 13–127. TURNER *v.* UNITED STATES, 572 U. S. 1134;

No. 13–339. CTS CORP. *v.* WALDBURGER ET AL., *ante*, p. 1;

No. 13–1076. PAIGE *v.* VERMONT ET AL., 572 U. S. 1115;

No. 13–1093. GIBSON *v.* KILPATRICK, *ante*, p. 942;

No. 13–1120. IBIDA *v.* HAGEL, SECRETARY OF DEFENSE, ET AL., 572 U. S. 1089;

No. 13–1163. YADAV ET AL. *v.* TOWNSHIP OF WEST WINDSOR, NEW JERSEY, 572 U. S. 1150;

No. 13–1210. DIFRANCESCO *v.* MCSWAIN ET AL., *ante*, p. 905;

No. 13–1360. FERGUSON *v.* UNITED STATES, *ante*, p. 907;

No. 13–1364. SHENEMAN *v.* UNITED STATES, *ante*, p. 918;

No. 13–5186. IN RE RADCLIFF, 571 U. S. 813;

No. 13–6870. LAWS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 572 U. S. 1102;

No. 13–6892. TAGOE, AKA ROBERTS *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES ET AL., *ante*, p. 913;

No. 13–7529. HAFEZ *v.* FRAZIER, WARDEN, 571 U. S. 1179;

No. 13–8415. BELL *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL., 572 U. S. 1118;

No. 13–8660. WILLIAMS *v.* RUSSELL, WARDEN, ET AL., 572 U. S. 1066;

No. 13–8738. BOULDIN *v.* VIRGINIA, 572 U. S. 1091;

No. 13–9002. GRAY *v.* COMMISSIONER OF INTERNAL REVENUE, 572 U. S. 1137;

No. 13–9003. GRAY *v.* UNITED STATES, 572 U. S. 1137;

No. 13–9058. WILLIAMS *v.* SWARTHOUT, WARDEN, 572 U. S. 1120;

No. 13–9068. HINTON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 572 U. S. 1093;

No. 13–9082. HUNEYCUTT *v.* NEELY, SUPERINTENDENT, PIEDMONT CORRECTIONAL INSTITUTION, 572 U. S. 1071;

No. 13–9131. NUNES *v.* UNITED STATES, 572 U. S. 1072;

No. 13–9169. FLORES-LOPEZ *v.* UNITED STATES, 572 U. S. 1073;

No. 13–9249. HAENDEL *v.* PONT ET AL., 572 U. S. 1138;

No. 13–9250. SKLAR *v.* TOSHIBA AMERICA INFORMATION SYSTEMS, INC., 572 U. S. 1138;

No. 13–9341. ANDREWS *v.* ROZUM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL., 572 U. S. 1140;

No. 13–9359. IN RE JONES, 572 U. S. 1148;

No. 13–9377. LEE *v.* CAIN, WARDEN, 572 U. S. 1152;

No. 13–9426. RUFFIN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL., 572 U. S. 1153;

No. 13–9443. HAMILTON *v.* LOUISIANA, 572 U. S. 1124;

No. 13–9451. YAN YAN *v.* PENN STATE UNIVERSITY ET AL., 572 U. S. 1124;

No. 13–9458. BELL *v.* CHILDREN'S PROTECTIVE SERVICES ET AL., 572 U. S. 1154;

No. 13–9528. WAUGH *v.* ANHEUSER-BUSCH INBEV ET AL., *ante*, p. 908;

No. 13–9576. CHAO HO LIN ET AL. *v.* CHI CHU WU, *ante*, p. 909;

No. 13–9631. GULBRANDSON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, *ante*, p. 919;

No. 13–9641. MOORE *v.* UNITED STATES, 572 U. S. 1155;

No. 13–9672. PULLEY *v.* UNITEDHEALTH GROUP INC., 572 U. S. 1155;

No. 13–9676. ADAMS *v.* UNIVERSITY OF TENNESSEE HEALTH SCIENCE CENTER AT MEMPHIS ET AL., 572 U. S. 1155;

No. 13–9711. REDMAN *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES ET AL., 572 U. S. 1142;

No. 13–9717. PENN *v.* ARKANSAS, 572 U. S. 1127;

No. 13–9764. MORRIS *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, *ante*, p. 909;

No. 13–9778. IN RE KOCH, *ante*, p. 930;

No. 13–9813. HAMILTON *v.* MISSOURI, *ante*, p. 920;

No. 13–9824. MILLIS *v.* CROSS, WARDEN, 572 U. S. 1146;

No. 13–9862. IN RE LACROIX, *ante*, p. 930;

No. 13–9875. JONES *v.* OHIO, *ante*, p. 910;

No. 13–9897. LOCKETT *v.* CITY OF CHICAGO, ILLINOIS, 572 U. S. 1156; and

No. 13–9963. BAQUEDANO *v.* UNITED STATES, 572 U. S. 1157. Petitions for rehearing denied.

