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Table of Contents

Table of Cases

Principal cases are in bold type. Cases cited or discussed in the text are in roman type. Cases cited within principal cases and within other quoted materials are not included. References are to pages.

Chapter 1

JUSTICIABILITY

C. STANDING

1. Standing to Challenge Legislation, Federal Officials' Conduct, and State Action

To be added immediately before the final paragraph on page 47:

Picking up on *Spokeo*'s language, *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190 (2021), *see infra* at 16, ruled that concrete injuries include "traditional tangible harms, such as physical harms and monetary harms," as well as "intangible harms" that have "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." Concrete harms "may also include harms specified by the Constitution itself."

To be added to Note 2(a) on page 49, immediately before the paragraph discussing *Clapper v. Amnesty International USA*.

Carney v. Adams, 141 S. Ct. 493 (2020), rejected the "some day intentions" of an attorney challenging Delaware's political-balance requirement for its state judiciary. For its five main courts, the state constitution prohibits the members of a single "political party" from occupying more than "a bare majority" of seats. For three of those courts (Supreme, Superior, and Chancery), the state constitution limits the remaining seats to members of "the other major political party" (what the Court called the "major party requirement"). Plaintiff, a long-time registered Democrat and an attorney who had never applied for any state judicial vacancy open to Democrats, changed his bar status from "Active" to "Emeritus" about a year before commencing his action. Within six to eight weeks before filing, Plaintiff changed back to "Active" status. Eight days before filing, plaintiff reregistered to vote as an independent. While plaintiff challenged both the bare-majority and major-party requirements, only the latter remained in play before the Court. (The Third Circuit found no standing to challenge the bare-majority requirement, and plaintiff did not seek *certiorari* review of that ruling). With respect to the major-party requirement, plaintiff claimed injury-in-fact because his status as a "political independent" rendered him ineligible for positions with three state courts. The Court rejected the argument, finding that plaintiff failed to show that he was "likely to apply to become a judge in the reasonably foreseeable future if Delaware did not bar him because of political affiliation." Plaintiff's failure to apply for prior judicial vacancies, together with the circumstances described above and a lack of planning for future opportunities, discredited his claim during discovery that he "would apply" for a

judicial position. Would the result have been different had plaintiff applied for a position before filing suit, or articulated suitable plans for doing so? Even if this question is debatable, one might wonder why plaintiff—an attorney—failed to do either of these things. After all, *Lujan's* warning about the need for concrete plans preceded the suit by almost twenty-five years.

To be added after the first paragraph of note 2(b) on page 51:

In *California v. Texas*, 141 S. Ct. 2104 (2021), the Patient Protection and Affordable Care Act (ACA) survived Supreme Court scrutiny yet again, this time on standing (specifically, traceability) grounds. In 2017, Congress reduced to zero the penalty for failure to purchase health insurance, rendering unenforceable the ACA provision that required such purchase (nicknamed the "individual mandate"). Texas, along with numerous other states, filed suit, seeking a declaration that the amended mandate is unconstitutional and inseverable from the remaining provisions of the ACA. Two individuals joined as plaintiffs, and California, with the District of Columbia and numerous other states, intervened as defendants. The district court found standing for the individual plaintiffs and declared the mandate both unconstitutional and inseverable from the remainder of the ACA. The appellate court, 2-1, found standing for all plaintiffs (individual and state) and agreed that the mandate violated the Constitution.

In a 7-2 opinion by Justice Breyer, the Court reversed, ruling that both sets of plaintiffs failed to show that their alleged harms traced back to "the allegedly unlawful conduct of which they complain"—the individual mandate. The individual plaintiffs claimed financial injury from past and future payments to purchase healthcare required by the mandate, but because the mandate lacked an enforcement provision, "there [was] no possible Government action * * * causally connected to the plaintiffs' injury * * * ." Threat of enforcement must be "substantial" to show a causal link between the challenged government action and the injury, a standard the individual plaintiffs failed to meet because they identified no "way in which the defendants * * * [would] act to enforce" the mandate.

The state plaintiffs claimed "an indirect injury in the form of the increased use of (and therefore cost to) state-operated medical insurance programs," but the Court rejected the states' premise that the mandate, with zero penalty for noncompliance, caused an increase in enrollment in state-run programs. The benefits flowing from *other* (unrelated) ACA provisions, rather than the neutered mandate, provided a more likely cause for any increased enrollment. The state plaintiffs' other claimed injury—increased costs associated with ACA compliance—fared no better, as those costs related to compliance with *other* ACA provisions, not the mandate.

In dissent, Justice Alito, joined by Justice Gorsuch, embraced a standing argument the majority declined to address because it was not "directly argued" in the lower courts or raised on certiorari (conclusions with which the dissent disagreed). Alito argued that injuries flowing from unlawful enforcement of the other ACA provisions link back to the mandate because the mandate rendered those provisions inseverable (and therefore unenforceable).

Justice Alito's accusation notwithstanding,[1] all members of the Court agree that a plaintiff's injury must trace back to the government's "allegedly unlawful conduct." The state plaintiffs challenged the constitutionality of the mandate. Did they also challenge the legality of the remaining ACA provisions, or did they merely seek a remedy (invalidation of the entire ACA) for the unconstitutional mandate? The issue, as Justice Thomas put it in his concurrence, is "whether inseverability is a remedy or merits question." Only the latter, he explained, would support Justice Alito's "standing-through-inseverability * * * theory of standing." Justice Thomas agreed with the majority's refusal to entertain the newly raised theory in part because the Court has not come down clearly on the merits side or the remedy side. For now, Justice Alito's theory remains just that—a theory. Unless a majority adopts it, states lack standing to challenge the individual mandate.

Does the majority announce a new rule for traceability, or does it apply the existing rule to a particular set of facts? If it is the latter, why would the Court grant certiorari? As a general matter, the Court does not grant certiorari to engage in error-correction.

To be added on page 55 after Note 7:

UZUEGBUNAM v. PRECZEWSKI

141 S. Ct. 792.
Supreme Court of the United States, 2021.

JUSTICE THOMAS delivered the opinion of the Court.

At all stages of litigation, a plaintiff must maintain a personal interest in the dispute. The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings. To demonstrate standing, the plaintiff must not only establish an injury that is fairly traceable to the challenged conduct but must also seek a remedy that redresses that injury. And if in the course of litigation a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot. This case asks whether an

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[1] Justice Alito accused the majority of making "a flat-out misstatement of the law and what the Court wrote in *Allen [v. Wright]*" when the majority said: "The Government's conduct in question is therefore not 'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain—[the individual mandate]." Alito interpreted this statement to require traceability to *actual*, as opposed to alleged, unlawfulness:

> What *Allen* actually requires is a 'personal injury fairly traceable to *the defendant's allegedly unlawful conduct.*" And what this statement means is that the plaintiff's 'injury' must be traceable to the defendant's conduct, and that conduct must be 'allegedly unlawful.' 'Allegedly unlawful' means that the plaintiff must allege that the conduct is unlawful. * * * But a plaintiff's standing (and thus the court's Article III jurisdiction) does not require a demonstration that the defendant's conduct is in fact unlawful. That is a merits issue." (Emphasis added by Justice Alito.)

Re-read the majority's quotation. Does it misstate *Allen*? Does it require a showing of actual unlawfulness, rather than an allegation of unlawfulness? You be the judge.

award of nominal damages by itself can redress a past injury. We hold that it can.

I

According to the complaint, Chike Uzuegbunam is an evangelical Christian who believes that an important part of exercising his religion includes sharing his faith. In 2016, Uzuegbunam decided to share his faith at Georgia Gwinnett College, a public college where he was enrolled as a student. At an outdoor plaza on campus near the library where students often gather, Uzuegbunam engaged in conversations with interested students and handed out religious literature.

A campus police officer soon informed Uzuegbunam that campus policy prohibited distributing written religious materials in that area and told him to stop. Uzuegbunam complied with the officer's order. To learn more about this policy, he then visited the college's Director of the Office of Student Integrity, who was directly responsible for promulgating and enforcing the policy. When asked if Uzuegbunam could continue speaking about his religion if he stopped distributing materials, the official said no. The official explained that Uzuegbunam could speak about his religion or distribute materials only in two designated "free speech expression areas," which together make up just 0.0015 percent of campus. And he could do so only after securing the necessary permit. Uzuegbunam then applied for and received a permit to use the free speech zone.

Twenty minutes after Uzuegbunam began speaking on the day allowed by his permit, another campus police officer again told him to stop, this time saying that people had complained about his speech. Campus policy prohibited using the free speech zone to say anything that "disturbs the peace and/or comfort of person(s)." App. to Pet. for Cert. 151(a). The officer told Uzuegbunam that his speech violated this policy because it had led to complaints. The officer threatened Uzuegbunam with disciplinary action if he continued. Uzuegbunam again complied with the order to stop speaking. Another student who shares Uzuegbunam's faith, Joseph Bradford, decided not to speak about religion because of these events.

Both students sued a number of college officials in charge of enforcing the college's speech policies, arguing that those policies violated the First Amendment. As relevant here, they sought nominal damages and injunctive relief. Respondents initially attempted to defend the policy, stating that Uzuegbunam's discussion of his religion "arguably rose to the level of 'fighting words.' " *Id.,* at 155(a). But the college officials quickly abandoned that strategy and instead decided to get rid of the challenged policies. They then moved to dismiss, arguing that the suit was moot, because of the policy change. The students agreed that injunctive relief was no longer available, but they disagreed that the case was moot. They contended that their case was still live because they had also sought nominal damages. The District

Court dismissed the case, holding that the students' claim for nominal damages was insufficient by itself to establish standing.

The Eleventh Circuit affirmed. It stated that a request for nominal damages can save a case from mootness in certain circumstances, such as where a person pleads but fails to prove an amount of compensatory damages. But, because the students did not request compensatory damages, their plea for nominal damages could not by itself establish standing.

We granted certiorari to consider whether a plaintiff who sues over a completed injury and establishes the first two elements of standing (injury and traceability) can establish the third by requesting only nominal damages. We now reverse.

II

To satisfy the " 'irreducible constitutional minimum' " of Article III standing, a plaintiff must not only establish (1) an injury in fact (2) that is fairly traceable to the challenged conduct, but he must also seek (3) a remedy that is likely to redress that injury. *Spokeo, Inc.* v. *Robins.* There is no dispute that Uzuegbunam has established the first two elements. The only question is whether the remedy he sought—nominal damages—can redress the constitutional violation that Uzuegbunam alleges occurred when campus officials enforced the speech policies against him.

A

In determining whether nominal damages can redress a past injury, we look to the forms of relief awarded at common law. "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.' " The parties here agree that courts at common law routinely awarded nominal damages. They, instead, dispute what kinds of harms those damages could redress.

Both sides agree that nominal damages historically could provide prospective relief. The award of nominal damages was one way for plaintiffs at common law to "obtain a form of declaratory relief in a legal system with no general declaratory judgment act." D. LAYCOCK & R. HASEN, MODERN AMERICAN REMEDIES 636 (5th ed. 2019). For example, a trespass to land or water rights might raise a prospective threat to a property right by creating the foundation for a future claim of adverse possession or prescriptive easement. By obtaining a declaration of trespass, a property owner could "vindicate his right by action" and protect against those future threats. Courts at common law would not declare property boundaries in the abstract, "but the suit for nominal damages allowed them to do so indirectly." LAYCOCK.

The parties disagree, however, about whether nominal damages alone could provide retrospective relief. Stressing the declaratory function, respondents argue that nominal damages by themselves redressed only continuing or threatened injury, not past injury.

But cases at common law paint a different picture. Early courts required the plaintiff to prove actual monetary damages in every case: "*[I]njuria & damnum* [injury and damage] are the two grounds for the having [of] all actions, and without these, no action lieth." Later courts, however, reasoned that *every* legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages (such as compensatory, statutory, or punitive damages), and they did so where there was no apparent continuing or threatened injury for nominal damages to redress..

The latter approach was followed both before and after ratification of the Constitution. An early case about voting rights effectively illustrates this common-law understanding. Faced with a suit pleading denial of the right to vote, the court rejected the plaintiff 's claim because, among other reasons, the plaintiff had not established actual damages. *Ashby* v. *White* (K. B. 1703). Dissenting, Lord Holt argued that the common law inferred damages whenever a legal right was violated. Observing that the law recognized "not merely pecuniary" injury but also "personal injury," Lord Holt stated that "every injury imports a damage" and that a plaintiff could always obtain damages even if he "does not lose a penny by reason of the [violation]." Although Lord Holt was in the minority, the House of Lords overturned the majority decision, thus validating Lord Holt's position, and this principle "laid down * * * by Lord Holt" was followed "in many subsequent cases."

The dissent correctly notes that English courts differed in some respects from courts under our system, but Lord Holt's position also prevailed in courts on this side of the Atlantic. Applying what he called Lord Holt's "incontrovertible" reasoning, Justice Story explained that a prevailing plaintiff "is entitled to a verdict for nominal damages" whenever "no other [kind of damages] be proved." Because the common law recognized that "every violation imports damage," Justice Story reasoned that "[t]he law tolerates no farther inquiry than whether there has been the violation of a right." Justice Story also made clear that this logic applied to both retrospective and prospective relief.

The dissent discounts Justice Story's statement, saying that he took a potentially contradictory position elsewhere and asserted that both actual damages and a violation of a legal right are required. But in the same source the dissent cites, Justice Story said that nominal damages are "presumed" "[w]here the breach of duty is clear." Justice Story adopted the same position a few years later. And other jurists declared that "[t]he principle that every injury legally imports

damage, was decisively settled, in the case of *Ashby*." This history is hardly one of "indeterminate sources."

Admittedly, the rule allowing nominal damages for a violation of any legal right, though "decisively settled," was not universally followed—as is true for most common-law doctrines. And some courts only followed the rule in part, recognizing the availability of nominal damages but holding that the improper denial of nominal damages could be harmless error. Yet, even among these courts, many adopted the rule in full whenever a person proved that there was a violation of an "important right." Nonetheless, the prevailing rule, "well established" at common law, was "that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage."

That this rule developed at common law is unsurprising in the light of the noneconomic rights that individuals had at that time. A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation. By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.

B

Respondents and the dissent attempt to discount this historical line of cases by contending that something other than nominal damages provided redressability. They argue instead that courts could award nominal damages only when a plaintiff pleaded compensatory damages but failed to prove a specific amount. In those circumstances, they say, the plea for compensatory damages is what satisfied the redressability requirement, and courts awarded nominal damages merely as a technical matter. We do not agree.

To begin with, the cases themselves did not require a plea for compensatory damages as a condition for receiving nominal damages. Lord Holt spoke in categorical terms: "[E]very injury imports a damage," so a plaintiff who proved a legal violation could always obtain some form of damages because he "must of necessity have a means to vindicate and maintain [the right]." *Ashby*. Justice Story's language was no less definitive: "The law tolerates no farther inquiry than whether there has been the violation of a right." When a right is violated, that violation "imports damage in the nature of it" and "the party injured is entitled to a verdict for nominal damages."

Respondents and the dissent thus get the relationship between nominal damages and compensatory damages backwards. Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages

awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages.

The argument that a claim for compensatory damages is a prerequisite for an award of nominal damages also rests on the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff. That contention is not without some support. But this view is against the weight of the history discussed above, and we have already expressly rejected it. Despite being small, nominal damages are certainly concrete. The dissent says that "an award of nominal damages does not change [a plaintiff's] status or condition at all." But we have already held that a person who is awarded nominal damages receives "relief on the merits of his claim" and "may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages." Because nominal damages are in fact damages paid to the plaintiff, they "affec[t] the behavior of the defendant towards the plaintiff" and thus independently provide redress. True, a single dollar often cannot provide full redress, but the ability "to effectuate a partial remedy" satisfies the redressability requirement.

The next difficulty faced by respondents and the dissent is their inability to square their argument with established principles of standing. Because redressability is an " 'irreducible' " component of standing, *Spokeo*, no federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury. Yet early courts routinely awarded nominal damages alone. Certainly, no one seems to think that those judgments were without legal effect. Those nominal damages necessarily must have provided redress. Respondents contend that a request for compensatory damages at the pleading stage was what provided the basis for nominal damages at the judgment stage. But a plaintiff must maintain a personal interest in the dispute at every stage of litigation, including when judgment is entered, and must do so "separately for each form of relief sought." As soon as a plea for compensatory damages fails at the fact-finding stage of litigation, that plea can no longer support jurisdiction for a favorable judgment. The dissent's contrary assertion is unaccompanied by any citation.

Likewise, any analogy to attorney's fees and costs fails. A request for attorney's fees or costs cannot establish standing because those awards are merely a "byproduct" of a suit that already succeeded, not a form of redressability. In contrast, nominal damages are redress, not a byproduct.

III

Because nominal damages were available at common law in analogous circumstances, we conclude that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right.

The dissent worries that after today the Judiciary will be required to weigh in on legal questions "whenever a plaintiff asks for a dollar." But petitioners still would have satisfied redressability if instead of one dollar in nominal damages they sought one dollar in compensation for a wasted bus fare to travel to the free speech zone. The dissent "would place a higher value on Article III" than a dollar. [*B*]*ut see Sprint Communications Co. v. APCC Services, Inc.* (2008) (Roberts, C. J., dissenting) ("Article III is worth a dollar"). But Congress abolished the statutory amount-in-controversy requirement for federal-question jurisdiction in 1980. And we have never held that one applies as a matter of constitutional law.

This is not to say that a request for nominal damages guarantees entry to court. Our holding concerns only redressability. It remains for the plaintiff to establish the other elements of standing (such as a particularized injury); plead a cognizable cause of action, and meet all other relevant requirements. We hold only that, for the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right.

Applying this principle here is straightforward. For purposes of this appeal, it is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because "every violation [of a right] imports damage," nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.*

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

It is so ordered.

CHIEF JUSTICE ROBERTS, dissenting.

Petitioners Chike Uzuegbunam and Joseph Bradford want to challenge the constitutionality of speech restrictions at Georgia Gwinnett College. There are just a few problems: Uzuegbunam and Bradford are no longer students at the college. The challenged restrictions no longer exist. And the petitioners have not alleged actual damages. The case is therefore moot because a federal court cannot grant Uzuegbunam and Bradford "any effectual relief whatever."

The Court resists this conclusion, holding that the petitioners can keep pressing their claims because they have asked for "nominal damages." In the Court's view, nominal damages can save a case from mootness because any amount of money—no matter how trivial—

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* We do not decide whether Bradford can pursue nominal damages. Nominal damages go only to redressability and are unavailable where a plaintiff has failed to establish a past, completed injury. The District Court should determine in the first instance whether the enforcement against Uzuegbunam also violated Bradford's constitutional rights.

"can redress a past injury." But an award of nominal damages does not alleviate the harms suffered by a plaintiff, and is not intended to. If nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar. Because I would place a higher value on Article III, I respectfully dissent.

I

In urging the ratification of the Constitution, Alexander Hamilton famously wrote that "the judiciary, from the nature of its functions, will always be the least dangerous" of "the different departments of power." This was so, Hamilton explained, because the Judiciary "will be least in a capacity to annoy or injure" "the political rights of the Constitution." Whereas "[t]he executive not only dispenses the honors but holds the sword of the community," and "[t]he legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated," the Judiciary "may truly be said to have neither FORCE nor WILL but merely judgment."

But that power of judgment can nonetheless bind the Executive and Legislature—and the States. It is modest only if confined to its proper sphere. As John Marshall emphasized during his one term in the House of Representatives, "[i]f the judicial power extended to every *question* under the constitution" or "to every *question* under the laws and treaties of the United States," then "[t]he division of power [among the branches of Government] could exist no longer, and the other departments would be swallowed up by the judiciary." To maintain adequate separation between the Judiciary, on the one hand, and the political branches and the States, on the other, Article III of the Constitution authorizes federal courts to decide only "Cases" and "Controversies"—that is, "cases of a Judiciary nature."

The case-or-controversy requirement imposes fundamental restrictions on who can invoke federal jurisdiction and what types of disputes federal courts can resolve. As pertinent here, "when it is impossible for a court to grant any effectual relief whatever to the prevailing party," the case is moot, and the court has no power to decide it. To decide a moot case would be to give an advisory opinion, in violation of "the oldest and most consistent thread in the federal law of justiciability."

By insisting that judges be able to provide meaningful redress to litigants, Article III ensures that federal courts exercise their authority only "as a necessity in the determination of real, earnest and vital controversy between individuals." When plaintiffs like Uzuegbunam and Bradford allege neither actual damages nor the prospect of future injury, an award of nominal damages does not change their status or condition at all. Such an award instead represents a judicial determination that the plaintiffs' interpretation of the law is

correct—nothing more. The court in such a case is acting not as an Article III court, but as a moot court, deciding cases "in the rarified atmosphere of a debating society."

II

The Court sees no problem with turning judges into advice columnists. In its view, the common law and (to a lesser extent) our cases require that federal courts open their doors to any plaintiff who asks for a dollar. I part ways with the Court regarding both the framework it applies and the result it reaches.

Begin with the framework. The Court's initial premise is that we must "look to the forms of relief awarded at common law" in order to decide "whether nominal damages can redress a past injury." Because the Court finds that "nominal damages were available at common law in analogous circumstances" to the ones before us, it "conclude[s] that a request for nominal damages satisfies the redressability element of standing where a plaintiff 's claim is based on a completed violation of a legal right."

Any lessons that we learn from the common law, however, must be tempered by differences in constitutional design. The structure and function of 18th-century English courts were in many respects irreconcilable with "the role assigned to the judiciary in a tripartite allocation of power." Perhaps most saliently, in England "all jurisdictions of courts [were] either mediately or immediately derived from the crown," an organizational principle the Framers explicitly rejected by separating the Executive from the Judiciary. This difference in organization yielded a difference in operation. To give just one example, "English judicial practice with which early Americans were familiar had long permitted the Crown to solicit advisory opinions from judges." We would not look to such practice for guidance today if a plaintiff came into court arguing that advisory opinions were in fact an appropriate form of Article III redress. We would know that they are not. We likewise should know that a bare request for nominal damages is not justiciable because the plaintiff cannot "benefit in a tangible way from the court's intervention."

We should of course consult founding-era decisions when discerning the boundaries of our jurisdiction, for the Framers sought to limit the judicial power to "Cases" and "Controversies," as those terms were understood at the time. No question. But that does not mean that the requirements of Article III are "satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." A focus on common law analogues cannot obscure the significance of the establishment of an independent Judiciary—a "remarkable transformation" from a system with courts operating as "appendages of crown power." That transformation carries

with it the need to cabin the jurisdiction of the Judiciary to ensure it does not trespass on the province of the political branches.

It is in any event entirely unclear whether common law courts would have awarded nominal damages in a case like the one before us. There is no dispute that "nominal damages historically could provide *prospective* relief," because such awards allowed "plaintiffs at common law to 'obtain a form of declaratory relief in a legal system with no general declaratory judgment act.' " Yet the petitioners in this case no longer seek prospective relief. Although they initially asked for a declaratory judgment and a preliminary injunction, they abandoned those requests once the college rescinded the challenged policies.

The Court is correct to note that plaintiffs at common law often received nominal damages for past violations of their rights. Those awards, however, were generally limited to situations in which prevailing plaintiffs tried and failed to prove actual damages. Notwithstanding the Court's protestations to the contrary, nominal damages in such cases were in fact a "consolation prize," awarded as a hook to allow prevailing plaintiffs to at least recover attorney's fees and costs. The petitioners in this case have asked to recover their fees and costs, but they never sought actual damages, so the common law provides little relevant support.

On this last point, the Court acknowledges in several places that the historical record is mixed as to whether legal violations were actionable *at all* without a showing of compensable harm. And the Court does not cite any case in which plaintiffs sought only nominal damages for purely retrospective injuries. The Court instead relies on several decisions that contained live damages claims.

The Court also appeals to "categorical" and "definitive" statements by Lord Chief Justice Holt and Justice Story, that "every injury imports a damage," *Ashby* v. *White* (K. B. 1703), and that "[t]he law tolerates no farther inquiry than whether there has been the violation of a right." These statements, however, bear less weight than the Court suggests. Lord Holt was alone in dissent in *Ashby* (no shame there), and although his opinion has been cited favorably by subsequent cases and commentary, his colleagues disagreed with him. The Court writes that "the House of Lords overturned the majority decision, thus validating Lord Holt's position," but the House of Lords likely paid scant attention to Lord Holt's analysis. It appears instead that the majority decision was reversed as collateral damage in a Whig-Tory political dispute, and "little weight was given to reasoning or eloquence." Regardless, the House of Lords held that Ashby "should recover his damages assessed by the jury" at trial, suggesting that the fact of injury alone did not "import" them.

Justice Story is no more helpful to the Court—despite the supposedly "definitive" nature of his statement in *Webb*—as he took the

position elsewhere in his writings that a legal violation alone was *not* sufficient to ground a lawsuit. Perhaps Justice Story's conflicting statements can be reconciled, but neither his commentary nor Lord Holt's dissent provides firm footing for the position that a plaintiff could seek nominal damages without alleging actual damages or prospective harm.

At bottom, the Court relies on a handful of indeterminate sources to justify a radical expansion of the judicial power. The Court acknowledges that "the rule allowing nominal damages for a violation of any legal right . . . was not universally followed," but even this concession understates the equivocal nature of the historical record. I would require more before bursting the bounds of Article III.

The Court spends little time trying to reconcile its analysis with modern justiciability principles. It cites in passing [some of] our decisions, but those cases made no mention of Article III, and none involved a standalone claim for nominal damages. The Court also contends that nominal damages must provide redress because courts would otherwise lack jurisdiction to award them, even where a plaintiff tries and fails to prove actual damages. But a claim for actual damages preserves a live controversy, and a court does not lose jurisdiction just because that claim ultimately fails.

Finally, the Court argues that nominal damages provide Article III relief because they "affec[t] the behavior of the defendant towards the plaintiff " by requiring "money changing hands." ([I]nternal quotation marks omitted). If this were the standard, then the prospect of attorney's fees and costs would confer standing at the beginning of a lawsuit and prevent mootness throughout—a proposition we have squarely rejected. The Court posits that "nominal damages are redress," whereas fees and costs "are merely a byproduct of a suit that already succeeded." This classification just begs the question of what qualifies as redress. To satisfy Article III, redress must alleviate the plaintiff 's alleged injury in some way, either by compensating the plaintiff for a past loss or by preventing an ongoing or future harm. Nominal damages do not serve these ends where a plaintiff alleges only a completed violation of his rights. They are not intended to approximate the value of tangible or intangible harms, or the deterrent effect required to prevent future misconduct. And they are not calculated with reference to either of these purposes. Because such an award performs no remedial function—and because "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court,—nominal damages cannot preserve a live controversy where a case is otherwise moot.

III

Today's decision risks a major expansion of the judicial role. Until now, we have said that federal courts can review the legality of policies and actions only as a necessary incident to resolving real

disputes. Going forward, the Judiciary will be required to perform this function whenever a plaintiff asks for a dollar. For those who want to know if their rights have been violated, the least dangerous branch will become the least expensive source of legal advice.

In an effort to downplay these consequences, the Court argues that plaintiffs who seek nominal damages will often be able to seek actual damages as well. In this case, for example, the Court notes that Uzuegbunam and Bradford "would have satisfied redressability if instead of one dollar in nominal damages they sought one dollar in compensation for a wasted bus fare to travel to the free speech zone." Maybe they would have, and maybe they should have. The Court is mistaken, however, to equate a small amount of actual damages with the token award of nominal damages. The former redresses a compensable harm and satisfies Article III, while the latter is a legal fiction with "no existence in point of quantity."

The Court also insists that not every "request for nominal damages guarantees entry to court." Yet its holding admits of no limiting principle. As then-Judge McConnell remarked in an insightful concurrence on the issue before us, "[i]t is hard to conceive of a case in which a plaintiff would be unable to append a claim for nominal damages, and thus insulate the case from the possibility of mootness." The Court today reinforces this point by emphasizing that "*every* violation of a right imports damage," (emphasis added; alterations and internal quotation marks omitted)—even though we have definitively and recently held that a plaintiff must allege a concrete injury even where his rights have been violated, *see Thole* v. *U.S. Bank N. A.*, 140 S. Ct. 1615, 1621 (2020) ("This Court has rejected the argument that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.' " (quoting *Spokeo*).

The best that can be said for the Court's sweeping exception to the case-or-controversy requirement is that it may itself admit of a sweeping exception: Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court needing to pass on the merits of the plaintiff's claims. Although we recently reserved the question whether a defendant can moot a case by depositing the full amount requested by the plaintiff, our cases have long suggested that he can. The United States agrees, arguing in its brief in "support" of the petitioners that "the defendant should be able to end the litigation without a resolution of the constitutional merits, simply by accepting the entry of judgment for nominal damages against him." The defendant can even file an offer of judgment for one dollar, rendering the plaintiff liable for any subsequent costs if he receives only nominal damages. This is a welcome caveat, and it may ultimately save federal courts from issuing reams of advisory opinions. But it also highlights the flimsiness of the

Court's view of the separation of powers. The scope of our jurisdiction should not depend on whether the defendant decides to fork over a buck.

* * *

Five years after Hamilton wrote Federalist No. 78, Secretary of State Thomas Jefferson sent a letter on behalf of President George Washington to Chief Justice John Jay and the Associate Justices of the Supreme Court, asking for advice about the Nation's rights and obligations regarding the ongoing war in Europe. Washington's request must have struck him as reasonable enough, since English sovereigns regularly sought advice from their courts. Yet the Justices declined the entreaty, citing "the lines of separation drawn by the Constitution between the three departments of the government." 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488 (H. Johnston ed. 1891). For over two centuries, the Correspondence of the Justices has stood as a reminder that federal courts cannot give answers simply because someone asks.

The Judiciary is authorized "to say what the law is" only because "[t]hose who apply [a] rule to particular cases, must of *necessity* expound and interpret the rule." ([E]mphasis added). Today's decision abandons that principle. When a plaintiff brings a nominal damages claim in the absence of past damages or future harm, it is not "necessary to give an opinion upon a question of law." It is instead a "gratuitous" exercise of the judicial power, and expanding that power encroaches on the political branches and the States. Perhaps defendants will wise up and moot such claims by paying a dollar, but it is difficult to see that outcome as a victory for Article III. Rather than encourage litigants to fight over farthings, I would affirm the judgment of the Court of Appeals.

Notes and Questions

1. By its nature, standing doctrine restricts the number of justiciable disputes, and over the past 50 years the Court has deployed the doctrine with a vengeance. Will *Uzuegbunam* do the opposite—will it *increase* the number of justiciable disputes? Under the Court's holding, every claim for nominal damages for a past injury will meet the redressability requirement. All a plaintiff need do, as Chief Justice Roberts points out, is "tack[] on a request for a dollar." The majority did not share this concern, pointing out that plaintiffs must "establish the other elements of standing * * *; plead a cognizable cause of action; and meet all other relevant requirements." Does the majority's counterargument address the Chief Justice's concern that *Uzuegbunam*'s redressability rule will throw open the federal courthouse doors? In cases that meet injury-in-fact and traceability requirements, redressability presents no barrier to accessing Article III courts, at least with respect to a claim for nominal damages for a past injury. If *Linda R.S. v. Richard D.* (text at 51) were to arise today, could the plaintiff avoid dismissal for lack of

standing by including a claim for nominal damages? Even if it is the rare case where redressability is the only problem, does the Chief Justice have a point?

2. The majority anchored its holding in Lord Holt's statement that "every injury imports a damage." But the Court also described this common-law principle using language that linked "violation of a right" (rather than injury) to the imported damage. Is the Court correct to treat injury interchangeably with violation of a legal right? If violation of a legal right automatically results in an Article III injury, then the answer is yes. But as Chief Justice Roberts noted, the Court's recent decisions have made clear that injury-in-fact does not flow automatically from the mere violation of a legal right. *See Spokeo, Inc. v. Robins*, text at 47, 105. Indeed, *TransUnion v. Ramirez*, 578 U.S. 330 (2021), *see infra* at 17, handed down a few months after *Uzuegbunam*, ruled that statutory violations, standing alone, *never* supply the necessary injury-in-fact. Is it consistent to say, on the one hand, that violation of a legal right does not establish an injury-in-fact, but on the other hand, that violation of a legal right causes damage for purposes of the redressability requirement? Arguably not, since the question of redressability asks whether the requested remedy will ameliorate the injury that justifies standing. Considering *Uzuegbunam* together with *Ramirez*, perhaps the majority Justices in those cases distinguished between constitutional violations (at issue in *Uzuegbunam*) and statutory violations, concluding that a constitutional violation always (or at least generally) creates injury-in-fact but a statutory violation does not. Is such a distinction justifiable?

The Court's three recent cases holding that violation of rights does not always result in injury involved statutory rights. (*Spokeo* (text at 47, 105), *Ramirez*, and *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615 (2020)). In *Thole*, ERISA plan beneficiaries alleged that the plan fiduciaries had violated ERISA in administering the plan. However, because of the plan's structure, the violations (if any) would not affect plaintiffs' monthly benefits, so the 5-4 majority found that plaintiffs had suffered no injury-in-fact and therefore lacked standing. The four dissenters argued that the plan managers owed ERISA duties to all plan beneficiaries and that the plan managers' violation of those duties was sufficient harm under ERISA to support standing.

Does the harmless-error doctrine help answer the question whether constitutional and statutory violations are different? If a constitutional violation warrants no remedy because the error is harmless, does that suggest that at least some constitutional violations do not lead to injury?

3. Recall the majority's argument that nominal damages redress injury because they "affect[t] the behavior of the defendant towards the plaintiff." Is this argument relevant to the question in *Uzuegbunam*—whether nominal damages provide *retroactive* relief sufficient to satisfy the redressability requirement? A remedy that affects a defendant's future behavior provides *prospective* relief, does it not?

Does redressability invariably require retroactive relief? Certainly there are no problems when an injured party seeks an injunction to prevent repetition of the behavior that caused the injury. A bigger problem might be

whether anyone can get past the feeling that *de minimis* damages are unlikely to affect future behavior.

4. Chief Justice Roberts's lone dissent beat a separation-of-powers drum. The majority's decision, he argued, authorized advisory opinions in contravention of Article III. Roberts feared a dramatic, unconstitutional increase in federal judicial power, with federal judges serving as "advice columnists" for anyone who "tacks on a request for a dollar." His conclusion hinged on the argument that nominal damages "do[ ] not alleviate the harms suffered by a plaintiff, and [are] not intended to." Is he correct? Even if he is, how many disputes are likely to look just like this one, with a claim for nominal damages for a past injury unaccompanied by a claim for actual damages?

Does the Chief Justice's argument change at all if we remove the "nominal" label? If a plaintiff sues for damages and wins, but the jury awards only one dollar, does that mean that the plaintiff lacked standing? After all, Chief Justice Roberts does concede that if Uzuegbunam had sought damages to compensate him for bus fare to campus, he may have had standing. In other words, if the complaint had simply sought damages in an unspecified amount, would the Court have been unanimous?

Consider whether the Chief Justice may have something else on his mind. Although he never mentions the subject, perhaps he is concerned that the majority's approach will erode the Court's generalized-grievance jurisprudence (text at 104-07) as long as future plaintiffs ask for unspecified damages rather than "nominal damages."

TRANSUNION LLC v. RAMIREZ

141 S. Ct. 2190
Supreme Court of the United States, 2021.

JUSTICE KAVANAUGH delivered the opinion of the Court.

To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm. *Spokeo, Inc.* v. *Robins* (2016).

In this case, a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act. The plaintiffs claimed that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, as maintained internally by TransUnion. For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were *not* provided to third-party businesses during the relevant time period. We conclude that those 6,332 class

members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim.

In two other claims, all 8,185 class members complained about formatting defects in certain mailings sent to them by TransUnion. But the class members other than the named plaintiff Sergio Ramirez have not demonstrated that the alleged formatting errors caused them any concrete harm. Therefore, except for Ramirez, the class members do not have standing as to those two claims.

Over Judge McKeown's dissent, the U. S. Court of Appeals for the Ninth Circuit ruled that all 8,185 class members have standing as to all three claims. The Court of Appeals approved a class damages award of about $40 million. In light of our conclusion that (i) only 1,853 class members have standing for the reasonable-procedures claim and (ii) only Ramirez himself has standing for the two formatting claims relating to the mailings, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

I

In 1970, Congress passed and President Nixon signed the Fair Credit Reporting Act. The Act seeks to promote "fair and accurate credit reporting" and to protect consumer privacy. § 1681(a). To achieve those goals, the Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers.

The Act "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo, Inc.* v. *Robins* (2016). Three of the Act's requirements are relevant to this case. *First*, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. § 1681e(b). *Second*, the Act provides that consumer reporting agencies must, upon request, disclose to the consumer "[a]ll information in the consumer's file at the time of the request." § 1681g(a)(1). *Third*, the Act compels consumer reporting agencies to "provide to a consumer, with each written disclosure by the agency to the consumer," a "summary of rights" prepared by the Consumer Financial Protection Bureau. § 1681g(c)(2).

The Act creates a cause of action for consumers to sue and recover damages for certain violations. The Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages not less than $100 and not more than $1,000, as well as for punitive damages and attorney's fees. § 1681n(a).

TransUnion is one of the "Big Three" credit reporting agencies, along with Equifax and Experian. As a credit reporting agency,

TransUnion compiles personal and financial information about individual consumers to create consumer reports. TransUnion then sells those consumer reports for use by entities such as banks, landlords, and car dealerships that request information about the creditworthiness of individual consumers.

Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. OFAC is the U. S. Treasury Department's Office of Foreign Assets Control. OFAC maintains a list of "specially designated nationals" who threaten America's national security. Individuals on the OFAC list are terrorists, drug traffickers, or other serious criminals. It is generally unlawful to transact business with any person on the list. TransUnion created the OFAC Name Screen Alert to help businesses avoid transacting with individuals on OFAC's list.

When this litigation arose, Name Screen worked in the following way: When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against the OFAC list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. TransUnion did not compare any data other than first and last names. Unsurprisingly, TransUnion's Name Screen product generated many false positives. Thousands of law-abiding Americans happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals.

Sergio Ramirez learned the hard way that he is one such individual. On February 27, 2011, Ramirez visited a Nissan dealership in Dublin, California, seeking to buy a Nissan Maxima. Ramirez was accompanied by his wife and his father-in-law. After Ramirez and his wife selected a color and negotiated a price, the dealership ran a credit check on both Ramirez and his wife. Ramirez's credit report, produced by TransUnion, contained the following alert: "***OFAC ADVISOR ALERT—INPUT NAME MATCHES NAME ON THE OFAC DATABASE." A Nissan salesman told Ramirez that Nissan would not sell the car to him because his name was on a " 'terrorist list.' " Ramirez's wife had to purchase the car in her own name.

The next day, Ramirez called TransUnion and requested a copy of his credit file. TransUnion sent Ramirez a mailing that same day that included his credit file and the statutorily required summary of rights prepared by the CFPB. The mailing did not mention the OFAC alert in Ramirez's file. The following day, TransUnion sent Ramirez a second mailing—a letter alerting him that his name was considered a potential match to names on the OFAC list. The second mailing did

not include an additional copy of the summary of rights. Concerned about the mailings, Ramirez consulted a lawyer and ultimately canceled a planned trip to Mexico. TransUnion eventually removed the OFAC alert from Ramirez's file.

In February 2012, Ramirez sued TransUnion and alleged three violations of the Fair Credit Reporting Act. *First*, he alleged that TransUnion, by using the Name Screen product, failed to follow reasonable procedures to ensure the accuracy of information in his credit file. *Second*, he claimed that TransUnion failed to provide him with *all* the information in his credit file upon his request. In particular, TransUnion's first mailing did not include the fact that Ramirez's name was a potential match for a name on the OFAC list. See *Third*, Ramirez asserted that TransUnion violated its obligation to provide him with a summary of his rights "with each written disclosure," because TransUnion's second mailing did not contain a summary of Ramirez's rights. Ramirez requested statutory and punitive damages.

Ramirez also sought to certify a class of all people in the United States to whom TransUnion sent a mailing during the period from January 1, 2011, to July 26, 2011, that was similar in form to the second mailing that Ramirez received. TransUnion opposed certification. The U.S. District Court for the Northern District of California rejected TransUnion's argument and certified the class.

Before trial, the parties stipulated that the class contained 8,185 members, including Ramirez. The parties also stipulated that only 1,853 members of the class (including Ramirez) had their credit reports disseminated by TransUnion to potential creditors during the period from January 1, 2011, to July 26, 2011. The District Court ruled that all 8,185 class members had Article III standing.

At trial, Ramirez testified about his experience at the Nissan dealership. But Ramirez did not present evidence about the experiences of other members of the class.

After six days of trial, the jury returned a verdict for the plaintiffs. The jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages for a total award of more than $60 million. The District Court rejected all of TransUnion's post-trial motions.

The U.S. Court of Appeals for the Ninth Circuit affirmed in relevant part. The court held that all members of the class had Article III standing to recover damages for all three claims. The court also concluded that Ramirez's claims were typical of the class's claims for purposes of Rule 23 of the Federal Rules of Civil Procedure. Finally, the court reduced the punitive damages award to $3,936.88 per class member, thus reducing the total award to about $40 million.

Judge McKeown dissented in relevant part. As to the reasonable-procedures claim, she concluded that only the 1,853 class members whose reports were actually disseminated by TransUnion to third parties had Article III standing to recover damages. In her view, the remaining 6,332 class members did not suffer a concrete injury sufficient for standing. As to the two claims related to the mailings, Judge McKeown would have held that none of the 8,185 class members other than the named plaintiff Ramirez had standing as to those claims.

We granted certiorari.

II

The question in this case is whether the 8,185 class members have Article III standing as to their three claims. In Part II, we summarize the requirements of Article III standing—in particular, the requirement that plaintiffs demonstrate a "concrete harm." In Part III, we then apply the concrete-harm requirement to the plaintiffs' lawsuit against TransUnion.

A

The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." ([I]nternal quotation marks omitted). Separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." ([I]nternal quotation marks omitted).

Therefore, we start with the text of the Constitution. Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." For there to be a case or controversy under Article III, the plaintiff must have a " 'personal stake' " in the case—in other words, standing. To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: " 'What's it to you?' "

To answer that question in a way sufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. If "the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve."

Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only "the rights of individuals," and that federal courts exercise "their proper function in a limited and separated government." Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal

courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions. As Madison explained in Philadelphia, federal courts instead decide only matters "of a Judiciary Nature."

In sum, under Article III, a federal court may resolve only "a real controversy with real impact on real persons."

B

The question in this case focuses on the Article III requirement that the plaintiff's injury in fact be "concrete"—that is, "real, and not abstract." ([I]nternal quotation marks omitted).

What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." And with respect to the concrete-harm requirement in particular, this Court's opinion in *Spokeo* v. *Robins* indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.

As *Spokeo* explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.

Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. And those traditional harms may also include harms specified by the Constitution itself.

In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress's views may be "instructive." Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. In that way, Congress may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." ([A]lterations and internal quotation marks omitted). But even though "Congress may 'elevate' harms that 'exist' in the real world

before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."

Importantly, this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." As the Court emphasized in *Spokeo*, "Article III standing requires a concrete injury even in the context of a statutory violation."

Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. As Judge Katsas has rightly stated, "we cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so."

For standing purposes, therefore, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court. As then-Judge Barrett succinctly summarized, "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions."

To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

Even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available) to sue over the defendant's legal violation, Article III standing doctrine sharply distinguishes between those two scenarios. The first lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property. But the second lawsuit may not proceed because that

plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages). Those are not grounds for Article III standing.[2]

As those examples illustrate, if the law of Article III did not require plaintiffs to demonstrate a "concrete harm," Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent. In our view, the public interest that private entities comply with the law cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue."[3]

A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable

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[2] The lead dissent notes that the terminology of injury in fact became prevalent only in the latter half of the 20th century. That is unsurprising because until the 20th century, Congress did not often afford federal "citizen suit"-style causes of action to private plaintiffs who did not suffer concrete harms. For example, until the 20th century, Congress generally did not create "citizen suit" causes of action for private plaintiffs to sue the Government. Moreover, until *Abbott Laboratories* v. *Gardner,* a plaintiff often could not bring a pre-enforcement suit against a Government agency or official under the Administrative Procedure Act arguing that an agency rule was unlawful; instead, a party could raise such an argument only in an enforcement action. Likewise, until the 20th century, Congress rarely created "citizen suit"-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm. All told, until the 20th century, this Court had little reason to emphasize the injury-in-fact requirement because, until the 20th century, there were relatively few instances where litigants without concrete injuries had a cause of action to sue in federal court. The situation has changed markedly, especially over the last 50 years or so. During that time, Congress has created many novel and expansive causes of action that in turn have required greater judicial focus on the requirements of Article III.

[3] A plaintiff must show that the injury is not only concrete but also particularized. But if there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely creating causes of action for vast classes of *unharmed* plaintiffs to sue any defendants who violate any federal law. (Congress might, for example, provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law.) That is one reason why the Court has been careful to emphasize that concreteness and particularization are separate requirements.

to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.

In sum, the concrete-harm requirement is essential to the Constitution's separation of powers. To be sure, the concrete-harm requirement can be difficult to apply in some cases. Some advocate that the concrete-harm requirement be ditched altogether, on the theory that it would be more efficient or convenient to simply say that a statutory violation and a cause of action suffice to afford a plaintiff standing. But as the Court has often stated, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." So it is here.[3]

III

We now apply those fundamental standing principles to this lawsuit. We must determine whether the 8,185 class members have standing to sue TransUnion for its alleged violations of the Fair Credit Reporting Act. The plaintiffs argue that TransUnion failed to comply with statutory obligations (i) to follow reasonable procedures to ensure the accuracy of credit files so that the files would not include OFAC alerts labeling the plaintiffs as potential terrorists; and (ii) to provide a consumer, upon request, with his or her complete credit file, including a summary of rights.

Some preliminaries: As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing. Every class member must have Article III standing in order to recover individual damages. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[4] Plaintiffs must maintain their personal interest in the dispute at all stages of litigation. A plaintiff must demonstrate standing "with

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[3] The lead dissent would reject the core standing principle that a plaintiff must always have suffered a concrete harm, and would cast aside decades of precedent articulating that requirement, such as *Spokeo*, *Summers*, and *Lujan*. As we see it, the dissent's theory would largely outsource Article III to Congress. As we understand the dissent's theory, a suit seeking to enforce "general compliance with regulatory law" would not suffice for Article III standing because such a suit seeks to vindicate a duty owed to the whole community. But under the dissent's theory, so long as Congress frames a defendant's obligation to comply with regulatory law as an obligation owed to *individuals*, any suit to vindicate that obligation suddenly suffices for Article III. Suppose, for example, that Congress passes a law purporting to give all American citizens an individual right to clean air and clean water, as well as a cause of action to sue and recover $100 in damages from any business that violates any pollution law anywhere in the United States. The dissent apparently would find standing in such a case. We respectfully disagree. In our view, unharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law. And under Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law.

[4] We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class.

the manner and degree of evidence required at the successive stages of the litigation." Therefore, in a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing "must be supported adequately by the evidence adduced at trial." *Ibid.* ([I]internal quotation marks omitted). And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages).

A

We first address the plaintiffs' claim that TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy" of the plaintiffs' credit files maintained by TransUnion. In particular, the plaintiffs argue that TransUnion did not do enough to ensure that OFAC alerts labeling them as potential terrorists were not included in their credit files.

Assuming that the plaintiffs are correct that TransUnion violated its obligations under the Fair Credit Reporting Act to use reasonable procedures in internally maintaining the credit files, we must determine whether the 8,185 class members suffered concrete harm from TransUnion's failure to employ reasonable procedures.[5]

1

Start with the 1,853 class members (including the named plaintiff Ramirez) whose reports were disseminated to third-party businesses. The plaintiffs argue that the publication to a third party of a credit report bearing a misleading OFAC alert injures the subject of the report. The plaintiffs contend that this injury bears a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation.

We agree with the plaintiffs. Under longstanding American law, a person is injured when a defamatory statement "that would subject him to hatred, contempt, or ridicule" is published to a third party. TransUnion provided third parties with credit reports containing OFAC alerts that labeled the class members as potential terrorists, drug traffickers, or serious criminals. The 1,853 class members therefore suffered a harm with a "close relationship" to the harm associated with the tort of defamation. We have no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact.

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[5] For purposes of this case, the parties have assumed that TransUnion violated the statute even with respect to those plaintiffs whose OFAC alerts were never disseminated to third-party businesses. We take no position on that issue.

TransUnion counters that those 1,853 class members did not suffer a harm with a "close relationship" to defamation because the OFAC alerts on the disseminated credit reports were only misleading and not literally false. TransUnion points out that the reports merely identified a consumer as a "*potential* match" to an individual on the OFAC list—a fact that TransUnion says is not technically false.

In looking to whether a plaintiff's asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate. The harm from being labeled a "potential terrorist" bears a close relationship to the harm from being labeled a "terrorist." In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.

In short, the 1,853 class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III.

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The remaining 6,332 class members are a different story. To be sure, their credit files, which were maintained by TransUnion, contained misleading OFAC alerts. But the parties stipulated that TransUnion did not provide those plaintiffs' credit information to any potential creditors during the class period from January 2011 to July 2011. Given the absence of dissemination, we must determine whether the 6,332 class members suffered some other concrete harm for purposes of Article III.

The initial question is whether the mere existence of a misleading OFAC alert in a consumer's internal credit file at TransUnion constitutes a concrete injury. As Judge Tatel phrased it in a similar context, "if inaccurate information falls into" a consumer's credit file, "does it make a sound?"

Writing the opinion for the D. C. Circuit in *Owner-Operator*, Judge Tatel answered no. Publication is "essential to liability" in a suit for defamation. And there is "no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." "Since the basis of the action for words was the loss of credit or fame, and not the insult, it was always necessary to show a publication of the words." Other Courts of Appeals have similarly recognized that, as Judge Colloton summarized, the "retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts," meaning that the mere existence of inaccurate information in a database is insufficient to confer Article III standing.

The standing inquiry in this case thus distinguishes between (i) credit files that consumer reporting agencies maintain internally

and (ii) the consumer credit reports that consumer reporting agencies disseminate to third-party creditors. The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm. In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer. A letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here.[6]

Because the plaintiffs cannot demonstrate that the misleading information in the internal credit files itself constitutes a concrete harm, the plaintiffs advance a separate argument based on an asserted *risk of future harm*. They say that the 6,332 class members suffered a concrete injury for Article III purposes because the existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm. The plaintiffs rely on language from *Spokeo* where the Court said that "the risk of real harm" (or as the Court otherwise stated, a "material risk of harm") can sometimes "satisfy the requirement of concreteness."

To support its statement that a material risk of future harm can satisfy the concrete-harm requirement, *Spokeo* cited this Court's decision in *Clapper*. But importantly, *Clapper* involved a suit for *injunctive relief*. As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.

But a plaintiff must "demonstrate standing separately for each form of relief sought." Therefore, a plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.

TransUnion advances a persuasive argument that in a suit for damages, the mere risk of future harm, standing alone, cannot

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[6] For the first time in this Court, the plaintiffs also argue that TransUnion "published" the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That new argument is forfeited. In any event, it is unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. Nor have they necessarily recognized disclosures to printing vendors as actionable publications. Moreover, even the plaintiffs' cited cases require evidence that the defendant actually "brought an idea to the perception of another," and thus generally require evidence that the document was actually read and not merely processed. That evidence is lacking here. In short, the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently "close relationship" to the traditional defamation tort to qualify for Article III standing.

qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm.[7] TransUnion contends that if an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm. If the risk of future harm materializes and the individual suffers a concrete harm, then the harm itself, and not the preexisting risk, will constitute a basis for the person's injury and for damages. If the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm sufficient for standing, according to TransUnion.

Consider an example. Suppose that a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. As counsel for TransUnion stated, that would ordinarily be cause for celebration, not a lawsuit. But if the reckless driver crashes into the woman's car, the situation would be different, and (assuming a cause of action) the woman could sue the driver for damages.

The plaintiffs note that *Spokeo* cited libel and slander *per se* as examples of cases where, as the plaintiffs see it, a mere risk of harm suffices for a damages claim. But as Judge Tatel explained for the D. C. Circuit, libel and slander *per se* "require evidence of *publication*." And for those torts, publication is generally presumed to cause a harm, albeit not a readily quantifiable harm. As *Spokeo* noted, "the law has long permitted recovery by certain tort victims *even if their harms may be difficult to prove or measure*." ([E]mphasis added). But there is a significant difference between (i) an actual harm that has occurred but is not readily quantifiable, as in cases of libel and slander *per se*, and (ii) a mere risk of future harm. By citing libel and slander *per se*, *Spokeo* did not hold that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages.

Here, the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized—that is, that the inaccurate OFAC alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit. Nor did those plaintiffs present evidence that the class members were independently harmed by their

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[7] For example, a plaintiff 's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm. We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress. The plaintiffs here have not relied on such a theory of Article III harm. They have not claimed an emotional distress injury from the risk that a misleading credit report might be sent to a third-party business. Nor could they do so, given that the 6,332 plaintiffs have not established that they were even aware of the misleading information in the internal credit files maintained at TransUnion.

exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses. Therefore, the 6,332 plaintiffs' argument for standing for their damages claims based on an asserted risk of future harm is unavailing.

Even apart from that fundamental problem with their argument based on the risk of future harm, the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing. As Judge McKeown explained in her dissent, the risk of future harm that the 6,332 plaintiffs identified—the risk of dissemination to third parties—was too speculative to support Article III standing. The plaintiffs claimed that TransUnion could have divulged their misleading credit information to a third party at any moment. But the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested by third-party businesses and provided by TransUnion during the relevant time period. Nor did the plaintiffs demonstrate that there was a sufficient likelihood that TransUnion would otherwise intentionally or accidentally release their information to third parties. "Because no evidence in the record establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm."