No. 13–9864. ROLLNESS *v.* UNITED STATES, 572 U. S. 1146. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

AUGUST 20, 2014

Miscellaneous Order

No. 14A196. MCQUIGG *v.* BOSTIC ET AL. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted, and the issuance of the mandate of the United States Court of Appeals for the Fourth Circuit in case No. 14–1167 is stayed 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 sending down of the judgment of this Court.

AUGUST 29, 2014

Miscellaneous Orders

No. 13A1163. WHITWORTH *v.* UNITED STATES. C. A. 11th Cir. Application for certificate of appealability, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 13A1180. STOUTAMIRE *v.* MORGAN, WARDEN. C. A. 6th Cir. Application for certificate of appealability, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 13A1216 (13–1548). J. L. B. *v.* S. J. B. Dist. Ct. App. Fla., 5th Dist. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 13A1264. SCHNEIDER *v.* SUTTER AMADOR HOSPITAL ET AL. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 13A1286. BALL ET AL. *v.* LEBLANC, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Application to vacate stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. D–2772. IN RE DISBARMENT OF CEGELSKI. Disbarment entered. [For earlier order herein, see 572 U. S. 1147.]

No. D–2773. IN RE DISBARMENT OF HARRINGTON. Disbarment entered. [For earlier order herein, see 572 U. S. 1148.]

No. D–2774. IN RE DISBARMENT OF SLOANE. Disbarment entered. [For earlier order herein, see 572 U. S. 1148.]

No. D–2775. IN RE DISBARMENT OF RICE. Disbarment entered. [For earlier order herein, see *ante*, p. 901.]

No. D–2778. IN RE DISBARMENT OF COOK. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2779. IN RE DISBARMENT OF NUSBAUM. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2780. IN RE DISBARMENT OF KAHL. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2781. IN RE DISBARMENT OF BERRY. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2799. IN RE DISCIPLINE OF LINK. Robert E. Link III, of East Norwich, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2800. IN RE DISCIPLINE OF BIGLER. John Martin Bigler, of Wantagh, N. Y., is suspended from the practice of law

in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2801. IN RE DISCIPLINE OF RICKLES. Wendy Jane Rickles, of Worcester, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2802. IN RE DISCIPLINE OF BRUFSKY. Allen David Brufsky, of Naples, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2803. IN RE DISCIPLINE OF NANSEN. Peter Dirk Nansen, of Bellingham, Wash., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2804. IN RE DISCIPLINE OF AGUILEZ. Herocio M. Aguilez, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2805. IN RE DISCIPLINE OF ZUCKER. Isaac Mannes Zucker, of Garden City, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2806. IN RE DISCIPLINE OF WEINSTEIN. Brett B. Weinstein, of King of Prussia, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2807. IN RE DISCIPLINE OF QUICHOCHO. Ramon King Quichocho, Jr., of Saipan, N. Mar. I., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2808. In re Discipline of Felix. John A. Felix, of Williamsport, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2809. In re Discipline of Jones. Mikel D. Jones, of Boynton Beach, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2810. In re Discipline of Seltzer. James Jay Seltzer, of Muntinlupa City, Luzon, Philippines, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2811. In re Discipline of Mannear. William Stephen Mannear, of Baton Rouge, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2812. In re Discipline of Nalls. Clarence T. Nalls, of Baton Rouge, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 13–604. Heien *v.* North Carolina. Sup. Ct. N. C. [Certiorari granted, 572 U. S. 1059.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–6827. Holt, aka Muhammad *v.* Hobbs, Director, Arkansas Department of Correction, et al. C. A. 8th Cir. [Certiorari granted, 571 U. S. 1236.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Rehearing Denied

No. 13–1358. Facey *v.* New York City Department of Education, *ante*, p. 948;

No. 13–1381. Oyakhire *v.* United States, *ante*, p. 933;

No. 13–7750. PRASAD *v.* HILL, WARDEN, 571 U. S. 1210;
No. 13–8905. BLAKELY *v.* WARDS ET AL., *ante*, p. 907;
No. 13–9069. MOUTON *v.* SMITH, WARDEN, 572 U. S. 1121;
No. 13–9151. PREYOR *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 918;
No. 13–9252. SEIBERT *v.* TATUM, WARDEN, 572 U. S. 1138;
No. 13–9261. GREENE *v.* RENICO, WARDEN, 572 U. S. 1138;
No. 13–9430. POUNCY *v.* SOLOTAROFF ET AL., 572 U. S. 1153;
No. 13–9471. BERRYHILL *v.* ILLINOIS STATE TOLL HIGHWAY AUTHORITY, 572 U. S. 1154;
No. 13–9492. BIDWAI *v.* PEREZ, SECRETARY OF LABOR, ET AL., 572 U. S. 1141;
No. 13–9499. IN RE AKERS, 572 U. S. 1149;
No. 13–9586. WASHINGTON *v.* DENNEY, WARDEN, ET AL., *ante*, p. 919;
No. 13–9612. RICHARDS *v.* MITCHEFF ET AL., *ante*, p. 919;
No. 13–9647. CHANCE *v.* TORRINGTON SAVINGS BANK MORTGAGE SERVICING CO., 572 U. S. 1155;
No. 13–9700. ANDERSON *v.* CITY OF DANVILLE, VIRGINIA, ET AL., *ante*, p. 934;
No. 13–9716. HAMMOCK *v.* JENSON ET AL., *ante*, p. 934;
No. 13–9742. WADDLETON *v.* JACKSON ET AL., *ante*, p. 909;
No. 13–9826. LYONS *v.* STODDARD, WARDEN, *ante*, p. 909;
No. 13–9834. SIKES *v.* TEXAS, *ante*, p. 950;
No. 13–9947. MARQUEZ *v.* NEW MEXICO BEHAVIORAL HEALTH INSTITUTE, *ante*, p. 936;
No. 13–9974. GIPSON *v.* DEPARTMENT OF THE TREASURY, *ante*, p. 910;
No. 13–10046. O'RILEY *v.* WALMART, INC., ET AL., *ante*, p. 936;
No. 13–10132. WARNER *v.* UNITED STATES, *ante*, p. 921; and
No. 13–10159. CLAY *v.* OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, *ante*, p. 937. Petitions for rehearing denied.

SEPTEMBER 9, 2014

Miscellaneous Orders

No. 14A266. RINGO *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE

BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

No. 14A269. RINGO *v.* ROPER, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied.

Certiorari Denied

No. 14–6168 (14A265). RINGO *v.* ROPER, WARDEN. 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.

No. 14–6169 (14A267). RINGO *v.* ROPER, WARDEN. 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. JUSTICE SOTOMAYOR would grant the application for stay of execution. Reported below: 766 F. 3d 880.

SEPTEMBER 10, 2014

Certiorari Denied

No. 14–6170 (14A268). TROTTIE *v.* STEPHENS, 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: 581 Fed. Appx. 436.

No. 14–6200 (14A275). TROTTIE *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. 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: 766 F. 3d 450.

SEPTEMBER 17, 2014

Certiorari Denied

No. 14–6306 (14A296). COLEMAN *v.* STEPHENS, 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: 768 F. 3d 367.

SEPTEMBER 23, 2014

Miscellaneous Order

No. 13–640. PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI *v.* INDYMAC MBS, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 572 U. S. 1002.] The parties are directed to file letter briefs addressing the following question: "What should be the effect, if any, of the proposed settlement agreement now pending before the District Court on the matter pending before this Court?" Briefs, limited to 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before noon, Thursday, September 25, 2014.

SEPTEMBER 24, 2014

Dismissal Under Rule 46

No. 14–27. CITY OF LOS ANGELES, CALIFORNIA, ET AL. *v.* JONES ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 555 Fed. Appx. 659.

SEPTEMBER 26, 2014

Dismissal Under Rule 46

No. 13–1178. KIRBY ET AL. *v.* MARVEL CHARACTERS, INC., ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 726 F. 3d 119.

SEPTEMBER 29, 2014

Certiorari Dismissed

No. 13–640. PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI *v.* INDYMAC MBS, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 572 U. S. 1002.] Writ of certiorari dismissed as improvidently granted.

Miscellaneous Order

No. 14A336. HUSTED, OHIO SECRETARY OF STATE, ET AL. *v.* OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. D. C. S. D. Ohio. Application for stay, presented to JUSTICE KAGAN, and

by her referred to the Court, granted, and the District Court's September 4, 2014, order granting preliminary injunction is stayed 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 sending down of the judgment of this Court. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application for stay.

SEPTEMBER 30, 2014

Dismissals Under Rule 46

No. 13–376. ELECTRONIC ARTS INC. *v.* HART. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 717 F. 3d 141.

No. 13–377. ELECTRONIC ARTS INC. *v.* KELLER ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 724 F. 3d 1268.

OCTOBER 2, 2014

Miscellaneous Orders

No. 126, Orig. KANSAS *v.* NEBRASKA ET AL. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. [For earlier order herein, see, *e. g.*, *ante*, p. 902.]