Moreover, the plaintiffs did not present any evidence that the 6,332 class members even *knew* that there were OFAC alerts in their internal TransUnion credit files. If those plaintiffs prevailed in this case, many of them would first learn that they were "injured" when they received a check compensating them for their supposed "injury." It is difficult to see how a risk of future harm could supply the basis for a plaintiff 's standing when the plaintiff did not even know that there was a risk of future harm.

Finally, the plaintiffs advance one last argument for why the 6,332 class members are similarly situated to the other 1,853 class members and thus should have standing. The 6,332 plaintiffs note that they sought damages for the entire 46-month period permitted by the statute of limitations, whereas the stipulation regarding dissemination covered only 7 of those months. They argue that the credit reports of many of those 6,332 class members were likely also sent to third parties outside of the period covered by the stipulation because all of the class members requested copies of their reports, and consumers usually do not request copies unless they are contemplating a transaction that would trigger a credit check.

That is a serious argument, but in the end, we conclude that it fails to support standing for the 6,332 class members. The plaintiffs had the burden to prove at trial that their reports were actually sent to third-party businesses. The inferences on which the argument rests are too weak to demonstrate that the reports of any particular number of the 6,332 class members were sent to third-party

businesses. The plaintiffs' attorneys could have attempted to show that some or all of the 6,332 class members were injured in that way. They presumably could have sought the names and addresses of those individuals, and they could have contacted them. In the face of the stipulation, which pointedly failed to demonstrate dissemination for those class members, the inferences on which the plaintiffs rely are insufficient to support standing.

In sum, the 6,332 class members whose internal TransUnion credit files were not disseminated to third-party businesses did not suffer a concrete harm. By contrast, the 1,853 class members (including Ramirez) whose credit reports were disseminated to third-party businesses during the class period suffered a concrete harm.

B

We next address the plaintiffs' standing to recover damages for two other claims in the complaint: the disclosure claim and the summary-of-rights claim. Those two claims are intertwined.

In the disclosure claim, the plaintiffs alleged that TransUnion breached its obligation to provide them with their complete credit files upon request. According to the plaintiffs, TransUnion sent the plaintiffs copies of their credit files that omitted the OFAC information, and then in a second mailing sent the OFAC information. In the summary-of-rights claim, the plaintiffs further asserted that TransUnion should have included another summary of rights in that second mailing—the mailing that included the OFAC information. As the plaintiffs note, the disclosure and summary-of-rights requirements are designed to protect consumers' interests in learning of any inaccuracies in their credit files so that they can promptly correct the files before they are disseminated to third parties.

In support of standing, the plaintiffs thus contend that the TransUnion mailings were formatted incorrectly and deprived them of their right to receive information in the format required by statute. But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. In fact, they do not demonstrate that they suffered any harm *at all* from the formatting violations. The plaintiffs presented no evidence that, other than Ramirez, "a single other class member so much as *opened* the dual mailings," "nor that they were confused, distressed, or relied on the information in any way." ([E]mphasis added). The plaintiffs put forth no evidence, moreover, that the plaintiffs would have tried to correct their credit files—and thereby prevented dissemination of a misleading report—had they been sent the information in the proper format. Without any evidence of harm caused by the format of the mailings, these are "bare procedural

violation[s], divorced from any concrete harm." That does not suffice for Article III standing.[8]

The plaintiffs separately argue that TransUnion's formatting violations created a risk of future harm. Specifically, the plaintiffs contend that consumers who received the information in this dual-mailing format were at risk of not learning about the OFAC alert in their credit files. They say that they were thus at risk of not being able to correct their credit files before TransUnion disseminated credit reports containing the misleading information to third-party businesses. As noted above, the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim. In any event, the plaintiffs made no effort here to explain how the formatting error prevented them from contacting TransUnion to correct any errors before misleading credit reports were disseminated to third-party businesses. To reiterate, there is no evidence that "a single other class member so much as opened the dual mailings," "nor that they were confused, distressed, or relied on the information in any way."

For its part, the United States as *amicus curiae*, but not the plaintiffs, separately asserts that the plaintiffs suffered a concrete "informational injury" under several of this Court's precedents. We disagree. The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it *in the wrong format*. Therefore, *Akins* and *Public Citizen* do not control here. In addition, those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information. This case does not involve such a public-disclosure law. Moreover, the plaintiffs have identified no "downstream consequences" from failing to receive the required information. They did not demonstrate, for example, that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties. An "asserted informational injury that causes no adverse effects cannot satisfy Article III."

No concrete harm, no standing. The 1,853 class members whose credit reports were provided to third-party businesses suffered a concrete harm and thus have standing as to the reasonable-procedures claim. The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing as to the reasonable-procedures claim. As

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[8] The District Court and the Court of Appeals concluded that Ramirez (in addition to the other 8,184 class members) had standing as to those two claims. In this Court, TransUnion has not meaningfully contested Ramirez's individual standing as to those two claims. We have no reason or basis to disturb the lower courts' conclusion on Ramirez's individual standing as to those two claims.

for the claims pertaining to the format of TransUnion's mailings, none of the 8,185 class members other than the named plaintiff Ramirez suffered a concrete harm.

We reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion. In light of our conclusion about Article III standing, we need not decide whether Ramirez's claims were typical of the claims of the class under Rule 23. On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing.

It is so ordered.

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

TransUnion generated credit reports that erroneously flagged many law-abiding people as potential terrorists and drug traffickers. In doing so, TransUnion violated several provisions of the Fair Credit Reporting Act (FCRA) that entitle consumers to accuracy in credit-reporting procedures; to receive information in their credit files; and to receive a summary of their rights. Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing.

I

For decades, the Treasury Department's Office of Foreign Assets Control (OFAC) has compiled a list of "Specially Designated Nationals." The list largely includes terrorists and drug traffickers, among other unseemly types. And, as a general matter, Americans are barred from doing business with those listed. In the wake of the September 11 attacks, TransUnion began to sell a new (and more expensive) type of credit report that flagged whether an individual's name matched a name found on that list.

The system TransUnion used to decide which individuals to flag was rather rudimentary. It compared only the consumer's first and last name with the names on the OFAC list. If the names were identical or similar, TransUnion included in the consumer's report an "OFAC ADVISOR ALERT," explaining that the consumer's name matches a name on the OFAC database. TransUnion did not compare birth dates, middle initials, Social Security numbers, or any other available identifier routinely used to collect and verify credit-report data.

In 2005, a consumer sued. TransUnion had sold an OFAC credit report about this consumer to a car dealership. The report flagged her—Sandra Jean Cortez, born in May 1944—as a match for a person

on the OFAC list: Sandra Cortes Quintero, born in June 1971. TransUnion withheld this OFAC alert from the credit report that Cortez had requested. And despite Cortez's efforts to have the alert removed, TransUnion kept the alert in place for years.

After a trial, the jury returned a verdict in the consumer's favor on four FCRA claims, two of which are similar to claims at issue here: (1) TransUnion failed to follow reasonable procedures that would ensure maximum possible accuracy, and (2) TransUnion failed to provide Cortez all information in her file despite her requests. The jury awarded $50,000 in actual damages and $750,000 in punitive damages, and it also took the unusual step of including on the verdict form a handwritten note urging TransUnion to "completely revam[p]" its business practices. The District Court reduced the punitive damages award to $100,000, which the Third Circuit affirmed on appeal, stressing that TransUnion's failure to, "at the very least, compar[e] birth dates when they are available," was "reprehensible."

But TransUnion "made surprisingly few changes" after this verdict. It did not begin comparing birth dates. Or middle initials. Or citizenship. In fact, TransUnion did not compare *any* new piece of information. Instead, it hedged its language saying a consumer was a " 'potential match' " rather than saying the person was a " 'match.' " And instead of listing matches for similar names, TransUnion required that the first and last names match exactly. Unsurprisingly, these reports kept flagging law-abiding Americans as potential terrorists and drug traffickers. And equally unsurprising, someone else sued.

That brings us to this case. Sergio Ramirez visited a car dealership, offered to buy a car, and negotiated the terms. The dealership then ran a joint credit check on Ramirez and his wife. The salesperson said that the check revealed that Ramirez was on " 'a terrorist list,' " so the salesperson refused to close the deal with him.

Ramirez requested and received a copy of his credit report from TransUnion. The report purported to be "complete and reliable," but it made no mention of the OFAC alert. TransUnion later sent a separate " 'courtesy' " letter, which informed Ramirez that his "TransUnion credit report" had "been mailed to [him] separately." That letter informed Ramirez that he was a potential match to someone in the OFAC database, but it never revealed that any OFAC information was present on his credit report. TransUnion opted not to include with this letter a description of Ramirez's rights under the FCRA or any information on how to dispute the OFAC match. The letter merely directed Ramirez to visit the Department of Treasury's website or to call or write TransUnion if Ramirez had any additional questions or concerns.

Ramirez sued, asserting three claims under the FCRA: TransUnion willfully failed to follow reasonable procedures to assure

maximum possible accuracy of the information concerning him; TransUnion willfully failed to disclose to him all the information in his credit file by withholding the true version of his credit report; and TransUnion willfully failed to provide a summary of rights when it sent him the courtesy letter.

Ramirez also sought to represent a class of individuals who had received a similar OFAC letter from TransUnion. "[E]veryone in the class: (1) was falsely labeled . . . a potential OFAC match; (2) requested a copy of his or her credit report from TransUnion; and (3) in response, received a credit-report mailing with the OFAC alert redacted and a separate OFAC Letter mailing with no summary of rights."

The jury found in favor of the class on all three claims. And because it also determined that TransUnion's misconduct was "willfu[l]," § 1681n(a), the jury awarded each class member $984.22 in statutory damages (about $8 million total) and $6,353.08 in punitive damages (about $52 million total).

TransUnion appealed, arguing that the class members lacked standing. The Ninth Circuit disagreed, explaining that "TransUnion's reckless handling of OFAC information exposed every class member to a real risk of harm to their concrete privacy, reputational, and informational interests protected by the FCRA."[1].

II

A

Article III vests "[t]he judicial Power of the United States" in this Court "and in such inferior Courts as the Congress may from time to time ordain and establish." This power "shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." ([E]mphasis added). When a federal court has jurisdiction over a case or controversy, it has a "virtually unflagging obligation" to exercise it.

The mere filing of a complaint in federal court, however, does not a case (or controversy) make. Article III "does not extend the judicial power to every violation of the constitution" or federal law "which may possibly take place." Rather, the power extends only "to 'a case in law or equity,' in which a *right*, under such law, is asserted." ([E]mphasis added).

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[1] TransUnion also contends that Ramirez's claims and defenses are not typical of those of the class. The Court declines to reach that question because its jurisdictional holding is dispositive. In my view, the District Court did not abuse its discretion in certifying the class given the similarities among the claims and defenses at issue.

Key to the scope of the judicial power, then, is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation. Courts typically did not require any showing of actual damage. But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required "not only *injuria* [legal injury] but also *damnum* [damage]." ([B]rackets in original).

This distinction mattered not only for traditional common-law rights, but also for newly created statutory ones. The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder "could not show monetary loss." In the patent context, a defendant challenged an infringement suit brought under a similar law. Along the lines of what TransUnion argues here, the infringer contended that "the making of a machine cannot be an offence, because no action lies, except for actual damage, and there can be no actual damages, or even a rule for damages, for an infringement by making a machine." Riding circuit, Justice Story rejected that theory, noting that the plaintiff could sue in federal court merely by alleging a violation of a private right: "[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage."[2]

The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases. And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights. No one could seriously dispute, for example, that a violation of property rights is actionable, but as a general matter, "[p]roperty rights are created by the State." In light of this history, tradition, and common practice, our test should be clear: So long as a "statute fixes a minimum of recovery . . . , there would seem to be no doubt of the right of one who establishes a technical ground of

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[2] The "public rights" terminology has been used to refer to two different concepts. In one context, these rights are " 'take[n] from the public' "—like the right to make, use, or sell an invention—and " 'bestow[ed] . . . upon the' " individual, like a "decision to grant a public franchise." Disputes with the Government over these rights generally can be resolved "outside of an Article III court." Here, in contrast, the term "public rights" refers to duties owed collectively to the community. For example, Congress owes a duty to all Americans to legislate within its constitutional confines. But not every single American can sue over Congress' failure to do so. Only individuals who, at a minimum, establish harm beyond the mere violation of that constitutional duty can sue.

action to recover this minimum sum without any specific showing of loss." While the Court today discusses the supposed failure to show "injury in fact," courts for centuries held that injury in law to a private right was enough to create a case or controversy.

B

Here, each class member established a violation of his or her private rights. The jury found that TransUnion violated three separate duties created by statute. All three of those duties are owed to individuals, not to the community writ large. Take § 1681e(b), which requires a consumer reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." This statute creates a duty: to use reasonable procedures to assure maximum possible accuracy. And that duty is particularized to an individual: the subject of the report. Section 1681g does the same. It requires an agency to "clearly and accurately disclose" to a consumer, upon his request, "[a]ll information in the consumer's file at the time of the request" and to include a written "summary of rights" with that "written disclosure." Those directives likewise create duties: provide all information in the consumer's file and accompany the disclosure with a summary of rights. And these too are owed to a single person: the consumer who requests the information.

Were there any doubt that consumer reporting agencies owe these duties to specific individuals—and not to the larger community—Congress created a cause of action providing that "[a]ny person who willfully fails to comply" with an FCRA requirement "with respect to any *consumer* is liable to *that consumer*." ([E]mphasis added). If a consumer reporting agency breaches any FCRA duty owed to a specific consumer, then that individual (not all consumers) may sue the agency. No one disputes that each class member possesses this cause of action. And no one disputes that the jury found that TransUnion violated each class member's individual rights. The plaintiffs thus have a sufficient injury to sue in federal court.

C

The Court chooses a different approach. Rejecting this history, the majority holds that the mere violation of a personal legal right is *not*—and never can be—an injury sufficient to establish standing. What matters for the Court is only that the "injury in fact be 'concrete.' " "No concrete harm, no standing."

That may be a pithy catchphrase, but it is worth pausing to ask why "concrete" injury in fact should be the sole inquiry. After all, it was not until 1970—"180 years after the ratification of Article III"—that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing. And the concept then was not even

about constitutional standing; it concerned a *statutory* cause of action under the Administrative Procedure Act.

The Court later took this statutory requirement and began to graft it onto its constitutional standing analysis. But even then, injury in fact served as an *additional* way to get into federal court. Article III injury still could "exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " So the introduction of an injury-in-fact requirement, in effect, "represented a substantial broadening of access to the federal courts." A plaintiff could now invoke a federal court's judicial power by establishing injury by virtue of a violated legal right *or* by alleging some *other* type of "personal interest."

In the context of public rights, the Court continued to require more than just a legal violation. In *Lujan* v. *Defenders of Wildlife*, for example, the Court concluded that several environmental organizations lacked standing to challenge a regulation about interagency communications, even though the organizations invoked a citizen-suit provision allowing " 'any person [to] commence a civil suit . . . to enjoin any person . . . who is alleged to be in violation of' " the law. Echoing the historical distinction between duties owed to individuals and those owed to the community, the Court explained that a plaintiff must do more than raise "a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws." "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." " 'The province of the court,' " in contrast, " 'is, solely, to decide on the rights of individuals.' "

The same public-rights analysis prevailed in *Summers* v. *Earth Island Institute*. There, a group of organizations sought to prevent the United States Forest Service from enforcing regulations that exempt certain projects from notice and comment. The Court, again, found that the mere violation of the law "without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." But again, this was rooted in the context of public rights: " 'It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the *public's* nonconcrete interest in the proper administration of the laws.' " ([E]mphasis added; brackets omitted).

In *Spokeo*, the Court built on this approach. Based on a few sentences from *Lujan* and *Summers*, the Court concluded that a plaintiff does not automatically "satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." But the Court made clear that "Congress is well positioned to identify intangible

harms that meet minimum Article III requirements" and explained that "the violation of a procedural right granted by statute *can be* sufficient in some circumstances to constitute injury in fact." ([E]mphasis added).

Reconciling these statements has proved to be a challenge. But "[t]he historical restrictions on standing" offer considerable guidance. A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing.[4] A statute that creates a private right and a cause of action, however, *does* gives plaintiffs an adequate interest in vindicating their private rights in federal court.

The majority today, however, takes the road less traveled: "[U]nder Article III, an injury in law is not an injury in fact." No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law. The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.

This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights.

III

Even assuming that this Court should be in the business of second-guessing private rights, this is a rather odd case to say that Congress went too far. TransUnion's misconduct here is exactly the sort of thing that has long merited legal redress.

As an initial matter, this Court has recognized that the unlawful withholding of requested information causes "a sufficiently distinct injury to provide standing to sue." Here, TransUnion unlawfully withheld from each class member the OFAC version of his or her credit report that the class member requested. And TransUnion

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[4] *But see* Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341, 342, n. 3 (1989) ("Six statutes [enacted by the First Congress] imposed penalties and/or forfeitures for conduct injurious to the general public and expressly authorized suits by private informers, with the recovery being shared between the informer and the United States"); *McCulloch* v. *Maryland*, 4 Wheat. 316, 317, 321–322 (1819) (reviewing "an action of debt brought by the defendant in error . . . who sued as well for himself as for the State of Maryland . . . to recover certain penalties")

unlawfully failed to send a summary of rights. The majority's response is to contend that the plaintiffs actually did not allege that they failed to receive any required information; they alleged only that they received it in the "*wrong format*."

That reframing finds little support in the complaint, which alleged that TransUnion "fail[ed] to include the OFAC alerts . . . in the consumer's own files which consumers, as of right, may request and obtain," and that TransUnion did "not advise consumers that they may dispute inaccurate OFAC alerts." It also finds no footing in the record. Neither the mailed credit report nor separate letter provide any indication that a person's report is marked with an OFAC alert.

Were there any doubt about the facts below, we have the helpful benefit of a jury verdict. The jury found that "Defendant TransUnion, LLC willfully fail[ed] to clearly and accurately disclose OFAC information in the written disclosures it sent to members of the class." And the jury found that "Defendant TransUnion, LLC willfully fail[ed] to provide class members a summary of their FCRA rights with each written disclosure made to them." I would not be so quick as to recharacterize these jury findings as mere "formatting" errors.

Moreover, to the extent this Court privileges concrete, *financial* injury for standing purposes, recall that TransUnion charged its clients extra to receive credit reports with the OFAC designation. According to TransUnion, these special OFAC credit reports are valuable. Even the majority must admit that withholding something of value from another person—that is, "monetary harm"—falls in the heartland of tangible injury in fact. Recognizing as much, TransUnion admits that its clients would have standing to sue if they, like the class members, did not receive the OFAC credit reports they had requested.

And then there is the standalone harm caused by the rather extreme errors in the credit reports. The majority (rightly) decides that having one's identity falsely and publically [*sic*] associated with terrorism and drug trafficking is itself a concrete harm. For good reason. This case is a particularly grave example of the harm this Court identified as central to the FCRA: "curb[ing] the dissemination of false information." And it aligns closely with a "harm that has traditionally been regarded as providing a basis for a lawsuit." Historically, "[o]ne who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other," even though "no special harm or loss of reputation results therefrom."

The question this Court has identified as key, then, is whether a plaintiff established "a degree of risk" that is "sufficient to meet the concreteness requirement." Here, in a 7-month period, it is undisputed that nearly 25 percent of the class had false OFAC-flags sent to potential creditors. Twenty-five percent over just a 7-month period

seems, to me, "a degree of risk sufficient to meet the concreteness requirement." If 25 percent is insufficient, then, pray tell, what percentage is?

The majority deflects this line of analysis by all but eliminating the risk-of-harm analysis. According to the majority, an elevated risk of harm simply shows that a concrete harm is *imminent* and thus may support only a claim for injunctive relief. But this reworking of *Spokeo* fails for two reasons. First, it ignores what *Spokeo* said: "[Our opinion] does not mean . . . that the risk of real harm cannot satisfy the requirement of concreteness." Second, it ignores what *Spokeo* did. The Court in *Spokeo* remanded the respondent's claims for statutory damages to the Ninth Circuit to consider "whether the . . . violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." The theory that risk of harm matters only for injunctive relief is thus squarely foreclosed by *Spokeo* itself.

But even if risk of harm is out, the Ninth Circuit indicated that every class member may have had an OFAC alert disclosed. According to the court below, TransUnion not only published this information to creditors for a quarter of the class but also "communicated about the database information and OFAC matches" with a third party. Respondent adds to this by pointing out that TransUnion published this information to vendors that printed and sent the mailings. In the historical context of libel, publication to even a single other party could be enough to give rise to suit. This was true, even where the third party was a telegraph company, an attorney, or a stenographer who merely writes the information down. Surely with a harm so closely paralleling a common-law harm, this is an instance where a plaintiff "need not allege any additional harm beyond the one Congress has identified." ([E]mphasis deleted).

But even setting aside everything already mentioned—the Constitution's text, history, precedent, financial harm, libel, the risk of publication, and actual disclosure to a third party—one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted.

And if this sort of confusing and frustrating communication is insufficient to establish a real injury, one wonders what could rise to that level. If, instead of falsely identifying Ramirez as a potential drug trafficker or terrorist, TransUnion had flagged him as a "potential" child molester, would that alone still be insufficient to open the courthouse doors? What about falsely labeling a person a racist? Including a slur on the report? Or what about openly reducing a person's credit score by several points because of his race? If none of these constitutes an injury in fact, how can that possibly square with our past cases indicating that the inability to "observe an animal

species, even for purely esthetic purposes, . . . undeniably" is? Had the class members claimed an aesthetic interest in viewing an accurate report, would this case have come out differently?

And if some of these examples do cause sufficiently "concrete" and "real"—though "intangible"—harms, how do *we* go about picking and choosing which ones do and which do not? I see no way to engage in this "inescapably value-laden" inquiry without it "devolv[ing] into [pure] policy judgment." Weighing the harms caused by specific facts and choosing remedies seems to me like a much better fit for legislatures and juries than for this Court.

Finally, it is not just the harm that is reminiscent of a constitutional case or controversy. So too is the remedy. Although statutory damages are not necessarily a proxy for unjust enrichment, they have a similar flavor in this case. TransUnion violated consumers' rights in order to create and sell a product to its clients. Reckless handling of consumer information and bungled responses to requests for information served a means to an end. And the end was financial gain. "TransUnion could not confirm that a single OFAC alert sold to its customers was accurate." Yet thanks to this Court, it may well be in a position to keep much of its ill-gotten gains.[9]

Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is *not* sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.

I respectfully dissent.

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

The familiar story of Article III standing depicts the doctrine as an integral aspect of judicial restraint. The case-or-controversy requirement of Article III, the account runs, is "built on a single basic idea—the idea of separation of powers." Rigorous standing rules help safeguard that separation by keeping the courts away from issues

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[9] Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law," as the sole forum for such cases, with defendants unable to seek removal to federal court. By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.

"more appropriately addressed in the representative branches." In so doing, those rules prevent courts from overstepping their "proper—and properly limited—role" in "a democratic society."

After today's decision, that story needs a rewrite. The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III. I join Justice Thomas's dissent, which explains why the majority's decision is so mistaken. As he recounts, our Article III precedents teach that Congress has broad "power to create and define rights." And Congress may protect those rights by authorizing suits not only for past harms but also for the material risk of future ones. Under those precedents, this case should be easy. In the Fair Credit Reporting Act, Congress determined to protect consumers' reputations from inaccurate credit reporting. TransUnion willfully violated that statute's provisions by preparing credit files that falsely called the plaintiffs potential terrorists, and by obscuring that fact when the plaintiffs requested copies of their files. To say, as the majority does, that the resulting injuries did not " 'exist' in the real world" is to inhabit a world I don't know. And to make that claim in the face of Congress's contrary judgment is to exceed the judiciary's "proper—and properly limited—role."

I add a few words about the majority's view of the risks of harm to the plaintiffs. In addressing the claim that TransUnion failed to maintain accurate credit files, the majority argues that the "risk of dissemination" of the plaintiffs' credit information to third parties is "too speculative." But why is it so speculative that a company in the business of selling credit reports to third parties will in fact sell a credit report to a third party? And in addressing the claims of faulty disclosure to the plaintiffs, the majority makes a set of curious assumptions. According to the majority, people who specifically request a copy of their credit report may not even "*open*[ ] " the envelope. ([E]mphasis in original). And people who receive multiple opaque mailings are not likely to be "confused." And finally, people who learn that their credit files label them potential terrorists would not "have tried to correct" the error. Rather than accept those suppositions, I sign up with Justice Thomas: "[O]ne need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful."

I differ with Justice Thomas on just one matter, unlikely to make much difference in practice. In his view, any "violation of an individual right" created by Congress gives rise to Article III standing. But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." I continue to adhere to that view, but think it should lead to the same result as Justice Thomas's approach in all but highly unusual cases. As *Spokeo* recognized, "Congress is well positioned to identify [both tangible and]

intangible harms" meeting Article III standards. Article III requires for concreteness only a "real harm" (that is, a harm that "actually exist[s]") or a "risk of real harm." And as today's decision definitively proves, Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional judgments. Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue. Subject to that qualification, I join Justice Thomas's dissent in full.

Notes and Questions

1. *Spokeo* recognized that "Article III standing requires a concrete injury even in the context of a statutory violation," but one could interpret the decision to suggest that *some* statutory violations create the necessary injury. *Ramirez* rejects that reading of *Spokeo*, holding that statutory violations, standing alone, *never* supply the necessary injury-in-fact. In other words, plaintiffs must point to some tangible or intangible harm flowing from the violation, not to the violation itself.

2. Congress had placed a monetary value on each inclusion by credit-reporting companies of false information in credit-report files (as it has attempted to do with respect to unsolicited marketing calls for people on the federally maintained Do-Not-Call list, *see* Communications Act of 1934, 47 U.S.C. § 227). The majority Justices nonetheless say that Congress is without the power to create Article III injury-in-fact merely by assigning a value to something that has not caused actual injury. Much of the majority's analysis rests on its conclusion that violations of the statute are akin to defamation actions, which allows the majority to import the tort requirement of publication. Has the majority thus raised one of the elements of common-law defamation to a constitutional level? What is its authority for doing that?

3. Does the majority imply that for purposes of Article III, common-law regimes of, for example, contracts, property, and torts limit the kinds of rights violations that can cause Article III injury-in-fact? Does the informational injury the Court recognized in *FEC v. Akins* (text at 106) have a "close relationship" with common-law injuries? Which ones?

4. Justice Kavanaugh declares, "But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." Thus, he makes it sound much like a jurisdictional inquiry. Could one not ask as well whether society, through the legislature, can give legal recognition to new kinds of harm that did not exist at common law?

For example, it seems fair to speculate that the activity now known colloquially as "computer trespass" has no common-law ancestor. Nonetheless, states and the federal government now have criminal statutes imposing penalties for hacking into a computer without authorization, and hacking can give rise to civil liability as well. If legislatures can recognize new kinds of crime made possible by evolving technology, can they not similarly recognize

that such crimes also give rise to compensable injury within the meaning of Article III?

5. Although the *Akins* Court was split, the majority did recognize that Congress had created a right to receive information, violation of which qualified as Article III injury-in-fact. If all the members of the *Ramirez* class had requested copies of their own credit reports, and TransUnion, as with Ramirez, sent them only their reports omitting the OFAC designations, would they then have Article III injury-in-fact? TransUnion at that point would have deprived them of information to which a federal statute entitled them. How is that informational injury different from the injury in *Akins*? Neither entitlement to information had a common-law analog. For Article III purposes, can they possibly stand on different footing? Is there a way to read *Ramirez* as *not* overruling *Akins sub silentio*?

6. As Justice Kavanaugh acknowledges, *Spokeo* said that "Congress is well positioned to identify intangible harms * * *." Dare one suggest that Congress is well positioned only when a majority of the Court agrees with Congress's policy decision?

7. Recognition of privacy violations as actionable torts is a latecomer to the common law of torts, dating only from the second half of the twentieth century. Statutes designed to protect privacy came along much later. Is the now established right to privacy as a part of tort law the kind of common law that can furnish an Article III injury, or is it disqualified because it did not exist during the constitutional period?[2]

8. The Fifteenth Amendment recognized a right to freedom from racially discriminatory voting restrictions, a right not part of our common law heritage. Congress attempted to make that right effective in the Voting Rights Act of 1965 (which the Court gutted in *Shelby County v. Holder*, 570 U.S. 529 (2013)). *Shelby County* did not hold that denial of the right to vote created no Article III injury-in-fact. It did, though, effectively say that the Voting Rights Act had become unconstitutional (no longer "appropriate legislation" within the meaning of § 2 of the Amendment) with the passage of time. Does the juxtaposition of *Ramirez* and *Shelby County* suggest that for injury-in-fact purposes, only constitutional provisions, not congressional statutes, can create enforceable new rights? The Court appears to think so. For a related discussion, see Note 2 following *Uzuegbunam v. Preczewski*, *supra* at 3.

9. The Court does mention disclosure of private information as a basis for an action, but Justice Kavanaugh lumps it together with reputational harm (defamation) and "intrusion upon seclusion." At common law, unless such an intrusion was in the form of a trespass, it was not actionable. The common law did not recognize a right to recover against someone who revealed someone else's private (but entirely true) information.

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[2] Perhaps one could think of the Fair Credit Reporting Act as embodying the tort now known as "false light." If that is so, would the *Ramirez* majority take the position that it isn't false light for Article III purposes until someone other than the bulb manufacturer sees it, thus analogizing it to defamation's publication element?

10. Mathematics appears to become surprisingly important. Justice Thomas notes that TransUnion did disseminate defamatory misinformation in response to credit inquiries for about 25% of the class. The majority says that does not show a sufficient likelihood of injury to the remaining members of the class, and Justice Thomas asks, with some force, what percentage would be enough for the majority. What is the majority's answer?

11. If the other 75% of the class brought an action to enjoin TransUnion from disseminating their uncorrected credit reports, would the majority say that they had standing? The majority's citing *Clapper* suggests that it would. The Court, of course, reminds us that one must have Article III standing for each type of relief. Could Ramirez have avoided most of the problem here had he requested both damages and injunctive relief for the class? Or would the majority say that rather than a single class with two subdivisions, the proper procedural posture for a case like this is to have separate classes?

12. In *Uzuegbunam*, Chief Justice Roberts bemoaned "a major expansion of the judicial role." *See supra* at 13. If, as appears to be the case after *Ramirez*, the Court has limited Congress's ability to recognize new kinds of harm, as it did in the statute involved in *Akins*, is that an "expansion of the judicial role"? How might the Chief Justice reconcile the apparent inconsistency?

13. Footnote 9 in Justice Thomas's dissent raises an interesting question. One might think that since the Court found no Article III standing, state-court decisions (at least from the highest state court in which review was possible) would be conclusive. But is that necessarily so? If a state court entered a money judgment against TransUnion in a case like this, would the money judgment itself constitute injury-in-fact within the Court's Article III jurisprudence? If so, why wouldn't the Supreme Court be able to review the state-court judgment under 28 U.S.C. § 1257?

To be added as a second paragraph to Note 1 on page 103:

The relaxed-standing inquiry extends only to whether compliance with procedural rights will give rise to or redress an injury. It does not extend to whether the challenged substantive conduct will cause or redress an injury. In *Department of Education v. Brown*, 143 S. Ct. 2343 (2023), plaintiffs challenged the Department of Education's loan- forgiveness program, arguing, inter alia, that the Department failed to comply with procedural requirements when promulgating the program. Plaintiffs claimed injury not from adoption of the challenged program, but from the Department's failure to adopt a *different* debt-relief program pursuant to a *different* statute that would have benefited plaintiffs. While some uncertainty as to whether procedural compliance would redress plaintiffs' injury would not prevent standing, but complete lack of a causal connection between the Department's substantive decision to promulgate the challenged plan and its decision not to enact a different plan benefitting plaintiffs did prevent standing. The Court found it "purely speculative" whether plaintiffs' injury "fairly can be traced to" the promulgation of the challenged plan, because the

Department's selection of that plan did not prevent it from also promulgating a different plan benefiting plaintiffs.

3. Note on Further Problems with the Court's Standing Jurisprudence

To be added to Section 3a(1) on page 104 after the third full paragraph:

Carney v. Adams, 141 S. Ct. 493 (2020), rejected as a generalized grievance an attorney's challenge to Delaware's political-balance requirement for its state judiciary. For its five main courts, the state constitution prohibits the members of a single "political party" from occupying more than "a bare majority" of seats. For three of those courts (Supreme, Superior, and Chancery), the state constitution limits the remaining seats to members of "the other major political party" (what the Court called the "major party requirement"). Plaintiff, a long-time Democrat who in prior years failed to apply for judicial vacancies open to Democrats, filed suit shortly after discovering a law review article challenging the constitutionality of Delaware's political-balance requirement. (While plaintiff challenged both the bare-majority and major-party requirements, only the latter remained in play before the Court.) Sometime in the six to eight weeks preceding the suit, plaintiff returned to "Active" bar status, having switched to "Emeritus" status less than a year prior. And eight days before filing suit, plaintiff reregistered as an independent, making him ineligible for openings on three courts. He did not, however, submit an application for a judicial position. Leaning on the "highly fact-specific" nature of the case, the Court concluded that plaintiff sued to "vindicate his view of the law, as articulated in the article he read," rather than to redress a concrete, particularized injury inflicted by the major-party requirement. In short, he failed to "sufficiently differentiate[] himself from a general population of individuals affected in the abstract by the legal provision he attack[ed]." Could plaintiff have done anything to avoid a generalized grievance? Would the outcome have been different, for example, had plaintiff applied for a judicial position prior to filing suit, or did the other facts tilt inexorably toward a generalized grievance?

To be added on page 105 in place of the last sentence of the first full paragraph:

Just five years after *Spokeo*, *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021), *see supra* at 17, ruled that violation of a statutory right, by itself, can *never* supply the necessary injury-in-fact, rejecting a reading of *Spokeo* that arguably suggested that some violations *might* supply the injury.

To be added at the end of page 107:

UNITED STATES v. TEXAS

Supreme Court of the United States, 2023.
143 S. Ct. 1964.

JUSTICE KAVANAUGH delivered the opinion of the Court.

I

In 2021, Secretary of Homeland Security Mayorkas promulgated new "Guidelines for the Enforcement of Civil Immigration Law." The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example.

Texas and Louisiana sued the Department of Homeland Security, as well as other federal officials and agencies. According to those States, the Guidelines contravene two federal statutes that purportedly require the Department to arrest more criminal noncitizens pending their removal. First, the States contend that for certain noncitizens, such as those who are removable due to a state criminal conviction, § 1226(c) of Title 8 says that the Department "shall" arrest those noncitizens and take them into custody when they are released from state prison. Second, § 1231(a)(2), as the States see it, provides that the Department "shall" arrest and detain certain noncitizens for 90 days after entry of a final order of removal.

In the States' view, the Department's failure to comply with those statutory mandates imposes costs on the States. The States assert, for example, that they must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government.

The U. S. District Court for the Southern District of Texas found that the States would incur costs as a result of the Department's Guidelines. Based on those costs, the District Court determined that the States have standing. On the merits, the District Court ruled that the Guidelines are unlawful, and vacated the Guidelines. The U. S. Court of Appeals for the Fifth Circuit declined to stay the District Court's judgment. This Court granted certiorari before judgment.

Food for Thought

Why do you think the Court granted certiorari before judgment?

II

Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock

constitutional requirement that this Court has applied to all manner of important disputes.

As this Court's precedents amply demonstrate, Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." The principle of Article III standing is "built on a single basic idea—the idea of separation of powers." Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system. By ensuring that a plaintiff has standing to sue, federal courts "prevent the judicial process from being used to usurp the powers of the political branches."

A

* * *

The threshold question is whether the States have standing under Article III to maintain this suit. The answer is no.

* * *

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has "also stressed that the alleged injury must be legally and judicially cognizable." That "requires, among other things," that the "dispute is traditionally thought to be capable of resolution through the judicial process"—in other words, that the asserted injury is traditionally redressable in federal court. ([I]nternal quotation marks omitted). In adhering to that core principle, the Court has examined "history and tradition," among other things, as "a meaningful guide to the types of cases that Article III empowers federal courts to consider."

Food for Thought

Note that the focus of this explanation, and others in the case, is on redressability, yet the Court's analysis discusses only injury-in-fact.

The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit.

The leading precedent is *Linda R. S. v. Richard D.*(1973). The plaintiff in that case contested a State's policy of declining to prosecute certain child-support violations. This Court decided that the

plaintiff lacked standing to challenge the State's policy, reasoning that in "American jurisprudence at least," a party "lacks a judicially cognizable interest in the prosecution * * * of another." The Court concluded that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Ibid.*

The Court's Article III holding in *Linda R. S.* applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute. See [cases] (citing *Linda R. S.* principle in immigration context and stating that the petitioners there had "no judicially cognizable interest in procuring enforcement of the immigration laws" by the Executive Branch). And importantly, that Article III standing principle remains the law today; the States have pointed to no case or historical practice holding otherwise. A "telling indication of the severe constitutional problem" with the States' assertion of standing to bring this lawsuit "is the lack of historical precedent" supporting it. ([I]nternal quotation marks omitted).

Food for Thought

Did *Linda R.S. v. Richard D.* (text at 51) base its holding on lack of a cognizable injury or lack of redressability?

In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court.

Food for Thought

If the suit here is "not the kind redressable by a federal court" why doesn't the majority anchor its analysis and holding under the redressability prong of standing, as does Justice Gorsuch?

B

[Part II B discusses how the nature of executive prosecutorial discretion and Article II power generally justifies the Court's standing decision.]

C

In holding that Texas and Louisiana lack standing, we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions.

First, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause. In those cases, however, a party typically seeks to prevent his or her own prosecution, not to mandate additional prosecutions against other possible defendants.

Second, as the Solicitor General points out, the standing analysis might differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries redressable by a federal court. For example, Congress might (i) specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch.

Food for Thought

Texas and Louisiana alleged that they suffered (and will continue to suffer) monetary harm from the Executive Branch's failure to enforce the law. Is the Court saying that Congress could enact a statute authorizing this particular lawsuit? How so, given the Court's holding that the suit violates Article III?

Here, however, the relevant statutes do not supply such specific authorization. The statutes, even under the States' own reading, simply say that the Department "shall" arrest certain noncitizens. Given the "deep-rooted nature of law-enforcement discretion," a purported statutory arrest mandate, without more, does not entitle any particular plaintiff to enforce that mandate in federal court. For an arrest mandate to be enforceable in federal court, we would need at least a "stronger indication" from Congress that judicial review of enforcement discretion is appropriate—for example, specific authorization for particular plaintiffs to sue and for federal courts to order more arrests or prosecutions by the Executive. We do not take a position on whether such a statute would suffice for Article III purposes; our only point is that no such statute is present in this case.[4]

Third, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Under the Administrative Procedure Act, a plaintiff arguably could obtain review of agency non-enforcement if an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." So too, an extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion and support Article III standing. But the States have not advanced a *Heckler*-style "abdication" argument in this case or argued that the Executive has entirely ceased enforcing the relevant statutes. Therefore, we do not analyze the standing ramifications of such a hypothetical scenario.

Fourth, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities *and* the

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[4] As the Solicitor General noted, those kinds of statutes, by infringing on the Executive's enforcement discretion, could also raise Article II issues.

Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. Again, we need not resolve the Article III consequences of such a policy.

Fifth, policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies. But this case does not concern a detention policy, so we do not address the issue here.

D

The discrete standing question raised by this case rarely arises because federal statutes that purport to *require* the Executive Branch to make arrests or bring prosecutions are rare—not surprisingly, given the Executive's Article II authority to enforce federal law and the deeply rooted history of enforcement discretion in American law. Indeed, the States cite no similarly worded federal laws. This case therefore involves both a highly unusual provision of federal law and a highly unusual lawsuit.

To be clear, our Article III decision today should in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action. Moreover, the Federal Judiciary of course routinely and appropriately decides justiciable cases involving statutory requirements or prohibitions on the Executive.

Food for Thought

The Court suggests that its holding applies only in the narrow context of executive prosecutorial discretion. Is that accurate, or can the holding also extend to *any* allegation of government failure to follow the law?

This case is categorically different, however, because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law. And this case raises only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions against violators of federal law—here, by making more arrests. Under this Court's Article III precedents and the historical practice, the answer is no.

It bears emphasis that the question of whether the federal courts have jurisdiction under Article III is distinct from the question of whether the Executive Branch is complying with the relevant statutes—here, § 1226(c) and § 1231(a)(2). In other words, the question of reviewability is different from the question of legality. We take no

position on whether the Executive Branch here is complying with its legal obligations under § 1226(c) and § 1231(a)(2). We hold only that the federal courts are not the proper forum to resolve this dispute.

On that point, even though the federal courts lack Article III jurisdiction over this suit, other forums remain open for examining the Executive Branch's arrest policies. For example, Congress possesses an array of tools to analyze and influence those policies—oversight, appropriations, the legislative process, and Senate confirmations, to name a few. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions. In any event, those are political checks for the political process. We do not opine on whether any such actions are appropriate in this instance.

The Court's standing decision today is narrow and simply maintains the longstanding jurisprudential status quo. The Court's decision does not alter the balance of powers between Congress and the Executive, or change the Federal Judiciary's traditional role in separation of powers cases.

* * *

In sum, the States have brought an extraordinarily unusual lawsuit. They want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit; indeed, the States cite no precedent for a lawsuit like this. The States lack Article III standing because this Court's precedents and the "historical experience" preclude the States' "attempt to litigate this dispute at this time and in this form." *Raines*, 521 U. S., at 829, 117 S.Ct. 2312. And because the States lack Article III standing, the District Court did not have jurisdiction. We reverse the judgment of the District Court.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE BARRETT join, concurring in the judgment.

The Court holds that Texas and Louisiana lack Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law. I agree. But respectfully, I diagnose the jurisdictional defect differently. The problem here is redressability.

I

* * *

The Court holds that Texas and Louisiana lack standing to challenge the Guidelines because "a party lacks a judicially cognizable interest in the prosecution * * * of another." To be sure, the district court found that the Guidelines have led to an increase in the number

of aliens with criminal convictions and final orders of removal who are released into the States. The district court also found that, thanks to this development, the States have spent, and continue to spend, more money on law enforcement, incarceration, and social services. Still, the Court insists, "[s]everal good reasons explain why" these harms are insufficient to afford the States standing to challenge the Guidelines

I confess to having questions about each of the reasons the Court offers. Start with its observation that the States have not pointed to any "historical practice" of courts ordering the Executive Branch to change its arrest or prosecution policies. The Court is right, of course, that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." But, again, the district court found that the Guidelines impose "significant costs" on the States. The Court today does not set aside this finding as clearly erroneous. Nor does anyone dispute that even one dollar's worth of harm is traditionally enough to "qualify as concrete injur[y] under Article III." Indeed, this Court has allowed other States to challenge other Executive Branch policies that indirectly caused them monetary harms. So why are these States now forbidden from doing the same?

Next, the Court contends that, "when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property." Here again, in principle, I agree. But if an exercise of coercive power matters so much to the Article III standing inquiry, how to explain decisions like *Massachusetts* v. *EPA*? There the Court held that Massachusetts had standing to challenge the federal government's decision not to regulate greenhouse gas emissions from new motor vehicles. And what could be less coercive than a decision not to regulate? In *Massachusetts* v. *EPA*, the Court chose to overlook this difficulty in part because it thought the State's claim of standing deserved "special solicitude." I have doubts about that move. Before *Massachusetts* v. *EPA*, the notion that States enjoy relaxed standing rules "ha[d] no basis in our jurisprudence." Nor has "special solicitude" played a meaningful role in this Court's decisions in the years since. Even so, it's hard not to wonder why the Court says nothing about "special solicitude" in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.

Finally, the Court points to the fact that Article II vests in the President considerable enforcement discretion. So much so that "courts generally lack meaningful standards for assessing the propriety of [the Executive Branch's] enforcement choices." But almost as soon as the Court announces this general rule, it adds a caveat, stressing that "[t]his case concerns only arrest and prosecution policies." *Ante,* at 1974 n. 5. It's a curious qualification. Article II does not have an Arrest and Prosecution Clause. It endows the President with

the "executive Power," § 1, cl. 1, and charges him with "tak[ing] Care" that federal laws are "faithfully executed," § 3. These provisions give the President a measure of discretion over the enforcement of *all* federal laws, not just those that can lead to arrest and prosecution. So if the Court means what it says about Article II, can it mean what it says about the narrowness of its holding? There's another curious qualification in the Court's opinion too. "[T]he standing calculus might change," we are told, "if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." But the Court declines to say more than that because "the States have not advanced" such an argument. Is that true, though? The States have pleaded a claim under the Take Care Clause. Is that not an abdication argument? Did they fail to plead it properly? Or is the Court simply ignoring it?

II

As I see it, the jurisdictional problem the States face in this case isn't the lack of a "judicially cognizable" interest or injury. The States proved that the Guidelines increase the number of aliens with criminal convictions and final orders of removal released into the States. They also proved that, as a result, they spend more money on everything from law enforcement to healthcare. The problem the States face concerns something else altogether—a lack of redressability.

To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied " 'by a favorable decision.' " Ordinarily, to remedy harms like those the States demonstrated in this suit, they would seek an injunction. The injunction would direct federal officials to detain aliens consistent with what the States say the immigration laws demand. But even assuming an injunction like that would redress the States' injuries, that form of relief is not available to them.

It is not available because of 8 U.S.C. § 1252(f)(1). There, Congress provided that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of " certain immigration laws, including the very laws the States seek to have enforced in this case. If there were any doubt about how to construe this command, we resolved it in *Garland* v. *Aleman Gonzalez*, (2022). In that case, we held that § 1252(f)(1) "prohibits lower courts from * * * order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." Put simply, the remedy that would ordinarily have the best chance of redressing the States' harms is a forbidden one in this case.

The district court thought it could sidestep § 1252(f)(1). Instead of issuing an injunction, it purported to "vacate" the Guidelines pursuant to § 706(2) of the Administrative Procedure Act Vacatur, as the district court understood it, is a distinct form of relief that operates

directly on agency action, depriving it of legal force or effect. And vacatur, the district court reasoned, does not offend § 1252(f)(1), because it does not entail an order directing any federal official to do anything. The States embrace this line of argument before us.

It's a clever workaround, but it doesn't succeed. Start with perhaps the simplest reason. Assume for the moment the district court was right that § 1252(f)(1) does not bar vacatur orders and that § 706(2) authorizes courts to issue them. Even so, a vacatur order still does nothing to redress the States' injuries. The Guidelines merely advise federal officials about how to exercise their prosecutorial discretion when it comes to deciding which aliens to prioritize for arrest and removal. A judicial decree rendering the Guidelines a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion. Nor does such a decree require federal officials to change how they exercise that discretion in the Guidelines' absence. It's a point even the States have acknowledged.

Faced with that difficulty, the States offer this reply. As a practical matter, they say, we can expect federal officials to alter their arrest and prosecution priorities in light of a judicial opinion reasoning that the Guidelines are unlawful. But this doesn't work either. Whatever a court may say in an opinion does no more to compel federal officials to change how they exercise their prosecutorial discretion than an order vacating the Guidelines. Nor do we measure redressability by asking whether a court's legal reasoning may inspire or shame others into acting differently. We measure redressability by asking whether a court's judgment will remedy the plaintiff's harms. As this Court recently put it: "It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." If the rule were otherwise, and courts could "simply assume that everyone * * * will honor the legal rationales that underlie their decrees, then redressability [would] *always* exist."

* * *

In our system of government, federal courts play an important but limited role by resolving cases and controversies. Standing doctrine honors this limitation at the front end of every lawsuit. It preserves a forum for plaintiffs seeking relief for concrete and personal harms while filtering out those with generalized grievances that belong to a legislature to address. Traditional remedial rules do similar work at the back end of a case. They ensure successful plaintiffs obtain meaningful relief. But they also restrain courts from altering rights and obligations more broadly in ways that would interfere with the power reserved to the people's elected representatives. In this case, standing and remedies intersect. The States lack standing because federal courts do not have authority to redress their injuries.

Section 1252(f)(1) denies the States any coercive relief. A vacatur order under § 706(2) supplies them no effectual relief. And such an order itself may not even be legally permissible. The States urge us to look past these problems, but I do not see how we might. The Constitution affords federal courts considerable power, but it does not establish "government by lawsuit."

JUSTICE BARRETT, with whom JUSTICE GORSUCH joins, concurring in the judgment.

I agree with the Court that the States lack standing to challenge the Federal Government's Guidelines for the enforcement of immigration law. But I reach that conclusion for a different reason: The States failed to show that the District Court could order effective relief. Justice Gorsuch ably explains why that is so. And because redressability is an essential element of Article III standing, the District Court did not have jurisdiction.

The Court charts a different path. In its view, this case can be resolved based on what it calls the "fundamental Article III principle" that " 'a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.' " In other words, the Court says, the States have not asserted a " 'judicially cognizable interest' " in this case. Respectfully, I would not take this route.

I

To begin with, I am skeptical that *Linda R. S.* suffices to resolve this dispute. First, the Court reads that decision too broadly. Consider the facts. The "mother of an illegitimate child" sued in federal court, "apparently seek[ing] an injunction running against the district attorney forbidding him from declining prosecution" of the child's father for failure to pay child support. She objected, on equal protection grounds, to the State's view that "fathers of illegitimate children" were not within the ambit of the relevant child-neglect statute.

We agreed that the plaintiff "suffered an injury stemming from the failure of her child's father to contribute support payments." But if the plaintiff "were granted the requested relief, it would result only in the jailing of the child's father." Needless to say, the prospect that prosecution would lead to child-support payments could, "at best, be termed only speculative." For this reason, we held that the plaintiff lacked standing. Only then, after resolving the standing question on redressability grounds, did we add that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." In short, we denied standing in *Linda R. S.* because it was speculative that the plaintiff 's requested relief would redress her asserted injury, not because she failed to allege one.

Viewed properly, *Linda R. S.* simply represents a specific application of the general principle that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish" given the causation and redressability issues that may arise. That is true for the States here. I see little reason to seize on the case's bonus discussion of whether "a private citizen" has a "judicially cognizable interest in the prosecution or nonprosecution of another" to establish a broad rule of Article III standing

Second, even granting the broad principle the Court takes from *Linda R. S.*, I doubt that it applies with full force in this case. Unlike the plaintiff in *Linda R. S.*, the States do not seek the prosecution of any particular individual—or even any particular class of individuals. In fact, they *disclaim* any interest in the prosecution or nonprosecution of noncitizens. They acknowledge that 8 U.S.C. § 1226(c)(1)'s detention obligation "only applies until" the Government makes "a decision whether or not to prosecute." And they readily concede that if the Government decides not to prosecute, any detention obligation imposed by § 1226(c)(1) "immediately ends." The States make similar concessions with respect to § 1231(a)(2). They maintain, for example, that § 1231(a)(2) applies "only where the United States has used its prosecutorial discretion to bring a notice to appear, to prosecute that all the way to a final ... order of removal." But if the Government for any reason "choose[s] to discontinue proceedings," the alleged detention obligation does not attach.

The upshot is that the States do not dispute that the Government can prosecute whomever it wants. They seek, instead, the temporary detention of certain noncitizens during elective removal proceedings of uncertain duration. And the States' desire to remove the Guidelines' influence on the Government's admittedly broad discretion to enforce immigration law meaningfully differs from the *Linda R. S.* plaintiff 's desire to channel prosecutorial discretion toward a particular target. Given all of this, I would not treat *Linda R. S.* as the "leading precedent" for resolving this case. In my view, the Court is striking new ground rather than applying settled principles.

II

In addition to its reliance on *Linda R. S.*, the Court offers several reasons why "federal courts have not traditionally entertained lawsuits of this kind." I am skeptical that these reasons are rooted in Article III standing doctrine.

Take, for example, the Court's discussion of *Castle Rock v. Gonzales* (2005). There, we reasoned that given "[t]he deep-rooted nature of law-enforcement discretion," a "true mandate of police action would require some stronger indication" from the legislature than, for example, the bare use of the word " 'shall' " in a statutory directive. The Court today concludes that "no such statute is present in this case."

But *Castle Rock* is not a case about Article III standing. It addressed "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest" under the Fourteenth Amendment "in having the police enforce the restraining order when they have probable cause to believe it has been violated." I see no reason to opine on *Castle Rock*'s application here, especially given that the parties (correctly) treat *Castle Rock* as relevant to the *merits* of their statutory claims rather than to the States' *standing* to bring them..

The Court also invokes "the Executive's Article II authority to enforce federal law." I question whether the President's duty to "take Care that the Laws be faithfully executed," Art. II, § 3, is relevant to the standing analysis. While it is possible that Article II imposes justiciability limits on federal courts, it is not clear to me why any such limit should be expressed through Article III's definition of a cognizable injury. Moreover, the Court works the same magic on the Take Care Clause that it does on *Castle Rock*: It takes an issue that entered the case on the merits and transforms it into one about standing

* * *

The Court weaves together multiple doctrinal strands to create a rule that is not only novel, but also in tension with other decisions. See *ante,* at 1976 – 1978 (opinion of Gorsuch, J.). In my view, this case should be resolved on the familiar ground that it must be " 'likely,' as opposed to merely 'speculative,' " that any injury "will be 'redressed by a favorable decision.' " I respectfully concur only in the judgment.

JUSTICE ALITO, dissenting.

The Court holds Texas lacks standing to challenge a federal policy that inflicts substantial harm on the State and its residents by releasing illegal aliens with criminal convictions for serious crimes. In order to reach this conclusion, the Court brushes aside a major precedent that directly controls the standing question, refuses to apply our established test for standing, disregards factual findings made by the District Court after a trial, and holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress's power to employ the weapons of inter-branch warfare—withholding funds, impeachment and removal, etc. I would not blaze this unfortunate trail. I would simply apply settled law, which leads ineluctably to the conclusion that Texas has standing.