No. 13–433. INTEGRITY STAFFING SOLUTIONS, INC. *v.* BUSK ET AL. C. A. 9th Cir. [Certiorari granted, 571 U. S. 1236.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–435. OMNICARE, INC., ET AL. *v.* LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND ET AL. C. A. 6th Cir. [Certiorari granted, 571 U. S. 1236.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. The time is to be divided as follows: 30 minutes for petitioners, 20 minutes for respondents, and 10 minutes for the Solicitor General.

No. 13–517. WARGER *v.* SHAUERS. C. A. 8th Cir. [Certiorari granted, 571 U. S. 1236.] Motion of the Solicitor General for leave

to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–534. North Carolina State Board of Dental Examiners *v.* Federal Trade Commission. C. A. 4th Cir. [Certiorari granted, 571 U. S. 1236.] Motion of American Optometric Association et al. for leave to file brief as *amici curiae* out of time denied.

No. 13–854. Teva Pharmaceuticals USA, Inc., et al. *v.* Sandoz, Inc., et al. C. A. Fed. Cir. [Certiorari granted, 572 U. S. 1033.] Motion of petitioners for leave to file volume 4 of the joint appendix under seal granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–975. T-Mobile South, LLC *v.* City of Roswell, Georgia. C. A. 11th Cir. [Certiorari granted, 572 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Probable Jurisdiction Postponed

No. 13–1314. Arizona State Legislature *v.* Arizona Independent Redistricting Commission et al. Appeal from D. C. Ariz. Further consideration of question of jurisdiction postponed to hearing of case on the merits limited to the following questions: "(1) Do the Elections Clause of the United States Constitution and 2 U. S. C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts? (2) Does the Arizona Legislature have standing to bring this suit?" Reported below: 997 F. Supp. 2d 1047.

Certiorari Granted

No. 13–1333. Coleman, aka Coleman-Bey *v.* Tollefson et al. (Reported below: 733 F. 3d 175); Coleman, aka Coleman-Bey *v.* Bowerman et al.; Coleman, aka Coleman-Bey *v.* Dykehouse et al.; and Coleman, aka Coleman-Bey *v.* Vroman et al. C. A. 6th Cir. Certiorari granted.

No. 13–1402. Kerry, Secretary of State, et al. *v.* Din. C. A. 9th Cir. Certiorari granted. Reported below: 718 F. 3d 856.

No. 13–1499. Williams-Yulee *v.* Florida Bar. Sup. Ct. Fla. Certiorari granted. Reported below: 138 So. 3d 379.

No. 14–86. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ABERCROMBIE & FITCH STORES, INC. C. A. 10th Cir. Certiorari granted. Reported below: 731 F. 3d 1106.

No. 14–103. BAKER BOTTS L. L. P. ET AL. *v.* ASARCO LLC. C. A. 5th Cir. Certiorari granted. Reported below: 751 F. 3d 291.

No. 13–550. TIBBLE ET AL. *v.* EDISON INTERNATIONAL ET AL. C. A. 9th Cir. Certiorari granted limited to the following question: "Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U. S. C. § 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed." Reported below: 729 F. 3d 1110.

No. 13–1352. OHIO *v.* CLARK. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N. E. 2d 592.

No. 13–1371. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS ET AL. *v.* INCLUSIVE COMMUNITIES PROJECT, INC., ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 747 F. 3d 275.

No. 13–9972. RODRIGUEZ *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 741 F. 3d 905.

No. 14–15. ARMSTRONG ET AL. *v.* EXCEPTIONAL CHILD CENTER, INC., ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 567 Fed. Appx. 496.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2011, 2012, AND 2013

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2011	**2012**	**2013**	**2011**	**2012**	**2013**	**2011**	**2012**	**2013**	**2011**	**2012**	**2013**
Number of cases on dockets	3	3	5	1,867	1,806	1,869	7,082	6,997	6,706	8,952	8,806	8,580
Number disposed of during term	1	0	0	1,564	1,503	1,568	6,090	6,099	5,979	7,655	7,602	7,547
Number remaining on dockets	2	3	5	303	303	301	992	898	727	1,297	1,204	1,033

	TERMS		
	2011	**2012**	**2013**
Cases argued during term	* 79	77	79
Number disposed of by full opinions	73	76	77
Number disposed of by per curiam opinions	5	1	2
Number set for reargument	1	0	0
Cases granted review this term	66	93	76
Cases reviewed and decided without oral argument	137	88	72
Total cases to be available for argument at outset of following term	31	45	40

* Affordable Care Act cases counted as four cases for argument.

JULY 2, 2014

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