This Court has long applied a three-part test to determine whether a plaintiff has standing to sue. Under that test, a plaintiff must plead and ultimately prove that it has been subjected to or imminently faces an injury that is: (1) "concrete and particularized," (2) "fairly traceable to the challenged action," and (3) "likely" to be

"redressed by a favorable decision." Under that familiar test, Texas clearly has standing to bring this suit.

Nevertheless, the United States (the defendant in this case) has urged us to put this framework aside and adopt a striking new rule. At argument, the Solicitor General was asked whether it is the position of the United States that the Constitution does not allow any party to challenge a President's decision not to enforce laws he does not like. What would happen, the Solicitor General was asked, if a President chose not to enforce the environmental laws or the labor laws? Would the Constitution bar an injured party from bringing suit? She responded:

> "*That's correct under this Court's precedent*, but the framers intended political checks in that circumstance. You know, if—if an administration did something that extreme and said we're just not going to enforce the law at all, then the President would be held to account by the voters, and Congress has tools at its disposal as well." ([E]mphasis added).

Thus, according to the United States, even if a party clearly meets our three-part test for Article III standing, the Constitution bars that party from challenging a President's decision not to enforce the law. Congress may wield what the Solicitor General described as "political * * * tools"—which presumably means such things as withholding funds, refusing to confirm Presidential nominees, and impeachment and removal—but otherwise Congress and the American people must simply wait until the President's term in office expires.

The Court—at least for now—does not fully embrace this radical theory and instead holds only that, with some small and equivocal limitations that I will discuss, no party may challenge the Executive's "arrest and prosecution policies." But the Court provides no principled explanation for drawing the line at this point, and that raises the concern that the Court's only reason for framing its rule as it does is that no more is needed to dispose of *this* case. In future cases, Presidential power may be extended even further. That disturbing possibility is bolstered by the Court's refusal to reject the Government's broader argument.

As I will explain, nothing in our precedents even remotely supports this grossly inflated conception of "executive Power," U. S. Const., Art. II, § 1, which seriously infringes the "legislative Powers" that the Constitution grants to Congress, Art. I, § 1. At issue here is Congress's authority to control immigration, and "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." In the exercise of that power, Congress passed and President Clinton signed a law that commands the detention and removal of aliens who have been convicted of certain particularly dangerous crimes. The Secretary of Homeland Security, however, has instructed his agents to disobey this legislative command and instead follow a different policy that is more to his liking. And the Court now says that no party injured by this policy is allowed to challenge it in court.

That holding not only violates the Constitution's allocation of authority among the three branches of the Federal Government; it also undermines federalism. This Court has held that the Federal Government's authority in the field of immigration severely restricts the ability of States to enact laws or follow practices that address harms resulting from illegal immigration. If States are also barred from bringing suit even when they satisfy our established test for Article III standing, they are powerless to defend their vital interests. If a President fails or refuses to enforce the immigration laws, the States must simply bear the consequences. That interpretation of executive authority and Article III's case or controversy requirement is deeply and dangerously flawed.

Food for Thought

In 1972 President Nixon, perhaps still smarting from Congress's overriding his veto of the Federal Water Pollution Control Act's 1972 amendments, directed the head of the Environmental Protection Administration to withhold (impound) some of the funds Congress had authorized. A unanimous Court said that impoundment was improper under the statute. *Train v. City of New York*, 420 U.S. 35 (1975). Should Texas have relied on *Train*? Should the Court at least have acknowledged it?

II

Before I address the Court's inexplicable break from our ordinary standing analysis, I will first explain why Texas easily met its burden to show a concrete, particularized injury that is traceable to the Final Memorandum and redressable by the courts.

A

Injury in fact. The District Court's factual findings, which must be accepted unless clearly erroneous, quantified the cost of criminal supervision of aliens who should have been held in DHS custody and

also identified other burdens that Texas had borne and would continue to bear going forward. These findings sufficed to establish a concrete injury that was specific to Texas.

Traceability. The District Court found that each category of cost would increase "*because of* the Final Memorandum," rather than decisions that DHS personnel would make irrespective of the directions that memorandum contains ([E]mphasis added).

The majority does not hold—and in my judgment, could not plausibly hold—that these findings are clearly erroneous. Instead, it observes only that a "State's claim for standing can become more attenuated" when based on the "indirect effects" of federal policies "on state revenues or state spending." But while it is certainly true that indirect injuries may be harder to prove, an indirect financial injury that *is* proved at trial supports standing. And that is what happened here. As Justice Gorsuch notes, just a few years ago, we found in a very important case that a State had standing based in part on indirect financial injury. There is no justification for a conflicting holding here.

In any event, many of the costs in this case are not indirect. When the Federal Government refuses or fails to comply with §§ 1226(a) and (c) as to criminal aliens, the *direct* result in many cases is that the State must continue its supervision. As noted, the District Court made specific findings about the financial cost that Texas incurred as a result of DHS's failure to assume custody of aliens covered by §§ 1226(a) and (c). And the costs that a State must bear when it is required to assume the supervision of criminal aliens who should be kept in federal custody are not only financial. Criminal aliens whom DHS unlawfully refuses to detain may be placed on state probation, parole, or supervised release, and some will commit new crimes and end up in a state jail or prison. Probation, parole, and corrections officers are engaged in dangerous work that can put their lives on the line.

Redressability. A court order that forecloses reliance on the memorandum would likely redress the States' injuries. If, as the District Court found, DHS personnel rescind detainers "because of" the Final Memorandum, then vacating that memorandum would likely lead to those detainers' remaining in place.

B

While the majority does not contest redressability, Justice Gorsuch's concurrence does, citing two reasons. But the first is contrary to precedent, and the second should not be addressed in this case.

The first asserted reason is based on the inability of the lower courts to issue a broad injunction forbidding enforcement of the Final

Memorandum.[5] In this case, the District Court did not issue injunctive relief. Instead, it vacated the Final Memorandum, and Justice Gorsuch argues that this relief did not redress Texas's injuries because it does not "require federal officials to change how they exercise [their prosecutorial] discretion in the [Final Memorandum's] Guidelines' absence." There are two serious problems with this argument.

First, § 1252(f)(1) bars injunctive relief by courts "*other than* the Supreme Court." (Emphasis added.) As a result, redress in the form of an injunction *can* be awarded by this Court. According to the Court's decision last Term in *Biden* v. *Texas*, our authority to grant such relief "le[ft] no doubt" as to our jurisdiction even if § 1252(f)(1) precluded the lower courts from setting aside an administrative action under the APA. We have not been asked to revisit this holding, and I would not do so here.

Second, even if *Biden* v. *Texas* could be distinguished and no injunctive relief can be awarded by any court, setting aside the Final Memorandum satisfies the redressability requirement. Our decision in *Franklin v. Massachusetts* (1992), settles that question. There, the Court held that a declaratory judgment regarding the lawfulness of Executive Branch action satisfied redressability because "it [was] substantially likely that the President and other executive * * * officials would abide by an authoritative interpretation" of the law "even though they would not be directly bound by such a determination." ([O]pinion of O'Connor, J.).[6] Here, we need not speculate about how DHS officers would respond to vacatur of the Final Memorandum because the District Court found that the DHS personnel responsible for detainers were rescinding them "because of" the Final Memorandum. This point was effectively conceded by the Government's application for an emergency stay pending our decision in this case. The Government argued that the Final Memorandum was needed to guide prosecutorial discretion, and if the District Court's order were ineffectual, that would not be true. For these reasons, the harm resulting from the Final Memorandum is redressed by setting aside the Final Memorandum.

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[5] Section 1252(f)(1) reads in full:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

[6] While only four of eight Justices finding standing in *Franklin* formally joined this explanation, the Court subsequently ratified this reasoning. See *Utah v. Evans*, 536 U. S. 452, 460, 463–464 (2002).

As to the concurrence's second argument—that the APA's "set aside" language may not permit vacatur—the concurrence acknowledges that this would be a sea change in administrative law as currently practiced in the lower courts.[7] We did not grant review on this very consequential question, and I would not reach out to decide it in a case in which *Biden* v. *Texas* resolves the issue of redressability.

To be clear, I would be less troubled than I am today if Justice Gorsuch's concurrence had commanded a majority. At least then, Congress would be free to amend § 1252(f). But the majority reaches out and redefines our understanding of the *constitutional* limits on otherwise-available lawsuits. It is to this misunderstanding that I now turn.

III

* * *

A

Prior to today's decision, it was established law that plaintiffs who suffer a traditional injury resulting from an agency "decision not to proceed" with an enforcement action have Article III standing. *Federal Election Comm'n v. Akins* (1998). The obvious parallel to the case before us is *Massachusetts v. EPA* (2007), which has been called "the most important environmental law case ever decided by the Court." In that prior case, Massachusetts challenged the Environmental Protection Agency's failure to use its civil enforcement powers to regulate greenhouse gas emissions that allegedly injured the Commonwealth. Massachusetts argued that it was harmed because the accumulation of greenhouse gases would lead to higher temperatures; higher temperatures would cause the oceans to rise; and rising sea levels would cause the Commonwealth to lose some of its dry land. The Court noted that Massachusetts had a "quasi-sovereign interes[t]" in avoiding the loss of territory and that our federalist system had stripped the Commonwealth of "certain sovereign prerogatives" that it could have otherwise employed to defend its interests. Proclaiming that Massachusetts' standing claim was entitled to "special solicitude," the Court held that the Commonwealth had standing.

The reasoning in that case applies with at least equal force in the case at hand. In *Massachusetts* v. *EPA*, the Court suggested that allowing Massachusetts to protect its sovereign interests through litigation compensated for its inability to protect those interests by the means that would have been available had it not entered the Union.

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[7] Our decision three years ago in *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 140 S.Ct. 1891 (2020), appears to have assumed that the APA authorizes this common practice. We held that the rescission of the Deferred Action for Childhood Arrivals program had to be "vacated" because DHS had violated the procedures required by the APA.. If the court in that case had lacked the authority to set aside the rule adopting the program, there would have been no need to examine the sufficiency of DHS's procedures.

In the present case, Texas's entry into the Union stripped it of the power that it undoubtedly enjoyed as a sovereign nation to police its borders and regulate the entry of aliens. The Constitution and federal immigration laws have taken away most of that power, but the statutory provisions at issue in this case afford the State at least *some* protection—in particular by preventing the State and its residents from bearing the costs, financial and non-financial, inflicted by the release of certain dangerous criminal aliens. Our law on standing should not deprive the State of even that modest protection. We should not treat Texas less favorably than Massachusetts. And even if we do not view Texas's standing argument with any "special solicitude," we should at least refrain from treating it with special hostility by failing to apply our standard test for Article III standing.

Despite the clear parallel with this case and the States' heavy reliance on *Massachusetts* throughout their briefing, the majority can only spare a passing footnote for that important precedent. It first declines to say *Massachusetts* was correctly decided and references the "disagreements that some may have" with that decision. But it then concludes that *Massachusetts* "does not control" since the decision itself refers to " 'key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action,' " with the latter " 'not *ordinarily* subject to judicial review.' " ([E]mphasis added).

The problem with this argument is that the portion of *Massachusetts* to which the footnote refers deals not with its key Article III holding, but with the scope of review that is "ordinarily" available under the statutory scheme. Importantly, *Massachusetts* frames its statement about declining enforcement as restating the rule of *Heckler v. Chaney* (1985). And as the Court acknowledges when it invokes *Heckler* directly, that decision is not about standing; it is about the interpretation of the statutory exception to APA review for actions "committed to agency discretion by law." And even in that context, *Heckler* expressly contemplates that any "presumption" of discretion to withhold enforcement can be rebutted by an express statutory limitation of discretion—which is exactly what we have here.

So rather than answering questions about this case, the majority's footnote on *Massachusetts* raises more questions about *Massachusetts* itself—most importantly, has this monumental decision been quietly interred?

Massachusetts v. *EPA* is not the only relevant precedent that the Court brushes aside. "[I]t is well established that [this Court] has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." Yet in case after case, with that obligation in mind, we have not questioned the standing of States that brought suit under the APA to compel civil enforcement.

In *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania* 140 S.Ct. 2367 (2020), two States sued under the APA and sought to compel the Department of Health and Human Services to cease exercising regulatory enforcement discretion that exempted certain religious employers from compliance with a contraceptive-coverage mandate. The issue of the States' standing was discussed at length in the decision below, and in this Court, no Justice suggested that the Constitution foreclosed standing simply because the States were complaining of "the Executive Branch's * * * enforcement choices" regarding third parties.

Just last Term in *Biden* v. *Texas*, two States argued that their spending on the issuance of driver's licenses and the provision of healthcare for illegal immigrants sufficed to establish Article III standing and thus enabled them to sue to compel enforcement of a detain-or-return mandate. The Court of Appeals held that the States had standing, and the majority in this Court, despite extended engagement with other jurisdictional questions, never hinted that Article III precluded the States' suit.

If the new rule adopted by the Court in this case is sound, these decisions and others like them were all just wasted ink. I understand that what we have called " 'drive-by jurisdictional rulings' " are not precedents, but the Court should not use a practice of selective silence to accept or reject prominently presented standing arguments on inconsistent grounds.

* * *

C

Despite the majority's capacious understanding of executive discretion, today's opinion assures the reader that the decision "do[es] not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions," despite its otherwise broad language covering the "exercise of enforcement discretion over whether to arrest or prosecute." The majority lists five categories of cases in which a court would—or at least might—have Article III jurisdiction to entertain a challenge to arrest or prosecution policies, but this list does nothing to allay concern about the Court's new path. The Court does not identify any characteristics that are shared by all these categories and that distinguish them from cases in which it would not find standing. In addition, the Court is unwilling to say that cases in four of these five categories are actually exempted from its general rule, and the one remaining category is exceedingly small. I will discuss these categories one by one.

First, the majority distinguishes "selective-prosecution" suits by a plaintiff "to prevent his or her own prosecution." But such claims are ordinarily brought as defenses in ongoing prosecutions, as in the

cases the Court cites, and are rarely brought in standalone actions where a plaintiff must prove standing. This category is therefore little more than a footnote to the Court's general rule.

Second, the majority grants that "the standing analysis *might* differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries," and it hypothesizes a situation in which Congress "(i) specifically authorize[s] suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize[s] the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch." (emphasis added). It is puzzling why the presence or absence of such a statute should control the question of standing under the Constitution. We have said that the enactment of a statute may help us to determine in marginal cases whether an injury is sufficiently concrete and particularized to satisfy the first prong of our three-part standing test. But once it is posited that a plaintiff has personally suffered a "*de facto*" injury, *i.e.*, an injury in fact, it is hard to see why the presence or absence of a statute authorizing suit has a bearing on the question whether the court has Article III jurisdiction as opposed to the question whether the plaintiff has a cause of action. In the end, however, none of this may matter because the majority suggests that such a statute might be unconstitutional.

Third, the majority tells us that the standing outcome "*might* change" if the Federal Government "*wholly* abandoned its statutory responsibilities," but that statement is both equivocal and vague. ({E]mphasis added). Under what circumstances might the Court say that the Federal Government has "wholly abandoned" its enforcement duties? Suppose the Federal Government announced that it would obey 80% of the immigration laws or 70% of the environmental laws. Would the Court say that it had "wholly abandoned" enforcement of these bodies of law? What would happen if the Final Memorandum in this case had directed DHS agents not to arrest anyone convicted of any covered crime other than murder? DHS would still be enforcing the arrest mandate as to one of the many covered crimes. Would this only-murder policy qualify as complete abandonment? And why should the ability of a particular party to seek legal redress for an injury turn on the number of others harmed by the challenged enforcement policy? Standing is assessed plaintiff by plaintiff. The majority has no answers, and in the end, it cannot even bring itself to commit to this complete-abandonment exception. It says only that "the standing calculus *might*" or "arguably *could*" change. ([E]mphasis added).

Fourth, the Court says that a plaintiff might have standing to challenge an "Executive Branch's arrest or prosecution priorities *and* the Executive Branch's provision of legal benefits or legal status * * * because the challenged policy might implicate more than simply the

Executive's traditional enforcement discretion." Exactly what this means is not easy to ascertain. One possibility is that the majority is talking about a complaint that asserts separate claims based on the grant or denial of benefits, the grant or denial of legal status, and harms resulting from non-enforcement of a statutory mandate. In that event, standing with respect to each claim would have to be analyzed separately. Another possibility is that the majority is referring to a claim asserting that non-enforcement of a statutory requirement requiring the arrest or prosecution of third parties resulted in the plaintiff's loss of benefits or legal status. Such a situation is not easy to imagine, and the majority cites no case that falls within this category. But if such a case were to arise, there is no reason why it should not be analyzed under our standard three-pronged test.

Fifth, and finally, the majority states that "policies governing the continued detention of noncitizens who have already been arrested *arguably might* raise a different standing question than arrest or prosecution policies." ([E]mphasis added). The majority provides no explanation for this (noncommittal) distinction, and in any event, as the majority acknowledges, the States in this case challenged noncompliance with the § 1231(a)(2) detention mandate in addition to the § 1226(c) arrest requirement. The Court points to what it sees as a "represent[ation]" by the Solicitor General that the Final Memorandum does not affect "continued detention of noncitizens already in federal custody." But as Justice Barrett notes, the Government argued that when it chooses not to remove someone under the Final Memorandum's guidance, its mandatory detention obligation ends—meaning it *is* asserting discretion over continued detention.

In any event, arrest policy cannot be divided from detention policy in this case. When a person is arrested, he or she is detained for at least some period of time, and under the detainer system involved here, "arrest" often simply means transferring an immigrant from state custody to federal custody. As best I can tell, the majority's distinction between arrest and detention is made solely to avoid the obvious inference that our decision last Term in *Biden* v. *Texas* should have dismissed the case for lack of standing, without analyzing "the Government's detention obligations."

In sum, with the exception of cases in the first (very small) category (civil cases involving selective-prosecution claims), the majority does not identify any category of cases that it would definitely except from its general rule. In addition, category two conflates the question of constitutional standing with the question whether the plaintiff has a cause of action; category three is hopelessly vague; category four is incomprehensible; and category five actually encompasses the case before us.

IV

The Court declares that its decision upholds "[o]ur constitutional system of separation of powers," but as I said at the outset, the decision actually damages that system by improperly inflating the power of the Executive and cutting back the power of Congress and the authority of the Judiciary. And it renders States already laboring under the effects of massive illegal immigration even more helpless.

Our Constitution gives the President important powers, and the precise extent of some of them has long been the subject of contention, but it has been widely accepted that "the President's power reaches 'its lowest ebb' when he contravenes the express will of Congress, 'for what is at stake is the equilibrium established by our constitutional system.' " *Zivotofsky v. Kerry* (2015) (Roberts, C.J., dissenting).

That is the situation here. To put the point simply, Congress enacted a law that requires the apprehension and detention of certain illegal aliens whose release, it thought, would endanger public safety. The Secretary of DHS does not agree with that categorical requirement. He prefers a more flexible policy. And the Court's answer today is that the Executive's policy choice prevails unless Congress, by withholding funds, refusing to confirm Presidential nominees, threatening impeachment and removal, etc., can win a test of strength. Relegating Congress to these disruptive measures radically alters the balance of power between Congress and the Executive, as well as the allocation of authority between the Congress that enacts a law and a later Congress that must go to war with the Executive if it wants that law to be enforced.

* * *

This sweeping Executive Power endorsed by today's decision may at first be warmly received by champions of a strong Presidential power, but if Presidents can expand their powers as far as they can manage in a test of strength with Congress, presumably Congress can cut executive power as much as it can manage by wielding the formidable weapons at its disposal. That is not what the Constitution envisions.

I end with one final observation. The majority suggests that its decision rebuffs an effort to convince us to " 'usurp' " the authority of the other branches, but that is not true. We exercise the power conferred by Article III of the Constitution, and we must be vigilant not to exceed the limits of our constitutional role. But when we have jurisdiction, we have a "virtually unflagging obligation" to exercise that authority. Because the majority shuns that duty, I must respectfully dissent.

Notes and Questions

1. Plaintiffs challenging the government's failure to follow the law, as Texas and Louisiana did here, must show how that failure hurts them in a concrete manner, otherwise the dispute is a nonjusticiable generalized grievance. Monetary costs have long been sufficient, transforming an otherwise abstract injury into a concrete one. After *Texas* that seems no longer true, at least in cases where plaintiffs challenge "the government's allegedly unlawful regulation (or lack of regulation) of someone else." Such disputes remain nonjusticiable even in the presence of what the Court has previously recognized as a concrete injury. What impact on standing doctrine (and the scope of generalized grievances) does *Texas* have? And why would the liberal Justices, who tend to favor expansive standing, join the majority?

Why does the majority characterize the plaintiffs as challenging the federal government's failure to follow the law? That is the language of a generalized-grievance case, where no plaintiff suffers an injury distinct from any other plaintiff (or member of the public). Is that the case here? To be sure, the plaintiff states allege the same *type* of injury—monetary loss from increased law-enforcement and other state expenditures—but does that convert *Texas* into a generalized-grievance case? Consider the mass tort case, such as a plane crash. All the plaintiffs have suffered the same type of injury, but that hardly shoehorns the case into the generalized-grievance prohibition. Yet, even there, all the plaintiffs complain of the defendant's failure to follow the law, in that case the law of negligence.

Could the difference be that the plaintiffs in the mass-tort case seek compensation for harm already suffered, whereas the states seek forward-looking relief? If that is so, did the states err strategically by not also claiming damages in the amount of state money already expended as a result of federal nonenforcement? Or is causation the real problem—the states' inability to tie a particular law-enforcement expenditure to the federal government's nonenforcement? If so, then the standing problem is traceability rather than generalized grievance.

Suppose instead that the Internal Revenue Service decided to recognize every individual taxpayers' statutory entitlement to a personal exemption pursuant to 26 U.S.C. § 151(a) (2018) (an amount that the statute currently pegs at $2,000 (26 U.S.C. § 151(d)(1)) only for taxpayers whose gross income is less than $70,000 on the ground that they need the exemption the most. Thus, for a single taxpayer making more than $70,000 per year, the income tax due would rise by $2,000 times the taxpayer's marginal tax rate. Under *Texas*, would no such taxpayer have standing to challenge that action by attempting to recover the amount of the tax increase to her? Would such a taxpayer be entitled to an injunction requiring IRS to recognize the entitlement for her as long as she met the statutory criteria? Does her right to relief depend at all upon how many other taxpayers also suffer losses? If this case seems distinguishable from *Texas*, isn't it a combination of causation and redressability that makes it so?

The majority emphasizes the narrowness of its holding, asserting that it applies only in the context of challenges to executive prosecutorial discretion. But can the Court's reasoning be so neatly contained? If the concern is

"safeguard[ing] the Judiciary's proper—and properly limited—role in our constitutional system," the Court's reasoning should apply to all generalized grievances, not just those involving executive prosecutorial discretion. Moreover, the Court's reasoning seems to neutralize the power of *any* injury (not just monetary loss) to transform a generalized grievance into a concrete and personal injury. If applied in this manner, *Texas* drastically cuts back on standing doctrine.

2. Justice Gorsuch would decide the case on redressability grounds. Is redressability a better tool to resolve the case than injury-in-fact, especially since a federal statute (8 U.S.C. § 1252(f)(1)) specifically precludes the relief that would redress the injury? If so, why would the majority not take that path? In this regard, it is useful to note that Justice Kavanaugh, who authored the majority opinion in *Texas*, also wrote the majority opinion in *TransUnion v. Ramirez*, a recent standing case that limited "injury-in-fact." Might Justice Kavanaugh have embarked on a project to restrict our understanding of cognizable injuries?

3. Have we come to a point in standing doctrine where the idea of requiring the federal government to obey federal law is so farfetched that the courts will not even consider it? To borrow from Justice Kavanaugh's majority opinion, is the idea of government having to operate under its own law not " 'thought to be capable of resolution through the judicial process'—in other words, that the asserted injury is traditionally redressable in federal court"?

E. MOOTNESS

To be added as new Note 5 on page 156:

In *Moore v. Harper*, 143 S. Ct. 2065 (2023) a 6-3 Court ruled that a state supreme court's decision overruling an earlier decision in the same case (which was pending before the Supreme Court) on state-law grounds did not moot the case. Key to the majority's reasoning was the state supreme court's failure to "disturb" the judgment when it overruled itself. Because the judgment continued to bind the parties, a ruling in favor of petitioners (defendants below) would provide relief. Or, as the Court stated: "defendants' path to complete relief runs through this Court."

The legality of newly drawn congressional districting maps ("2021 maps") was central to the controversy. Plaintiffs argued that the 2021 maps violated the state constitution's prohibition against partisan gerrymanders. Defendants argued that the dispute was nonjusticiable—a political question under state law—and, alternatively, that the federal Elections Clause grants the state legislature authority to regulate federal elections without limitation by the state constitution or review by state courts. The North Carolina Supreme Court rejected both the state and federal defenses and ruled in plaintiffs' favor, enjoining use of the 2021 maps (*Harper I*) and remanding the case. The Supreme Court granted certiorari in *Harper I* to consider defendants' Elections Clause defense (more commonly known as the independent-state-legislature theory).

Meanwhile, remand proceedings continued in state court, and when the trial court ordered remedial relief, the defendants appealed again. The North Carolina Supreme Court initially upheld the trial court's remedial ruling (*Harper II*), but on rehearing (*Harper III*) withdrew its opinion in *Harper II*, overruled *Harper I*'s state-law ruling, and dismissed plaintiffs' claims as nonjusticiable political questions under the state constitution. *Harper III* did not, however, disturb *Harper I*'s judgment enjoining use of the 2021 maps. That failure, together with a state statute directing reinstatement of districting maps upon reversal by the Supreme Court, kept the controversy alive.

Justice Thomas, joined by Justices Alito and Gorsuch, disagreed, arguing that *Harper III* dismissed the case on adequate and independent state-law grounds, rendering the federal question pending before the Court moot. It mattered not, reasoned Justice Thomas, that the *Harper I* judgment remained intact because the Court's ruling on the Elections Clause defense, no matter who it favored or what it said, would not undo plaintiffs' loss. The case was a nonjusticiable political question.

What explains the opposing mootness conclusions? Is not the majority correct that a ruling in favor of defendants on the Election Clause issue would provide relief—bringing the 2021 maps back to life? If so, then the case is not moot. But is not Justice Thomas also correct that the Court lacks power (because it cannot affect the outcome) to entertain a federal claim if an adequate and independent state claim supports the judgment? How does one reconcile these positions? The unusual odyssey of state-court proceedings in *Harper* suggests that we might not have to confront that question. How often does a state supreme court overrule itself *after* it issues the judgment and mandate and *after* the Supreme Court takes jurisdiction of the matter by granting certiorari? Probably not often. It may have happened here because membership of the North Carolina Supreme Court changed between *Harper II* and *Harper III*., and a majority of the newly constituted state court disagreed with *Harper I*.

Chapter 2

CONGRESSIONAL CONTROL OF FEDERAL JURISDICTION

C. CONGRESSIONAL CONTROL OF THE JURISDICTION OF THE LOWER FEDERAL COURTS

To be added as new Note 4A on page 200:

Congress can strip jurisdiction from federal courts by using explicit statutory language. It can also do so implicitly. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), for example, ruled that Congress implicitly ousted federal district courts of jurisdiction over certain labor disputes involving the federal Mine Act before feared enforcement, noting Congress's creation of a detailed administrative remedial scheme followed by review in the Court of Appeals. In *Axon Enterprise, Inc. v. Federal Trade Commission*, 143 S. Ct. 890 (2023), the challenge ran to the constitutional legitimacy of the administrative agency itself rather than a particular enforcement action, and the Court ruled that Congress had not intended its detailed administrative enforcement scheme to preempt § 1331 jurisdiction.

How should the Court decide whether Congress has implicitly ousted federal courts of jurisdiction they previously exercised? Is there an argument that any attempt to do so creates a separation-of-powers problem, with the Court substituting its judgment for Congress's?

Chapter 3

FEDERAL QUESTION JURISDICTION

B. CONSTITUTIONAL AND STATUTORY "ARISING UNDER"—SEPARATE STRANDS INTERTWINED

To be inserted on page 311 at the end of n.8:

Tanzin v. Tanvir, 141 S.Ct. 486 (2020), was not about federal-question jurisdiction, but it nonetheless shone a bright light on the difficulty with the *Merrell Dow* (text at 310) analysis in this respect. The unanimous eight-Justice Court (newly appointed Justice Barrett not participating) had to decide whether the phrase "appropriate relief" in the Religious Freedom Restoration Act authorized the courts to award damages. (It decided that it did.) Of more importance for present purposes is Justice Thomas's careful focus on the relevant time frame. He noted that the critical thing was "the phrase's plain meaning *at the time of enactment*." *Id.* at 491 (emphasis added). He added, "Although background presumptions can inform the understanding of a word or phrase, those presumptions must exist at the time of enactment. We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted 27 years ago." *Id.* at 493. Is that not precisely what Justice Stevens did in *Merrell Dow* (text at 310)? The absence of a private right of action in the FDCA caused him to infer that the 1938 Congress that passed FDCA would not have wanted § 1331 to encompass *Merrell Dow* as a hybrid case in the mold of *Smith v. Kansas City Title* (text at 303). But the Congress that enacted § 1331 was in 1875, a full sixty-three years before the FDCA Congress. Why was that later Congress entitled to place a gloss on a jurisdiction statute that was not before it and that it did not seek to amend? There is one further point. The Court regularly assures us that Congress is aware of what the Court does. If that is the case, why did *Smith* not control the jurisdictional result in *Merrell Dow*?

Chapter 4

NON-ARTICLE-III COURTS

B. LIMITS ON NON-ARTICLE-III COURTS

To be inserted at page 361 immediately before note 2:

6. *Patel v. Garland*, 142 S.Ct. 1614 (2022), ruled that 8 U.S.C. § 1252(a)(2)(B) deprives federal courts of jurisdiction to review factual determinations made in discretionary-relief proceedings under the Immigration and Nationality Act (INA) (e.g., requests for status adjustment and relief from removal). Justice Barrett's opinion for the 5-member majority drew a strenuous dissent from Justice Gorsuch, joined by Justices Breyer, Sotomayor, and Kagan. He interprets § 1252(a)(2)(B) to preclude only jurisdiction over discretionary relief *decisions*, but not factual determinations such as eligibility for relief that precede discretionary relief decisions. He also argues that the majority's rule renders "courts . . . powerless to correct bureaucratic mistakes . . . no matter how grave they may be" and "promises that countless future immigrants will be left with no avenue to correct even more egregious agency errors."

Justice Gorsuch disagrees with the majority's interpretation of the statute. Is there a *constitutional* basis for this disagreement, or is it purely one of statutory interpretation? In other words, *can* Congress assign and reserve fact-finding to non-Article-III tribunals in this context?

Chapter 5

FEDERAL COMMON LAW

C. CHOOSING THE APPLICABLE LAW AND DETERMINING ITS CONTENT—FEDERAL INTERESTS OR LACK THEREOF

1. Spontaneous Generation

To be added as new Note 1(c) on page 456:

1. (c) Lest one leap too nimbly to the conclusion that Congress can always enact statutes that override common law, consider *Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176 (2023). A statute created the Board as an "entity within the territorial government." Neither that statute nor any other says anything about territorial sovereign immunity. The statute does say that "any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory." 48 U.S.C. § 2126(a). The plaintiff sued the Board in the United States District for the District of Puerto Rico.

The majority analyzed *Financial Management* as a sovereign-immunity case and ruled in the defendant Board's favor, reciting that "Congress, this Court has often held, must make its intent to abrogate sovereign immunity 'unmistakably clear in the language of the statute,' " 143 S. Ct. at 1183. In support of that assertion, the Court cited several Eleventh Amendment cases, a federal-government sovereign immunity case, and a tribal government sovereign-immunity case. The Eleventh Amendment, by its terms, applies only to "one of the United States," although the Court has extended its reach to include state-level government agencies. Neither the Board nor the territorial government of which it is a part fits any of those categories. Nonetheless, the Court disallowed the action, and how it did so deserves attention.

Relying on First Circuit precedent, the majority "assume[d] without deciding that Puerto Rico is immune from suit in federal district court, and that the Board partakes of that immunity." *Id*. That is quite an assumption, is it not? Whence that immunity? As Justice Thomas's lonely dissent pointed out, the Board had asserted only Eleventh Amendment immunity, relying on First Circuit precedent according Puerto Rico Eleventh Amendment protection, but the majority neither cited nor discussed the Amendment. The federal government had, on other occasions, "urged . . . that Puerto Rico enjoys a form of common-law immunity that, it claims, territorial governments can invoke in federal court." *Id.* at 1188 (Thomas, J., dissenting). The

majority did not discuss that either. Thus, the majority did not even suggest that territorial sovereign immunity can claim any basis in the Constitution.

The Court's Eleventh Amendment jurisprudence includes its recognition that when Congress legislates pursuant to § 5 of the Fourteenth Amendment, it can, in some limited circumstances abrogate states' otherwise existing Eleventh Amendment immunity from being sued in a federal forum (*see* text at 681-736), and it is in that context that the Court created the super-strong-clear-statement rule to which the majority's quotation refers.

Query whether the majority implicitly ruled that apart from the super-strong clear statement the Court, as a matter of federal common law, requires Congress to make to dispense with the states' Eleventh Amendment immunity when legislating under § 5 of the Fourteenth Amendment, Congress must also follow the same rule with respect to common-law immunity, although it can alter any other principle of common law within federal jurisdiction with ordinary statutory language. Congress's authority to legislate for the territories comes not from the Fourteenth Amendment but rather from art. IV, § 3, cl. 2. Should that have given the majority pause?

Justice Thomas made two arguments in support of his position against immunity. First, he read the words of the Eleventh Amendment and noted that the Amendment applies specifically to "one of the United States" and that, as a territory, Puerto Rico was neither a state nor an arm of any state government. Second, he argued that the Eleventh Amendment came into existence because "[a]t the Founding, the 'States considered themselves fully sovereign nations,' and part of that sovereignty 'was their immunity from private suits.' " *Id.* at 1187 (Thomas, J., dissenting) (quoting *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1493 (2019)). When the states ratified the Eleventh Amendment in 1795, the Northwest Territory was already part of the nation, yet the Eleventh Amendment refers only to states, which the Territory was not, and no one thought of it as a sovereign nation.

It does seem odd that the Court was comfortable assuming territorial sovereign immunity as a necessary predicate to its decision. Before the United States formed itself, states may have resembled sovereign nations. Territories never had. Should not the majority have confronted that unresolved question rather than assuming it and applying the federal-common-law principle it had previously articulated and applied only in the Eleventh/Fourteenth Amendment context?

3. Implying Private Rights of Action

To be added on page 487 in place of *Ziglar v. Abbasi* and the notes following it:

EGBERT v. BOULE

Supreme Court of the United States.
142 S. Ct. 1793 (2022)

JUSTICE THOMAS delivered the opinion of the Court.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, this Court authorized a damages action against federal officials for alleged

violations of the Fourth Amendment. Over the past 42 years, however, we have declined 11 times to imply a similar cause of action for other alleged constitutional violations. Nevertheless, the Court of Appeals permitted not one, but two constitutional damages actions to proceed against a U.S. Border Patrol agent: a Fourth Amendment excessive-force claim and a First Amendment retaliation claim. Because our cases have made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts, we reverse.

I

Blaine, Washington, is the last town in the United States along U.S. Interstate Highway 5 before reaching the Canadian border. Respondent Robert Boule is a longtime Blaine resident. The rear of his property abuts the Canadian border at "0 Avenue," a Canadian street. Boule's property line actually extends five feet into Canada. Several years ago, Boule placed a line of small stones on his property to mark the international boundary. As shown below, any person could easily enter the United States or Canada through or near Boule's property.

Boule markets his home as a bed-and-breakfast aptly named "Smuggler's Inn." The area surrounding the Inn "is a hotspot for cross-border smuggling of people, drugs, illicit money, and items of significance to criminal organizations." "On numerous occasions," U.S. Border Patrol agents "have observed persons come south across the border and walk into Smuggler's Inn through the back door." Federal agents also have seized from the Inn shipments of cocaine, methamphetamine, ecstasy, and other narcotics. For a time, Boule served as a confidential informant who would help federal agents identify and apprehend persons engaged in unlawful cross-border activity on

or near his property. Boule claims that the Government has paid him upwards of $60,000 for his services.

Ever the entrepreneur, Boule saw his relationship with Border Patrol as a business opportunity. Boule would host persons who unlawfully entered the United States as "guests" at the Inn and offer to drive them to Seattle or elsewhere. He also would pick up Canada-bound guests throughout the State and drive them north to his property along the border. Either way, Boule would charge $100–$150 per hour for his shuttle service and require guests to pay for a night of lodging even if they never intended to stay at the Inn. Meanwhile, Boule would inform federal law enforcement if he was scheduled to lodge or transport persons of interest. In short order, Border Patrol agents would arrive to arrest the guests, often within a few blocks of the Inn. Boule would decline to offer his erstwhile customers a refund. In his view, this practice was "nothing any different than [the] normal policies of any hotel/motel."

In light of Boule's business model, local Border Patrol agents, including petitioner Erik Egbert, were well acquainted with Smuggler's Inn and the criminal activity that attended it. On March 20, 2014, Boule informed Agent Egbert that a Turkish national, arriving in Seattle by way of New York, had scheduled transportation to Smuggler's Inn later that day. Agent Egbert grew suspicious, as he could think of "no legitimate reason a person would travel from Turkey to stay at a rundown bed-and-breakfast on the border in Blaine." The photograph below displays the amenities for which Boule's Turkish guest would have traveled more than 7,500 miles.

Later that afternoon, Agent Egbert observed one of Boule's vehicles—a black SUV with the license plate "SMUGLER"—returning to the Inn. Agent Egbert suspected that Boule's Turkish guest was a

passenger and followed the SUV into the driveway so he could check the guest's immigration status. On Boule's account, the situation escalated from there. Boule instructed Agent Egbert to leave his property, but Agent Egbert declined. Instead, Boule claims, Agent Egbert lifted him off the ground and threw him against the SUV. After Boule collected himself, Agent Egbert allegedly threw him to the ground. Agent Egbert then checked the guest's immigration paperwork, concluded that everything was in order, and left. Later that evening, Boule's Turkish guest unlawfully entered Canada from Smuggler's Inn.

Boule lodged a grievance with Agent Egbert's supervisors, alleging that Agent Egbert had used excessive force and caused him physical injury. Boule also filed an administrative claim with Border Patrol pursuant to the Federal Tort Claims Act (FTCA). According to Boule, Agent Egbert retaliated against him while those claims were pending by reporting Boule's "SMUGLER" license plate to the Washington Department of Licensing for referencing illegal conduct, and by contacting the Internal Revenue Service and prompting an audit of Boule's tax returns. Ultimately, Boule's FTCA claim was denied and, after a year-long investigation, Border Patrol took no action against Agent Egbert for his alleged use of force or acts of retaliation. Thereafter, Agent Egbert continued to serve as an active-duty Border Patrol agent.

In January 2017, Boule sued Agent Egbert in his individual capacity in Federal District Court, alleging a Fourth Amendment violation for excessive use of force and a First Amendment violation for unlawful retaliation. Boule invoked *Bivens* and asked the District Court to recognize a damages action for each alleged constitutional violation. The District Court declined to extend a *Bivens* remedy to Boule's claims and entered judgment for Agent Egbert. The Court of Appeals reversed. Twelve judges dissented from the denial of rehearing en banc.

We granted certiorari.

II

In *Bivens*, the Court held that it had authority to create "a cause of action under the Fourth Amendment" against federal agents who allegedly manacled the plaintiff and threatened his family while arresting him for narcotics violations. Although "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages," the Court "held that it could authorize a remedy under general principles of federal jurisdiction," Over the following decade, the Court twice again fashioned new causes of action under the Constitution—first, for a former congressional staffer's Fifth Amendment sex-discrimination claim, and second, for a federal prisoner's inadequate-care claim under the Eighth Amendment.

Since these cases, the Court has not implied additional causes of action under the Constitution. Now long past "the heady days in which this Court assumed common-law powers to create causes of action," we have come "to appreciate more fully the tension between" judicially created causes of action and "the Constitution's separation of legislative and judicial power." At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a "range of policy considerations . . . at least as broad as the range . . . a legislature would consider." Those factors include "economic and governmental concerns," "administrative costs," and the "impact on governmental operations systemwide." Unsurprisingly, Congress is "far more competent than the Judiciary" to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain.

Nonetheless, rather than dispense with *Bivens* altogether, we have emphasized that recognizing a cause of action under *Bivens* is "a disfavored judicial activity." When asked to imply a *Bivens* action, "our watchword is caution." "[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy[,] the courts must refrain from creating [it]." "[E]ven a single sound reason to defer to Congress" is enough to require a court to refrain from creating such a remedy. Put another way, "the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?" If there is a rational reason to think that the answer is "Congress"—as it will be in most every case, no *Bivens* action may lie. Our cases instruct that, absent utmost deference to Congress' preeminent authority in this area, the courts "arrogat[e] legislative power."

To inform a court's analysis of a proposed *Bivens* claim, our cases have framed the inquiry as proceeding in two steps. First, we ask whether the case presents "a new *Bivens* context"—*i.e.*, is it "meaningful[ly]" different from the three cases in which the Court has implied a damages action. Second, if a claim arises in a new context, a *Bivens* remedy is unavailable if there are "special factors" indicating that the Judiciary is at least arguably less equipped than Congress to "weigh the costs and benefits of allowing a damages action to proceed." If there is even a single "reason to pause before applying *Bivens* in a new context," a court may not recognize a *Bivens* remedy.

While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy. For example, we have explained that a new context arises when there are "potential special factors that previous *Bivens* cases did not consider." And we have identified several examples of new contexts—*e.g.*, a case that involves a "new category of defendants," largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action. We have never offered an

"exhaustive" accounting of such scenarios, however, because no court could forecast every factor that might "counse[l] hesitation." Even in a particular case, a court likely cannot predict the "systemwide" [*sic*] consequences of recognizing a cause of action under *Bivens*. That uncertainty alone is a special factor that forecloses relief.

Finally, our cases hold that a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, "an alternative remedial structure." If there are alternative remedial structures in place, "that alone," like any special factor, is reason enough to "limit the power of the Judiciary to infer a new *Bivens* cause of action."[2] Importantly, the relevant question is not whether a *Bivens* action would "disrup[t]" a remedial scheme, *Schweiker*, [text at 536] or whether the court "should provide for a wrong that would otherwise go unredressed," *Bush*. Nor does it matter that "existing remedies do not provide complete relief." Rather, the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies "should be augmented by the creation of a new judicial remedy."

III

Applying the foregoing principles, the Court of Appeals plainly erred when it created causes of action for Boule's Fourth Amendment excessive-force claim and First Amendment retaliation claim.

A

The Court of Appeals conceded that Boule's Fourth Amendment claim presented a new context for *Bivens* purposes, yet it concluded there was no reason to hesitate before recognizing a cause of action against Agent Egbert. That conclusion was incorrect for two independent reasons: Congress is better positioned to create remedies in the border-security context, and the Government already has provided alternative remedies that protect plaintiffs like Boule. We address each in turn.

1

In *Hernández*, we declined to create a damages remedy for an excessive-force claim against a Border Patrol agent who shot and killed a 15-year-old Mexican national across the border in Mexico. We did not recognize a *Bivens* action there because "regulating the conduct of agents at the border unquestionably has national security implications," and the "risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." This reasoning

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[2] Congress also may preclude a claim under *Bivens*, against federal officers if it affirmatively forecloses one. "Even in circumstances in which a *Bivens* remedy is generally available, an action under *Bivens* will be defeated if the defendant is immune from suit," *Hui v. Castaneda* (2010), and Congress may grant such immunity as it sees fit.

applies here with full force. During the alleged altercation with Boule, Agent Egbert was carrying out Border Patrol's mandate to "interdic[t] persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States." Because "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue.

The Court of Appeals thought otherwise. In its view, Boule's Fourth Amendment claim is "conventional," and, though it arises in a new context, this Court has not " 'cast doubt' " on extending *Bivens* within the " 'common and recurrent sphere of law enforcement' " in which it arose. While *Bivens* and this case do involve similar allegations of excessive force and thus arguably present "almost parallel circumstances" or a similar "mechanism of injury," these superficial similarities are not enough to support the judicial creation of a cause of action. The special-factors inquiry—which *Bivens* never meaningfully undertook—shows here, no less than in *Hernández*, that the Judiciary is not undoubtedly better positioned than Congress to authorize a damages action in this national-security context. That this case does not involve a cross-border shooting, as in *Hernández*, but rather a more "conventional" excessive-force claim, as in *Bivens*, does not bear on the relevant point. Either way, the Judiciary is comparatively ill suited to decide whether a damages remedy against any Border Patrol agent is appropriate.

The Court of Appeals downplayed the national-security risk from imposing *Bivens* liability because Agent Egbert was not "literally 'at the border,' " and Boule's guest already had cleared customs in New York. The court also found that Boule had a weightier interest in *Bivens* relief than the parents of the deceased Mexican teenager in *Hernández*, because Boule "is a United States citizen, complaining of harm suffered on his own property in the United States." Finding that "any costs imposed by allowing a *Bivens* claim to proceed are outweighed by compelling interests in favor of protecting United States citizens on their own property in the United States," the court extended *Bivens* to Boule's case.

This analysis is deeply flawed. The *Bivens* inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action. A court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to "weigh the costs and benefits of allowing a damages action to proceed." Thus, a court should not inquire, as the Court of Appeals did here, whether *Bivens* relief is appropriate in light of the balance of circumstances in the "particular case." A court inevitably will "impai[r]" governmental interests, and thereby frustrate Congress' policymaking role, if it applies the " 'special factors' analysis" at such a narrow "leve[l] of generality." Rather, under the proper approach, a

court must ask "[m]ore broadly" if there is any reason to think that "judicial intrusion" into a given field might be "harmful" or "inappropriate." If so, or even if there is the "*potential*" for such consequences, a court cannot afford a plaintiff a *Bivens* remedy. As in *Hernández*, then, we ask here whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally. The answer, plainly, is no.

The Court of Appeals' analysis betrays the pitfalls of applying the special-factors analysis at too granular a level. The court rested on three irrelevant distinctions from *Hernández*. First, Agent Egbert was several feet from (rather than straddling) the border, but cross-border security is obviously implicated in either event. Second, Boule's guest arrived in Seattle from New York rather than abroad, but an alien's port of entry does not make him less likely to be a national-security threat. And third, Agent Egbert investigated immigration violations on our side of the border, not Canada's, but immigration investigations in *this* country are perhaps *more* likely to impact the national security of the United States. In short, the Court of Appeals offered no plausible basis to permit a Fourth Amendment *Bivens* claim against Agent Egbert to proceed.

2

Second, Congress has provided alternative remedies for aggrieved parties in Boule's position that independently foreclose a *Bivens* action here. In *Hernández*, we declined to authorize a *Bivens* remedy, in part, because the Executive Branch already had investigated alleged misconduct by the defendant Border Patrol agent. In *Malesko*, we explained that *Bivens* relief was unavailable because federal prisoners could, among other options, file grievances through an "Administrative Remedy Program." Both kinds of remedies are available here. The U.S. Border Patrol is statutorily obligated to "control, direc[t], and supervis[e] . . . all employees." And, by regulation, Border Patrol must investigate "[a]lleged violations of the standards for enforcement activities" and accept grievances from "[a]ny persons wishing to lodge a complaint." As noted, Boule took advantage of this grievance procedure, prompting a year-long internal investigation into Agent Egbert's conduct.

Boule nonetheless contends that Border Patrol's grievance process is inadequate because he is not entitled to participate and has no right to judicial review of an adverse determination.[3] But we have

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[3] Boule also argues that Agent Egbert forfeited any argument about Border Patrol's grievance process because he did not raise the issue in the Court of Appeals. We disagree. Because recognizing a *Bivens* cause of action "is an extraordinary act that places great stress on the separation of powers," we have "a concomitant responsibility" to evaluate any grounds that counsel against *Bivens* relief. And, in any event, Agent Egbert has consistently claimed that alternative remedies foreclose applying *Bivens* in this case. Thus, under

never held that a *Bivens* alternative must afford rights to participation or appeal. That is so because *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers"—*i.e.*, the focus is whether the Government has put in place safeguards to "preven[t]" constitutional violations "from recurring." And, again, the question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts. So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy. That is true even if a court independently concludes that the Government's procedures are "not as effective as an individual damages remedy." Thus here, as in *Hernández*, we have no warrant to doubt that the consideration of Boule's grievance against Agent Egbert secured adequate deterrence and afforded Boule an alternative remedy.

B

We also conclude that there is no *Bivens* cause of action for Boule's First Amendment retaliation claim. While we have assumed that such a damages action might be available, "[w]e have never held that *Bivens* extends to First Amendment claims." Because a new context arises when there is a new "constitutional right at issue," the Court of Appeals correctly held that Boule's First Amendment claim presents a new *Bivens* context. Now presented with the question whether to extend *Bivens* to this context, we hold that there is no *Bivens* action for First Amendment retaliation. There are many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy.

Recognizing any new *Bivens* action "entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Extending *Bivens* to alleged First Amendment violations would pose an acute risk of increasing such costs. A plaintiff can turn practically any adverse action into grounds for a retaliation claim. And, "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on [retaliatory] intent may be less amenable to summary disposition." Even a frivolous retaliation claim "threaten[s] to set off broad-ranging discovery in which there is often no clear end to the relevant evidence."

"[U]ndoubtedly," then, the "prospect of personal liability" under the First Amendment would lead "to new difficulties and expense." Federal employees "face[d with] the added risk of personal liability for decisions that they believe to be a correct response to improper

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our precedents, he is "not limited to the precise arguments [he] made below."

[activity] would be deterred from" carrying out their duties. We are therefore "convinced" that, in light of these costs, "Congress is in a better position to decide whether or not the public interest would be served" by imposing a damages action.

The Court of Appeals nonetheless extended *Bivens* to the First Amendment because, in its view, retaliation claims are "well-established," and Boule alleges that Agent Egbert "was not carrying out official duties" when he retaliated against him. Neither rationale has merit. First, just because plaintiffs often plead unlawful retaliation to establish a First Amendment violation is not a reason to afford them a cause of action to sue federal officers for money damages. If anything, that retaliation claims are common, and therefore more likely to impose "a significant expansion of Government liability," counsels against permitting *Bivens* relief.

Second, the Court of Appeals' scope-of-duty observation does not meaningfully limit the number of potential *Bivens* claims or otherwise undermine the reasons for hesitation stated above. It is easy to allege that federal employees acted beyond the scope of their authority when claiming a constitutional violation. And, regardless, granting *Bivens* relief because a federal agent supposedly did not act pursuant to his law-enforcement mission "misses the point." "The question is not whether national security," or some other governmental interest, actually "requires [the defendant's] conduct." Instead, we "ask whether the Judiciary should alter the framework established by the political branches for addressing" any such conduct that allegedly violates the Constitution. With respect to that question, the foregoing discussion shows that the Judiciary is ill equipped to alter that framework generally, and especially so when it comes to First Amendment claims.

Boule responds that any hesitation is unwarranted because this Court in *Passman* already identified a *Bivens* cause of action under allegedly similar circumstances. There, the Court permitted a congressional staffer to sue a congressman for sex discrimination under the Fifth Amendment. In Boule's view, *Passman*, like this case, permitted a damages action to proceed even though it required the factfinder to probe a federal official's motives for taking an adverse action against the plaintiff.

Even assuming the factual parallels are as close as Boule claims, *Passman* carries little weight because it predates our current approach to implied causes of action and diverges from the prevailing framework in three important ways. First, the *Passman* Court concluded that a *Bivens* action must be available if there is "no effective means other than the judiciary to vindicate" the purported Fifth Amendment right. Since then, however, we have explained that the absence of relief "does not by any means necessarily imply that courts should award money damages." Second, *Passman* indicated that a

damages remedy is appropriate unless Congress "explicit[ly]" declares that a claimant "may not recover money damages." Now, though, we defer to "congressional inaction" if "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms." Third, when assessing the "special factors," *Passman* asked whether a court is competent to calculate damages "without difficult questions of valuation or causation." But today, we do not ask whether a court can determine a damages amount. Rather, we ask whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" at all.

In short, as we explained in *Ziglar*, a plaintiff cannot justify a *Bivens* extension based on "parallel circumstances" with *Bivens*, *Passman*, or *Carlson* unless he also satisfies the "analytic framework" prescribed by the last four decades of intervening case law. Boule has failed to do so.

IV

Since it was decided, *Bivens* has had no shortage of detractors. And, more recently, we have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution. But, to decide the case before us, we need not reconsider *Bivens* itself. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE GORSUCH, concurring in the judgment.

Our Constitution's separation of powers prohibits federal courts from assuming legislative authority. As the Court today acknowledges, crossed that line by "impl[ying]" a new set of private rights and liabilities Congress never ordained.

Recognizing its misstep, this Court has struggled for decades to find its way back. Initially, the Court told lower courts to follow a "two ste[p]" inquiry before applying *Bivens* to any new situation. . . . But these tests soon produced their own set of questions: What distinguishes the first step from the second? What makes a context "new" or a factor "special"? And, most fundamentally, on what authority may courts recognize new causes of action even under these standards?

Today, the Court helpfully answers some of these lingering questions. It recognizes that our two-step inquiry really boils down to a "single question": Is there "any reason to think Congress might be better equipped" than a court to " 'weigh the costs and benefits of allowing a damages action to proceed' "? But, respectfully, resolving that much only serves to highlight the larger remaining question: When might a court *ever* be "better equipped" than the people's

elected representatives to weigh the "costs and benefits" of creating a cause of action?

It seems to me that to ask the question is to answer it. To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation. If exercising that sort of authority may once have been a " 'proper function for common-law courts' " in England, it is no longer generally appropriate " 'for federal tribunals' " in a republic where the people elect representatives to make the rules that govern them. Weighing the costs and benefits of new laws is the bread and butter of legislative committees. It has no place in federal courts charged with deciding cases and controversies under existing law.

Instead of saying as much explicitly, however, the Court proceeds on to conduct a case-specific analysis. And there I confess difficulties. The plaintiff is an American citizen who argues that a federal law enforcement officer violated the Fourth Amendment in searching the curtilage of his home. Candidly, I struggle to see how this set of facts differs meaningfully from those in *Bivens* itself. To be sure, as the Court emphasizes, the episode here took place near an international border and the officer's search focused on violations of the immigration laws. But why does that matter? The Court suggests that Fourth Amendment violations matter less in this context because of "likely" national-security risks. So once more, we tote up for ourselves the costs and benefits of a private right of action in this or that setting and reach a legislative judgment. To atone for *Bivens*, it seems we continue repeating its most basic mistake.

Of course, the Court's real messages run deeper than its case-specific analysis. If the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could. And if the only question is whether a court is "better equipped" than Congress to weigh the value of a new cause of action, surely the right answer will always be no. Doubtless, these are the lessons the Court seeks to convey. I would only take the next step and acknowledge explicitly what the Court leaves barely implicit. Sometimes, it seems, "this Court leaves a door ajar and holds out the possibility that someone, someday might walk through it" even as it devises a rule that ensures "no one . . . ever will." In fairness to future litigants and our lower court colleagues, we should not hold out that kind of false hope, and in the process invite still more "protracted litigation destined to yield nothing." Instead, we should exercise "the truer modesty of ceding an ill-gotten gain," and forthrightly return the power to create new causes of action to the people's representatives in Congress.

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

Respondent Robert Boule alleges that petitioner Erik Egbert, a U.S. Customs and Border Patrol agent, violated the Fourth Amendment by entering Boule's property without a warrant and assaulting him. Existing precedent permits Boule to seek compensation for his injuries in federal court. The Court goes to extraordinary lengths to avoid this result: It rewrites a legal standard it established just five years ago, stretches national-security concerns beyond recognition, and discerns an alternative remedial structure where none exists. The Court's innovations, taken together, enable it to close the door to Boule's claim and, presumably, to others that fall squarely within *Bivens*' ambit.

Today's decision does not overrule *Bivens*. It nevertheless contravenes precedent and will strip many more individuals who suffer injuries at the hands of other federal officers, and whose circumstances are materially indistinguishable from those in *Bivens*, of an important remedy. I therefore dissent from the Court's disposition of Boule's Fourth Amendment claim. I concur in the Court's judgment that Boule's First Amendment retaliation claim may not proceed under *Bivens*, but for reasons grounded in precedent rather than this Court's newly announced test.

I

This case comes to the Court following the District Court's grant of summary judgment to Agent Egbert. The Court is therefore bound to draw all reasonable factual inferences in favor of Boule. Because the Court fails to do so, the factual record is described below in some detail, in the light our precedent requires.

A

Boule is a U.S. citizen who owns, operates, and lives in a small bed-and-breakfast called the Smuggler's Inn in Blaine, Washington. The property line of the land on which the inn is located touches the U.S.-Canada border. Shortly after purchasing the property in 2000, Boule became aware that people used his property to cross the border illegally in both directions. Boule began serving as a paid, confidential informant for Customs and Border Protection (CBP) in 2003 and for Immigration and Customs Enforcement (ICE) in 2008. At the time of the events at issue in this case, Boule was still serving as an informant for ICE. ICE would coordinate with CBP and other agencies based on the information Boule provided. Over the years, Boule provided information leading to numerous arrests.

On the morning of March 20, 2014, petitioner Erik Egbert, a CBP agent, twice stopped Boule while Boule was running errands in town. Agent Egbert knew that Boule was a long-time informant for ICE and

that he had previously worked as an informant for CBP. Agent Egbert asked Boule about guests at the inn, and Boule advised him of a guest he expected to arrive that day from New York who had flown in from Turkey the day before. Boule explained that two of his employees were en route to pick the guest up at the Seattle-Tacoma International Airport. Agent Egbert continued patrolling in his CBP vehicle for the rest of the morning but stayed near the inn so he would see when the car carrying the guest returned. When it arrived, he followed the car into the driveway of the inn, passing a "no trespassing" sign. Agent Egbert parked his vehicle behind the arriving car in the driveway immediately adjacent to the inn.

Agent Egbert exited his patrol vehicle and approached the car. Boule's employee also exited the car; the guest remained inside. From the front porch of his inn, Boule asked Agent Egbert to leave. When Agent Egbert refused, Boule stepped off the porch, positioned himself between Agent Egbert and the vehicle, and explained that the person in the car was a guest who had come from New York to Seattle and who had been through security at the airport. Boule again asked Agent Egbert to leave. Agent Egbert grabbed Boule by his chest, lifted him up, and shoved him against the vehicle and then threw him to the ground. Boule landed on his hip and shoulder.

Agent Egbert opened the car door and asked the guest about his immigration status. Boule called 911 to request a supervisor; Agent Egbert relayed the same request over his radio. Several minutes later, a supervisor and another agent arrived at the inn. After concluding that the guest was lawfully in the country (just as Boule had previously informed Agent Egbert), the three officers departed. Boule later sought medical treatment for his injuries.

Boule complained to Agent Egbert's superiors about the incident and filed an administrative claim with CBP, which allegedly prompted Agent Egbert to retaliate against Boule. Agent Egbert contacted the Internal Revenue Service (IRS), the Social Security Administration, the Washington State Department of Licensing, and the Whatcom County Assessor's Office, asking them to investigate Boule's business. These agencies did so, but none found that Boule had done anything wrong. Boule paid over $5,000 to his accountant to assist him in responding to the IRS' tax audit. Boule also filed claims pursuant to the Federal Tort Claims Act (FTCA), which were denied. CBP's investigation of Agent Egbert concluded that he failed to be forthcoming with investigators and "demonstrated lack of integrity," serious offenses that warranted his removal.

B

Boule sued Agent Egbert in Federal District Court, seeking damages under *Bivens* for violation of Boule's First and Fourth Amendment rights. The District Court granted summary judgment to Agent Egbert on both claims. The Court of Appeals reversed, concluding

that both claims were cognizable under *Bivens*. In the Court of Appeals' view, Boule's Fourth Amendment claim constituted a modest extension of *Bivens*. Even so, the court explained, no special factors counseled hesitation such that this extension should be foreclosed; rather, "Boule's Fourth Amendment excessive force claim is part and parcel of the 'common and recurrent sphere of law enforcement' " that remained "a permissible area for *Bivens* claims." The court separately held that Boule's First Amendment claim could proceed under *Bivens*.

This Court granted certiorari.

II

A

* * *

This Court has twice extended the cause of action first articulated in *Bivens*: first to a Fifth Amendment due process claim for sex discrimination, and then to an Eighth Amendment deliberate indifference claim for failure to provide proper medical attention. In *Davis*, *Carlson*, and subsequent cases, the Court built on *Bivens*' inquiry to develop a two-step test for determining whether a *Bivens* cause of action may be "defeated." Where, for example, Congress crafted an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," this Court concluded that "it would be inappropriate . . . to supplement that regulatory scheme with a new judicial remedy." Applying this two-step test, the Court has declined to extend *Bivens* beyond situations like those addressed in *Davis*, *Carlson*, and *Bivens* itself.

In *Ziglar* the Court not only declined to extend *Bivens* but also revised and narrowed its two-step analytic framework. The *Ziglar* Court set forth a new inquiry requiring courts considering a *Bivens* claim first to ask whether a case "is different in a meaningful way from previous *Bivens* cases decided by this Court" and therefore arises in a "new . . . context." The *Ziglar* Court offered a laundry list of differences that "might" be meaningful, including "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." The Court recognized, however, that some differences "will be so trivial that they will not suffice to create a new *Bivens* context."

If the differences are in fact "meaningful ones," "then the context is new," and a court "proceed[s] to the second step" of the analysis.

The second step requires courts to consider whether special factors counsel hesitation in recognizing a *Bivens* remedy in a new context.

Importantly, even as the *Ziglar* Court grafted a more demanding new-context inquiry onto the traditional *Bivens* framework, the Court emphasized that its opinion was "not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." Quite the opposite: The Court recognized that *Bivens* "vindicate[s] the Constitution by allowing some redress for injuries" and "provides instruction and guidance to federal law enforcement officers going forward." Accordingly, the Court explained, there are "powerful reasons to retain [*Bivens*]" in the "common and recurrent sphere of law enforcement." The Court further recognized that "individual instances of discrimination or law enforcement overreach" are, by their nature, "difficult to address except by way of damages actions after the fact."

B

Ziglar and *Hernández* control here. Applying the two-step framework set forth in those cases, the Court of Appeals' determination that Boule's Fourth Amendment claim is cognizable under *Bivens* should be affirmed for two independent reasons. First, Boule's claim does not present a new context. Second, even if it did, no special factors would counsel hesitation.

1

Boule's Fourth Amendment claim does not arise in a new context. *Bivens* itself involved a U.S. citizen bringing a Fourth Amendment claim against individual, rank-and-file federal law enforcement officers who allegedly violated his constitutional rights within the United States by entering his property without a warrant and using excessive force. Those are precisely the facts of Boule's complaint.

The only arguably salient difference in "context" between this case and *Bivens* is that the defendants in *Bivens* were employed at the time by the (now-defunct) Federal Bureau of Narcotics, while Agent Egbert was employed by CBP. As discussed, however, this Court's precedent instructs that some differences are too "trivial . . . to create a new *Bivens* context." *Ziglar*.[2] That it was a CBP agent rather than a Federal Bureau of Narcotics agent who unlawfully entered Boule's property and used constitutionally excessive force against him plainly is not the sort of "meaningful" distinction that our new-context inquiry is designed to weed out.

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[2] Egbert argues in passing that the fact that he was operating under a " 'statutory . . . mandate' not invoked in prior cases," standing alone, "dooms [Boule's] no-new-context argument." Not so. Egbert fails to show that any difference in statutory mandates as between CBP agents and other law enforcement officers is "meaningful," which our precedents require him to do.

It is of course well established that a *Bivens* suit involving an entirely " 'new category of defendants' " arises in a " 'new context.' " The Court, however, has never relied on this principle to draw artificial distinctions between line-level officers of the 83 different federal law enforcement agencies with authority to make arrests and provide police protection. Indeed, if the "new context" inquiry were defined at such a fine level of granularity, every case would raise a new context, because the Federal Bureau of Narcotics no longer exists.

Moreover, the "new category of defendants" language traces back to a different concern raised in the Court's decision in *Malesko*. That case involved an Eighth Amendment claim brought by a federal prisoner against a private corporation under contract with the federal Bureau of Prisons. The Court observed that "the threat of suit against an individual's employer," rather than "the individual directly responsible for the alleged injury," "was not the kind of deterrence contemplated by *Bivens*." Applying *Bivens* to a corporate defendant would amount to a "marked extension of *Bivens* . . . to contexts that would not advance *Bivens*' core purpose of deterring individual officers from engaging in unconstitutional wrongdoing." Here, by contrast, Boule's suit against Agent Egbert directly advances that core purpose.

At bottom, Boule's claim is materially indistinguishable from the claim brought in *Bivens*. His case therefore does not present a new context for the purposes of assessing whether a *Bivens* remedy is available.

2

Even assuming that this case presents a new context, no special factors warrant foreclosing a *Bivens* action.

The Court "has not defined the phrase 'special factors counselling hesitation,' " but it has recognized that the "inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." For example, where a claim "would call into question the formulation and implementation of a general policy" or "require courts to interfere in an intrusive way with sensitive functions of the Executive Branch," recognizing a *Bivens* action may be inappropriate. Precedent thus establishes that "separation-of-powers principles . . . should be central to the [special-factors] analysis."

* * *

The conduct here took place near an international border and involved a CBP agent. That, however, is where the similarities with *Hernández* begin and end. The conduct occurred exclusively on U.S. soil, and the injury was to a U.S. citizen. This case therefore does not present an "international incident" that might affect diplomatic

relations, unlike the cross-border killing of a foreign-national child. As for national-security concerns, the Court in *Hernández* emphasized that "some [CBP agents] are stationed right at the border and have the responsibility of attempting to prevent illegal entry"; it was "[f]or th[i]s reaso[n]," among others, that their conduct had "a clear and strong connection to national security." Here, by contrast, Agent Egbert was not "attempting to prevent illegal entry" or otherwise engaged in activities with a "strong connection to national security." Agent Egbert was aware (because Boule had told him earlier in the day and again at the scene) that the foreign national arriving at the inn had already entered the United States by airplane and had been processed by U.S. customs at the airport in New York the previous day.

Nor does this case present special factors similar to those that deterred the Court from recognizing a *Bivens* action in *Ziglar*. In that case, foreign nationals who had been unlawfully present in the United States brought a *Bivens* action against three "high executive officers in the Department of Justice" and two wardens of the facility where they had been held. The Court reasoned that allowing the plaintiffs' claims to proceed against the executive officers "would call into question the formulation and implementation of a general policy," and that the discovery and litigation process would "border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question," thereby implicating sensitive national-security functions entrusted to Congress and the President. If *Bivens* liability were imposed, the Court explained, "high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis," and "the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office."

Here, Boule plainly does not seek to challenge or alter "high-level executive policy." Allowing his claim to proceed would not require courts to intrude into "the discussion and deliberations that led to the formation" of any policy or national-security decision or interest. Agent Egbert, a line officer, was engaged in a run-of-the-mill inquiry into the status of a foreign national on U.S. soil who had no actual or suggested ties to terrorism, and who recently had been through U.S. customs to boot. No special factors counsel against allowing Boule's *Bivens* action to proceed.

C

Boule also argues that his First Amendment retaliatory-investigation claim is cognizable under *Bivens*. I concur in the Court's judgment that it is not, but I arrive at that conclusion by following precedent rather than by applying the Court's new, single-step inquiry.

This Court has repeatedly assumed without deciding that *Bivens* extends to First Amendment claims, but has never squarely held as

much. Accordingly, Boule's First Amendment retaliation presents a new context for the purpose of the *Bivens* analysis.

Moving to the second step of the *Bivens* inquiry, unlike Boule's Fourth Amendment claim, there is "reason to pause" before extending *Bivens* to Boule's First Amendment claim. In particular, his First Amendment claim raises line-drawing concerns similar to those this Court identified in [where] a landowner sought to bring a *Bivens* action against federal officials whom the landowner accused of harassment and intimidation meant to extract an easement across his property. The Court observed that "defining a workable cause of action" for such a claim was "difficul[t]." Recognizing a *Bivens* action to redress retaliation under such circumstances would, in the Court's view, "invite claims in every sphere of legitimate governmental action affecting property interests" and "across this enormous swath of potential litigation would hover the difficulty of devising a . . . standard that could guide an employee's conduct and a judicial factfinder's conclusion." Because of the "elusiveness of a limiting principle" for claims like the landowner's, the Court decided that courts were ill equipped to tailor an appropriate remedy.

Boule's First Amendment retaliation claim raises similar concerns. Unlike the constitutional rights this Court has recognized as cognizable under *Bivens*, First Amendment retaliation claims could potentially be brought against many different federal officers, stretching substantially beyond the "common and recurrent sphere of law enforcement" to reach virtually all federal employees. Under such circumstances, this Court's precedent holds that " 'evaluat[ing] the impact of a new species of litigation' " on the efficiency of civil service is a task for Congress, not the courts. I therefore concur in the judgment as to the Court's reversal of the Court of Appeals' conclusion that Boule's First Amendment *Bivens* action may proceed, not for the reasons the Court identifies, but because precedent requires it.

III

If the legal standard the Court articulates to reject Boule's Fourth Amendment claim sounds unfamiliar, that is because it is. Just five years after circumscribing the standard for allowing *Bivens* claims to proceed, a restless and newly constituted Court sees fit to refashion the standard anew to foreclose remedies in yet more cases. The measures the Court takes to ensure Boule's claim is dismissed are inconsistent with governing precedent.

A

Two Terms ago, this Court reiterated and reaffirmed *Ziglar*'s two-step test for assessing whether a claim may be brought as a *Bivens* action. Today, however, the Court pays lip service to the test set out in our precedents, but effectively replaces it with a new single-step inquiry designed to constrict *Bivens*. The Court goes so far as to

announce that "[t]he *Bivens* inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action," instead, courts must "only" decide "whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.' "

That approach contrasts starkly with the standard the Court announced in *Ziglar* and applied in *Hernández*. This Court regularly has considered whether courts are "well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed," and have never held that such weighing is categorically impermissible, contrary to the Court's analysis today.

The Court justifies its innovations by selectively quoting our precedents and presenting its newly announced standard as if it were always the rule. The Court's repeated citation to *Stanley* is just one example. The Court cites *Stanley* for, among other things, the proposition that the special-factors analysis must be conducted at a very broad level of generality. *Stanley*, however, cautioned against a case-specific special-factors analysis in the narrow context of "judicial intrusion upon military discipline." As it had in previous cases seeking to raise *Bivens* actions in the military context, the *Stanley* Court emphasized the need to be "protective of military concerns," and to avoid "call[ing] into question military discipline and decisionmaking." [*Sic*] The Court therefore determined that in the military sphere, the special-factors analysis should be applied somewhat more broadly than the respondent urged. *Stanley*, in other words, reflected the Court's longstanding approach to *Bivens* cases: considering the facts and the substantive context of each case and determining whether special factors counseled hesitation. *Stanley* did not purport to articulate a special-factors framework that should apply to all *Bivens* cases going forward.

The Court further declares that "a plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' " with previous cases that have recognized a *Bivens* remedy. To the extent these statements suggest an exacting new-context inquiry, they are in serious tension with the Court's longstanding rule that trivial differences alone do not create a new *Bivens* context. Indeed, until today, the Court has never so much as hinted that courts should refuse to permit a *Bivens* action in a case involving facts substantially identical to those in *Bivens* itself.[3]

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[3] The Court supports its decision not to recognize an action under *Bivens* by observing that we have declined to recognize a *Bivens*-style cause of action for other constitutional violations. What the Court fails to acknowledge, however, is that each of those cases presented a meaningfully new context and/or raised special factors counseling hesitation that are not present in this case. The one exception is *Hui v. Castaneda* (2010), in which the Court did not have to conduct this analysis because it held the FTCA's comprehensive

B

The Court's application of its new standard to Boule's Fourth Amendment claim underscores just how novel that standard is. Even assuming the claim presents a new context, the Court's insistence that national-security concerns bar the claim directly contravenes *Ziglar*. Moreover, the Court's holding that a nonbinding administrative investigation process, internal to the agency and offering no meaningful protection of the constitutional interests at stake, constitutes an alternative remedy that forecloses *Bivens* relief blinks reality.

1

The Court acknowledges the force of the Court of Appeals' conclusion that *Bivens* and this case present " 'almost parallel circumstances,' " but it nonetheless concludes that a most unlikely special factor counsels hesitation: the "national-security context." By the Court's telling, *Hernández* declined to recognize a *Bivens* action "because 'regulating the conduct of agents at the border unquestionably has national security implications,' and the 'risk of undermining border security provides reason to hesitate before extending *Bivens* into this field.' " That reasoning, the Court concludes, "applies here with full force" because "national security is at issue."

This is sheer hyperbole. Most obviously, the Court's conclusion that this case, which involves a physical assault by a federal officer against a U.S. citizen on U.S. soil, raises "national security" concerns does exactly what this Court counseled against just four years ago. Back then, the Court advised that "national-security concerns must not become a talisman to use to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.' " It explained that this "danger of abuse is even more heightened given the difficulty of defining the security interest in domestic cases." This case does not remotely implicate national security. The Court may wish it were otherwise, but on the facts of this case, its effort to raise the specter of national security is mere sleight of hand.

Nor is there any indication that Congress acted to deny a *Bivens* remedy for a case like this, which otherwise might counsel hesitation. Congress has not provided that federal law enforcement officers may enter private property near a border at any time or for any purpose. Quite the contrary: Congress has determined that immigration officers may enter "private lands" within 25 miles of an international border without a warrant only "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." This allowance is itself subject to exceptions: Officers cannot enter a "dwellin[g]" for immigration enforcement purposes without a

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remedial scheme, which provided both a cause of action and an exclusive damages remedy for the claim at issue, clearly precluded a *Bivens* claim.

warrant. Mere proximity to a border, in other words, did not give Agent Egbert greater license to enter Boule's property. Nor does it diminish or call into question the remedies for constitutional violations that a plaintiff may pursue, particularly where, as here, an agent unquestionably was not acting "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States."

Remarkably, the Court goes beyond invoking its national-security talisman in this case alone. In keeping with the unprecedented level of generality the Court imports into the special-factors analysis, the Court holds that courts are not "competent to authorize a damages action . . . against Border Patrol agents generally." This extraordinary and gratuitous conclusion contradicts decades of precedent requiring a context-specific determination of whether a particular claim presents special factors counseling hesitation.

The consequences of the Court's drive-by, categorical assertion will be severe. Absent intervention by Congress, CBP agents are now absolutely immunized from liability in any *Bivens* action for damages, no matter how egregious the misconduct or resultant injury. That will preclude redress under *Bivens* for injuries resulting from constitutional violations by CBP's nearly 20,000 Border Patrol agents, including those engaged in ordinary law enforcement activities, like traffic stops, far removed from the border. This is no hypothetical: Certain CBP agents exercise broad authority to make warrantless arrests and search vehicles up to 100 miles away from the border. The Court's choice to foreclose liability for constitutional violations that occur in the course of such activities, based on even the most tenuous and hypothetical connection to the border (and thereby, to the "national security context"), betrays the context-specific nature of *Bivens* and shrinks *Bivens* in the core Fourth Amendment law enforcement sphere where it is needed most.[5]

2

The Court further proclaims that Congress has provided alternative remedies that "independently foreclose" a *Bivens* action in this case. The administrative remedy the Court perceives, however, is no remedy whatsoever.

The sole "remedy" the Court cites is an administrative grievance procedure that does not provide Boule with any relief. The statute on which the Court relies provides: The "Secretary of Homeland Security

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[5] To the extent the Court's decision may be motivated by fears that allowing this *Bivens* action to proceed will open the floodgates to countless claims in the future, that concern is overblown. The doctrine of qualified immunity will continue to protect government officials from liability for damages unless a plaintiff " 'pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.' "

. . . shall have control, direction, and supervision of all employees and of all the files and records of [CBP].” Administrative regulations direct CBP to investigate alleged violations of its own standards by its own employees.[6] The Court sees fit to defer to this procedure, even while acknowledging that complainants in Boule's position have no right to participate in the proceedings or to seek judicial review of any determination. The Court supports its conclusion that CBP's internal administrative grievance procedure offers an adequate remedy by insisting that “we have never held that a *Bivens* alternative must afford rights to participation or appeal.” In the Court's view, “[s]o long as Congress *or the Executive* has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy.” ([E]mphasis added).

This analysis drains the concept of “remedy” of all meaning. To be sure, the Court has previously deemed *Bivens* claims foreclosed by “substantive” remedies to claimants that are in significant part administrative. The Court also has recognized that existing remedies need not “provide complete relief for the plaintiff,” including loss due to emotional distress or mental anguish, or attorney's fees. Until today, however, this Court has never held that a threadbare disciplinary review process, expressly conferring no substantive rights, “secure[s] adequate deterrence and afford[s] . . . an alternative remedy.” Nor has it held that remedies providing no relief to the individual whose constitutional rights have been violated are “adequate” for the purpose of foreclosing a *Bivens* action. To the contrary, each of the alternative remedies the Court has recognized has afforded participatory rights, an opportunity for judicial review, and the potential to secure at least some meaningful relief.[7]

The Court previously has emphasized that a *Bivens* action may be inappropriate where “Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.” Thus, our cases declining to extend *Bivens* have done so where Congress, sometimes in conjunction with the Executive Branch, provided

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[6] The regulations require any investigative report regarding excessive force to “be referred promptly for appropriate action in accordance with the policies and procedures of the Department [of Homeland Security].” Those policies and procedures, in turn, explicitly establish no “right or benefit, substantive or procedural, enforceable at law or in equity.”

[7] Aside from CBP's internal grievance procedure, Agent Egbert contends that the FTCA offers an alternative remedy for claims like Boule's. This Court does not endorse this argument, and for good reason. This Court repeatedly has observed that the FTCA does not cover claims against Government employees for “violation[s] of the Constitution of the United States.” Just two Terms ago, the Court reaffirmed that by carving out claims “ ‘brought for . . . violation[s] of the Constitution’ ” from the FTCA's “ ‘exclusive remedy for most claims against Government employees arising out of their official conduct,’ ” “Congress made clear that it was not attempting to abrogate *Bivens*” and instead “simply left *Bivens* where it found it,”

"comprehensive" and meaningful remedies. By the Court's logic, however, the existence of any disciplinary framework, even if crafted by the Executive Branch rather than Congress, and even if wholly nonparticipatory and lacking any judicial review, is sufficient to bar a court from recognizing a *Bivens* remedy. That reasoning, as disturbing as it is wrong, marks yet another erosion of *Bivens*' deterrent function in the law enforcement sphere.[8]

C

The Court thinly veils its disapproval of *Bivens*, ending its opinion by citing a string of dissenting opinions and single-Member concurrences by various Members of this Court expressing criticisms of *Bivens*. But the Court unmistakably stops short of overruling *Bivens* and its progeny, and appropriately so. Even while declining to extend *Bivens* to new contexts, this Court has reaffirmed that it did "not inten[d] to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." Although today's opinion will make it harder for plaintiffs to bring a successful *Bivens* claim, even in the Fourth Amendment context, the lower courts should not read it to render *Bivens* a dead letter.

That said, the Court plainly modifies the *Bivens* standard in a manner that forecloses Boule's claims and others like them that should be permitted under this Court's *Bivens* precedents. That choice is in tension with the Court's insistence that "prescribing a cause of action is a job for Congress, not the courts." Faithful adherence to this logic counsels maintaining *Bivens* in its current scope, but does not support changing the status quo to constrict *Bivens*, as the Court does today. Congress, after all, has recognized and relied on the *Bivens* cause of action in creating and amending other remedies, including the FTCA. By nevertheless repeatedly amending the legal standard that applies to *Bivens* claims and whittling down the number of claims that remain viable, the Court itself is making a policy choice for Congress. Whatever the merits of that choice, the Court's decision today is no exercise in judicial modesty.

* * *

This Court's precedents recognize that suits for damages play a critical role in deterring unconstitutional conduct by federal law enforcement officers and in ensuring that those whose constitutional rights have been violated receive meaningful redress. The Court's decision today ignores our repeated recognition of the importance of *Bivens* actions, particularly in the Fourth Amendment search-and-seizure context, and closes the door to *Bivens* suits by many who will

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[8] Even beyond its doctrinal innovations on the merits, the Court also fashions a brand new, *Bivens*-specific procedural rule under which it excuses Egbert's forfeiture of his argument that CBP's administrative process suffices as an alternative remedy.

suffer serious constitutional violations at the hands of federal agents. I respectfully dissent from the Court's treatment of Boule's Fourth Amendment claim.

Notes and Questions

1. As Justice Sotomayor's dissent notes, *Egbert* arrives on the scene only five years after *Ziglar v. Abbasi*, 582 U.S. 120 (2017). There the Court refused to allow Fourth Amendment actions against federal officials who had repeatedly violated detainees' rights in the aftermath of September 11. *Abbasi* was notable for several reasons.

a. It viewed *Bivens* as the Court's first venture into finding private rights of action in constitutional provisions, but it was not. The Court had first done so explicitly in *Jacobs v. United States*, 290 U.S. 13 (1933), allowing an individual to sue the government directly for a violation of Fifth Amendment rights. The Court (Chief Justice Hughes and Justices Van Devanter, Cardozo, McReynolds, Brandeis, Butler, Sutherland, Roberts, and Stone) was unanimous; apparently none of the Justices thought allowing plaintiff to proceed raised any separation-of-powers question. The *Abbasi* (and *Egbert*) Courts perhaps should have felt some embarrassment in ignoring *Jacobs*'s specific statement that, "Statutory recognition was not necessary. . . ."

After *Egbert*, if Congress passed a statute declaring that there is no private right of action under any provision of the Bill of Rights, is that a "special factor[ ] counseling hesitation?" Would it be constitutional? If you think it would, consider how someone might be able to get into court to challenge it. If Congress had passed such a statute the day after the Court announced *Jacobs*, what view of the statute might that Court have had? What has changed?

b. *Abbasi* did an excellent job of eliding any hierarchical distinction between a constitutional provision and a statute, noting that the determinative question is one of congressional intent. That, of course, may be appropriate with respect to statutes (at least to those enacted after *Cannon*'s [text at 515] admonition that Congress should explicitly provide private rights of action if it intends any), but is it appropriate to constitutional analysis? If the intent of the enacting body is important, what is the relevant body for purposes of the Bill of Rights?

c. *Abbasi* did note that it did not intend "to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." Does *Egbert* suggest that today's Court views things differently?

d. *Abbasi* asked " 'who should decide' whether to provide for a damages remedy, Congress or the courts." Does that dichotomy perhaps omit another relevant consideration—whether the Founders thought that the Fourth Amendment supported a damages remedy? With respect to that Amendment (or the others), should we believe that the Founders expected them to be toothless?

One must be careful here not to impose the Court's recent demands that Congress explicitly provide a private right of action in statutes it enacts if it

wants one. The Founders were writing a constitution, not a statute, and it seems inappropriate to impose on them a demand for specificity that the Court only articulated in 1979. The Founders lived in a time that *ubu jus, ibi remedium* was the rule, as Chief Justice Marshall noted in *Marbury*.[3] Should that understanding guide the Court when it adjudicates cases involving violations of constitutional rights?[4]

e. Only six Justices decided *Abbasi*. Justices Sotomayor and Kagan recused themselves, and Justice Gorsuch joined the Court too late to participate. Justice Thomas concurred in part and concurred in the judgment. Justices Breyer and Ginsburg dissented, so at best *Abbasi* had the *imprimatur* of only four Justices.

2. It is difficult to overstate *Egbert*'s implications for art. VI, cl. 2 supremacy.[5] It connotes either of two views about the Fourth Amendment itself: (a) that it creates no substantive right at all enforceable by an individual, or (b) that it does create a substantive right that, for all practical purposes, is not enforceable unless Congress acts affirmatively to provide a remedy. Either view creates difficulties.

a. The first view is consistent with *Egbert*'s gloss on *Bivens*: that the Founders adopted the Fourth Amendment only as a deterrent measure to protect "the people" generally rather than any particular individual. Note that the First, Second, Fourth, Ninth, and Tenth Amendments speak of "the people" as beneficiaries, while the Third, Fifth, and Sixth Amendments refer to individuals. (Under this reading, the Seventh and Eighth Amendments have no beneficiaries at all.) Is it plausible that the Founders contemplated such distinctions, particularly in light of *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.), a case well known to the Founders that awarded substantial damages against English officials who conducted an illegal search?

b. The second view blinks the history of the Bill of Rights. Several states made clear that their willingness to ratify the Constitution rested upon the understanding that there would be a Bill of Rights. *See, e.g., Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (Marshall, C.J.). Statutes, apparently, would not have afforded the degree of protection the states demanded. Is that history consistent with *Egbert*'s implication that the first eight amendments would be effective only if Congress wanted them to be?

3. *Egbert* is very clear about one thing: the Court will not allow individuals to recover against federal officials who violate the Constitution if there

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[3] "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded[.]" . . . "[E]very right, when withheld, must have a remedy, and every injury its proper redress."

[4] We perhaps proceed too quickly in referring to constitutional "rights." The first paragraph of Justice Gorsuch's concurrence views the matter as the judiciary's legislative intrusion into Congress's domain, In his view, would the Bill of Rights be better named as the Bill of Possibilities, awaiting congressional action to become effective?

[5] Note that none of the opinions cites or even obliquely refers to U.S. CONST. art. VI, cl. 2, the Supremacy Clause.

is any conceivable (not necessarily expressed) reason to think Congress might disapprove.

a. In the majority's view, Congress is far better suited to conduct the careful balancing of constitutional and non-constitutional policy considerations. Does the Bill of Rights reflect any policy considerations? If so, what weight should those considerations have *vis-à-vis* Congress's policy considerations? If not, then why is the Bill of Rights there at all?

b. Does the Supremacy Clause permit balancing constitutional values against non-constitutional values? If so, then non-constitutional values can trump supremacy. If not, then has the Court not itself violated supremacy by refusing to recognize constitutional remedies? It is not unheard of for the Court to violate the Constitution. Recall that Justice Brandeis cast no doubt on the Ruled of Decision Act's constitutionality, noting that the Court had "merely" violated the Constitution by following *Swift v. Tyson* for 96 years.

4. *Egbert* characterizes *Bivens* as interested only in deterrence of individual officers. The *Bivens* Court endorsed damages for someone in Bivens's situation: a citizen suspected of crime who had done nothing illegal. Does Justice Thomas explain why allowing damages against Egbert would not have the same deterrent effect that the *Bivens* Court recognized?

5. Does anything other than proximity to the international border offer a possible distinction between *Egbert* and *Bivens*? If Boule, suspected of aiding illegal entries to the United States and Canada, instead lived (as a later tenant) in Bivens's old apartment and Egbert's conduct had occurred there, would the Court come out the other way? If so, then does *Egbert* imply that one's constitutional protections become diluted the closer one gets to the border? If not, is the Court's real distinction between *Bivens* and *Egbert* that the officials suspected Bivens of drug trafficking and Egbert of violating immigration laws?

6. Justice Thomas has a reputation as an originalist. Does that suggest that he believes that those who wrote and adopted the Fourth Amendment would have looked upon Egbert's behavior as consistent with the Fourth Amendment and nothing about which to get excited?

7. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court took Congress to task for what the Court characterized as endeavoring to expand the scope of a constitutional right. Does *Egbert* implicitly take the position that provisions of the Bill of Rights have no enforceable scope unless Congress confers it? In that vein, consider the observation of one of Professor Doernberg's Federal Courts students[6] upon reading *Ziglar v. Abbasi*, *Egbert*'s predecessor: the people who wrote and ratified the Ninth Amendment did not intend the first eight amendments to be unenforceable.

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[6] Sierra Horton, J.D., University of the Pacific McGeorge School of Law, Class of 2023.

Chapter 6

THE FEDERAL FORUM, THE FOURTEENTH AMENDMENT, AND SECTION 1983

B. SECTION 1983 AS A REMEDY FOR VIOLATIONS OF THE FOURTEENTH AMENDMENT

1. "Under Color of State Law"

To be inserted on pages 576-77 in place of current Note 6:

Although one may think of § 1983 as being concerning only with violations of constitutional rights, the statute actually says "Constitution *and laws*." [Emphasis added.] In *Maine v. Thiboutot,* 448 U.S. 1 (1980), the Court gave that phrase an expansive reading, holding that it is available whenever the plaintiff alleges violation of any federal right. Subsequent cases, however, have greatly narrowed *Thiboutot's* effective scope. For more recent restrictive cases, *see, e.g., Blessing v. Freestone,* 520 U.S. 329, 340 (1997) (plaintiff must allege violation of federal right, not merely a federal "law");. *Wilder v. Virginia Hospital Association,* 496 U.S. 498 (1990) (§ 1983 available only when the statute relied upon creates a binding duty). *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981) (holding that citizen suit provisions requiring 60-day notice to state and federal officials and to alleged violators, and authorizing only injunctive relief, precluded § 1983 actions for damages and injunctive relief without notice); *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113 (2005) ("[T]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983) * * * . *But cf. Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009) (unanimously ruling that the Title IX implied right of action stemming from *Cannon* does not preclude an action under § 1983 relying on the Equal Protection Clause).

It may seem odd that Supreme Court rulings are not law within the meaning of § 1983, but that is what *Vega v. Tekoh*, 142 S. Ct. 2095 (2022), held. Vega had questioned Tekoh at the hospital at which he worked. The questioning proceeded for some length of time, at the conclusion of which Tekoh had written a confession subsequently used against him in a criminal trial. The jury acquitted Tekoh.[7] A 6-3 Court ruled that a *Miranda* violation

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[7] *Vega*'s procedural history is far more complex but of no relevance for our purposes. The jury verdict of acquittal was a general verdict and therefore opaque. Tekoh's confession

could not be the predicate for a § 1983 action. "*Miranda* itself and our subsequent cases make clear that *Miranda* imposed a set of prophylactic rules. Those rules, to be sure, are "constitutionally based," but they are prophylactic rules nonetheless." The dissent took sharp issue with the majority's reading of *Miranda* and what it characterized as the majority's ignoring of *Dickerson v. United States*, 530 U.S. 428 (2000).

The interesting thing about *Vega* is that the majority focused only upon § 1983's protection of constitutional rights, but the statute speaks of rights secured "by the Constitution *and laws* * * * " (emphasis added), so the Court seemed necessarily to say that its own rulings were not law for purposes of § 1983. By doing so, did it implicitly adopt the view Attorney General Edwin Meese expressed in 1986 that the Court's interpretations of the Constitution are not the " 'supreme law of the land' that is binding on all persons and parts of government * * * "?[8]

3. Officials' Immunities

To be inserted on page 627 after the third line:

Caniglia v. Strom, 141 S.Ct. 1596 (2021), has, regrettably, not cleared the air very much. Police officers detained Caniglia on the porch of his home. Caniglia had been involved in an argument with his wife the night before and at one point had placed a handgun on the table between them and asked her to shoot him "and get it over with."

> Petitioner spoke with respondents and confirmed his wife's account of the argument, but denied that he was suicidal. Respondents, however, thought that petitioner posed a risk to himself or others. They called an ambulance, and petitioner agreed to go to the hospital for a psychiatric evaluation—but only after respondents allegedly promised not to confiscate his firearms. Once the ambulance had taken petitioner away, however, respondents seized the weapons. Guided by petitioner's wife—whom they allegedly misinformed about his wishes—respondents entered the home and took two handguns.

Caniglia brought a § 1983 action against the officers, based on the Fourth Amendment. The district court ruled that Caniglia's trip to the hospital was not the product of a Fourth Amendment seizure and that the police seizure of the firearms did not violate Caniglia's Second Amendment rights, but also held that the seizure of the firearms in the absence of any policy or procedure for their return *did* violate due process.

The Court of Appeals ruled that the officer's being on Caniglia's back porch did not violate the Fourth Amendment and that the community-caretaking exception to the Fourth Amendment's warrant requirement, previously only applied in situations involving motor vehicles, extended to police

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was in evidence, and pursuant to the Ninth Circuit's instructions, the trial court charged the jury that "introduction of a defendant's un-Mirandized statement at his criminal trial during the prosecution's case in chief is alone sufficient to establish a Fifth Amendment violation and give rise to a § 1983 claim for damages." (The last part of the quotation is, of course, dictum.)

[8] *See* N.Y. TIMES, Oct. 23, 1986, at A1.

behavior on private premises. The circuit also held that the trip to the hospital *was* a Fourth Amendment seizure. Both lower courts found the defendants entitled to qualified immunity.

The Supreme Court, without dissent, vacated the judgment below and remanded for further proceedings. The opinion unmistakably said that the previously recognized community-caretaking exception to the warrant did not extend to private premises. Perhaps more important is what the opinion did not say. It did not say that its view of the Fourth Amendment was clearly established. Neither the term nor the words individually appear in the opinion. It did not say whether the police were or were not entitled to qualified immunity; "immunity" appears nowhere in the opinion.

Where does this leave us? It seems clearly to be another example, consistent with *Plumhoff v. Rickard* (text at 625), of examining the constitutional issue before tackling any possible immunity issue. What is less clear is whether the immunity question remains open when the case resumes in the lower courts. Although *Caniglia* appears to decide the Fourth Amendment issue, the Court never did the second step of the *Saucier* sequence (text at 622)—ruling on qualified immunity. And that is not the end of the matter. Apart from whether the Court's Fourth Amendment rule was clearly established before the case began, does the Court's opinion itself clearly establish the rule for purposes of this case? One might hazard a guess that it does not; the Court noted that the lower courts, because they relied on the community-caretaking exception to the warrant-preference rule, never examined the question of whether exigent circumstances, which can excuse the normal need for a warrant, existed in this case. So when the case returns to the lower courts, those courts will have to answer two questions: (1) did exigent circumstances exist, and (2) even if they did not, might the defendant officers have reasonably believed that they did, which might, under *Creighton* (text at 628), entitle them to immunity.

To be inserted on page 630, before *Ziglar v. Abbasi*:

Hope v. Pelzer (text at 627) lives! In *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (*per curiam*), the Court, refusing immunity, ruled that confining an inmate "in a pair of shockingly unsanitary cells . . ." violated the Eighth Amendment, and "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." Although there were precedents refusing immunity for ignoring an inmate's existing medical issues, there were none similar to *Riojas*. It did not matter.

Chapter 7

THE ELEVENTH AMENDMENT

B. THE BASIC DOCTRINE: MORE THAN MEETS THE EYE

To be added at page 688 at the end of Note 8:

Just as there is more to the Eleventh Amendment than meets the eye, there is more to *Atascadero* than meets the eye. *Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176 (2023) (*supra* at 79) extended *Atascadero*'s super-strong-clear-statement rule to territorial sovereign immunity. The majority did not even suggest that the Constitution undergirds sovereign immunity for United States territories. In fact, the majority specifically said it was assuming, without deciding, that territories enjoy immunity.

Thus, *Financial Oversight* simultaneously reminds us of the post-nineteenth-century Court's broad reading of the Eleventh Amendment (to include citizens of the defendant state, thus ignoring fourteen of the Amendment's forty-three words) and selective reading in that the majority, quite willing to assume territorial sovereign immunity as a hypothesis, nonetheless refrained from stating that the Eleventh Amendment (or any similar constitutional provision) applies to territories.

There is a critical difference between states and territories, is there not? Congress creates territories, but Congress did not create the original thirteen states. *Au contraire*, the states created Congress when they ratified the Constitution. The states gave Congress the power to admit new states, but the Court has recognized that the constitutional text requires the equal-footing doctrine, which holds that all new states enter the union with the same powers and rights as the original thirteen. *See Coyle v. Smith*, 221 U.S. 559 (1911).

Was it proper for the Court explicitly to state that it was assuming its conclusion and then to order dismissal of the case on that basis, or was the majority, whether it acknowledged it or not, exercising a quintessentially legislative function?

Chapter 8

REFUSING JURISDICTION: ABSTENTION AND OTHER DOCTRINES

A. INTRODUCTION

To be added at page 762 at the end of the introduction:

Treason and separation of powers are both important considerations, but at least the Court's abstention doctrines leave the litigants with an alternate forum. Refusing a constitutional grant and depriving litigants of any judicial forum may be quite another matter. Does a serious constitutional question arise when the Court refuses to entertain an action within its exclusive, original jurisdiction? Justices Alito and Thomas seem to think so. Dissenting from the Court's denial of leave to file a bill of complaint in *Texas v. California*, 141 S. Ct. 1469 (2021), Justice Alito, joined by Justice Thomas, invoked Chief Justice Marshall's now-familiar warning. Justice Alito acknowledged that the Court's refusal to entertain original cases is not new. But he questioned the constitutionality of the practice, and noted that "the Court has never provided a convincing justification" for it. Is there one? What would Chief Justice Marshall have said? How rapidly do you think he is spinning in his grave (in rpms)?

B. CONGRESSIONAL DOCTRINES OF RESTRAINT

To be added to the end of Note 7 at page 774:

The Internal Revenue Code, 26 U.S.C. § 7421, parallels the Tax Injunction Act in outlawing injunctions against collection of federal taxes. However, when a company sought an injunction against being required to comply with an IRS reporting requirement (which might have eventually led to a tax levy), the Court ruled that the Code's anti-injunction provision did not bar the suit. *CIC Services, LLC v. IRS*, 141 S. Ct. 1582 (2021). This seems entirely consistent with *Brohl*.

C. JUDICIAL DOCTRINES OF RESTRAINT

2. Abstention: The *Pullman* Doctrine

To be added at page 791 at the end of Note 8:

McKesson v. Doe, 141 S. Ct. 48 (2020), echoed Justice Ginsburg's *Arizonan for Official English* (text at 790 Note 8) observation about certification, with a vengeance. The Fifth Circuit had decided the case on its merits after construing an unclear state statute, one judge dissenting. The *en banc* court refused McKesson's request for review, two additional judges also dissenting from the panel's construction of the statute. The petition for certiorari

presented a First Amendment question. A *per curiam* Court granted the petition, vacated the Fifth Circuit's judgment, and remanded "for further proceedings consistent with this opinion."

The Court did not decide the First Amendment question. Instead, it noted that the state supreme court would accept certification of the state-law question. The discussion of the certification question is worth considering. "Certification is by no means 'obligatory' merely because state law is unsettled; the choice instead rests 'in the sound discretion of the federal court.' Federal courts have only rarely resorted to state certification procedures, which can prolong the dispute and increase the expenses incurred by the parties." Fair enough, but the Court was not finished. "In exceptional instances, however, certification is advisable before addressing a constitutional issue. Two aspects of this case, taken together, persuade us that the Court of Appeals should have certified to the Louisiana Supreme Court [two questions of state law]." So saying, the Court sent the case back.

Consider the juxtaposition of those two quotations. Certification is discretionary, said the Supreme Court, ordering the Fifth Circuit to certify. The review standard for discretionary decisions is ordinarily "abuse of discretion," the most difficult appellate review standard to meet. The Supreme Court did not say *in haec verba* that the Fifth Circuit had abused its discretion, but is there another way to explain the result? What are other courts to make of this?

Was the Court ordering a form of *Pullman* (text at 785) abstention? (It did not cite *Pullman*.) There are two ways to look at the problem. One might view certification almost as a *Pullman*-abstention express, bypassing the lower state courts and going directly to the state's highest court. It has an effect similar to *Pullman* abstention; the federal case is in limbo while the court awaits a definitive state-court decision on unclear state-law questions.

On the other hand, certification differs significantly from garden-variety *Pullman* abstention, which requires the plaintiff to commence a new action in a state trial court and pursue resolution of the state-law issues that caused the federal court to invoke *Pullman*. That may require appeals within the state system until the parties receive a definitive interpretation of state law. Then, if the constitutional question remains, they can return to the federal forum for its adjudication.

The authors are divided about which is the better characterization, but they agree that it does not seem to make any practical difference.

Chapter 9

SUPREME COURT REVIEW OF STATE COURT DECISIONS

C. INSULATING STATE DECISIONS FROM SUPREME COURT REVIEW

2. With Procedural Law

To be added as Note 7(c) on page 954:

For an example of the Supreme Court simply refusing to accept a state supreme court's finding of state law, see *Cruz v. Arizona*, 143 S. Ct. 650 (2023). There the Arizona Supreme Court ruled, contrary to earlier declarations, that overruling a precedent upon which a defendant's conviction or sentences rested was not a "significant change in the law" and therefore that Arizona law forbade defendant's second petition for state post-conviction relief. The United States Supreme Court would have none of it.

Cruz split the Court. Arizona convicted Cruz of murder, and the trial court sentenced him to death. *Simmons v. South Carolina*, 512 U.S. 154 (1994), had held in a plurality opinion (with Justice O'Connor concurring in the judgment) that defendants possess a due process right to inform the jury in a capital case that if the jury decided on life imprisonment rather than death as the sentence, the defendant would never be eligible for parole.[9] The Arizona trial court refused to allow Cruz to inform the jury of that fact, and the Arizona Supreme Court (agreeing with the trial court) "rejected Cruz's *Simmons* argument, believing, incorrectly, that Arizona's sentencing and parole scheme did not trigger application of *Simmons*." *Id.* at 654.

The majority was less than thrilled with the Arizona Supreme Court. "After the Arizona Supreme Court repeated that mistake in a series of cases, this Court summarily reversed the Arizona Supreme Court in *Lynch v. Arizona*, 578 U.S. 613 (2016) (*per curiam*), and held that it was fundamental error to conclude that *Simmons* 'did not apply' in Arizona." *Cruz*, 143 S. Ct. at 654. Cruz, whose final judgment antedated *Lynch*, sought state-postconviction relief under a state rule allowing successive petitions following "a significant change in the law that, if applicable to the defendant's case,

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[9] There is another interesting wrinkle in *Cruz*. The same year the Court decided *Simmons*, Arizona amended its parole statute, making parole unavailable for all felonies postdating 1993, long before Cruz's crime. Thus, the trial court's refusal of Cruz's *Simmons* instruction prevented his jury from knowing about the parole-exclusion statute, and the capital-sentencing statute continued list an outcome that would have allowed Cruz parole, and the trial judge's charge included that possible sentence, even though that was no longer possible under Arizona law.

would probably overturn the defendant's judgment or sentence." ARIZ. RULE CRIM. PROC 32.1(g). Cruz argued that *Lynch* was such a change. The Arizona Supreme Court declined to regard *Lynch* as a significant change, "despite having repeatedly held that an overruling of precedent is a significant change in the law." *Cruz*, 143 S. Ct. at 655. The issue was whether the Arizona Supreme Court's decision that Rule 32.1 did not encompass *Lynch* as a significant change was an adequate, independent state procedural ground precluding United States Supreme Court review. "It is not." *Cruz*, 143 S. Ct. at 655.[10]

The dissent, accepting Arizona's position, argued that *Lynch* merely "rectifie[d] an erroneous application" of *Simmons*. *Id.*, at 663 (Barrett, J., dissenting). Query whether repeated outright refusal to apply what the Arizona Supreme Court characterized as clearly established law qualifies as an "erroneous application" of that law. *Lynch*, according to the dissent, did not change federal law at all (and indeed, it did not). It did, however, change Arizona law, which had held *Simmons* inapplicable to Arizona cases in clear violation of that case, as *Lynch* pointed out. And while the dissent did acknowledge that a state's purposeful evasion of constitutional law could justify review, the state's evasion in the particular case had to be "wholly unforeseeable" in the context of prior state law.[11]

It may be that the majority, obviously irritated with Arizona's rejection of *Simmons*, simply could not believe that the Arizona Supreme Court's actions in refusing to apply it were in good faith, much as in *Ward v. Love County*, where the Court rejected the state's characterization of the plaintiff's, having paid property taxes under threat of losing their land, as acting "voluntarily." The majority did not articulate it that way, but it is challenging to avoid that conclusion.

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[10] The Arizona Supreme Court noted that when Cruz went to trial and subsequently appealed his conviction, *Simmons* was clearly established law (that the Arizona Supreme Court, as *Lynch* later revealed, had flouted). Arizona implicitly argued that Cruz's only path to relief at that point had been United States Supreme Court review, which the Court had denied. Thus, the Arizona Court implicitly invoked res judicata to protect its earlier unconstitutional decision

[11] The argument here seems to be that because Arizona had so openly and consistently defied *Simmons*, Cruz could not claim surprise when he did not reap its benefits and similarly could not properly characterize *Lynch* as a change, much less a significant one.

Chapter 11

FEDERAL HABEAS CORPUS

D. FEDERAL COURT REVIEW OF STATE CONVICTIONS

2. Constitutional Claims Cognizable on Habeas Corpus

To be added at the end of note 1(d) on page 1057:

Teague recognized an exception for watershed rules of criminal procedure, but "believe[d] it unlikely that many such [rules] ha[d] yet to emerge." That prediction proved accurate, as the watershed exception experienced a prolonged (and now permanent) drought. In the thirty-two years following *Teague*, the Court rejected every single request to classify a new rule of criminal procedure as watershed. Thedrick Edwards suffered the latest defeat with his request to recognize *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), as watershed. (*Ramos* held that the Sixth Amendment "requires a unanimous verdict to convict a defendant of a serious offense.") After ruling that *Ramos* did not qualify for watershed protection, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), laid the watershed exception to rest. The failure of any new rule, including the rules announced in *Ramos* and other "momentous and consequential" cases, to qualify for the exception in the prior three-plus decades led the 6-3 majority to conclude that no new rule could ever do so. The majority also expressed concern that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." Justice Kagan, joined by Justices Breyer and Sotomayor, dissented, arguing that *Ramos* "perfectly fits" the watershed exception and criticizing the majority for providing "the sketchiest of reasons" for eliminating it.

Teague functioned as a bright-line rule for decades, as the watershed exception posed no real threat to watering it down. Unwilling to take the chance, *Edwards* makes it official: new rules of criminal procedure are never retroactive on habeas. After *Edwards*, what is left of the retroactivity analysis?

To be inserted at page 1086 as new Note 6A, immediately following note 6:

6A. The Court has long interpreted the discretion granted to federal courts by federal habeas statutes to include the power to establish equitable doctrines governing issuance of the writ. The skeletal nature of pre-AEDPA federal habeas statutes provided room for many "gap-filler" rules, including procedural default, abuse of the writ, and harmless error. The question is

whether the Court's equitable gap-filler rules survived AEDPA, which contains express, detailed limits on the writ.

Brown v. Davenport, 142 S. Ct. 1510 (2022), answered that question affirmatively: "Congress did not wash away everything that came before. While AEDPA announced certain new conditions to relief, it did not guarantee relief upon their satisfaction. Instead, Congress left intact the equitable discretion traditionally invested in federal courts by preexisting habeas statutes.." As a result, *Davenport* held that in cases where harmless error is an issue, federal habeas courts may not grant relief unless the petitioner satisfies the requirements of AEDPA §2254(d) *and* the Court's harmless error standard announced in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Logic dictates that *Davenport*'s reasoning applies to all the equitable gap-filler rules AEDPA did not explicitly replace.

Davenport's recognition that the AEDPA operates in tandem with the Court's equitable gap-filler doctrines is consistent with the Court's understanding of its role in implementing federal habeas provisions. But *Davenport* and *Shinn v. Ramirez*, *infra* at 137 (weeks after *Davenport*) arguably articulate a broader role for federal-court discretion than existed before—one that extends *beyond* merely creating equitable rules governing habeas procedure and determining whether constitutional error occurred. *Davenport* ruled that "a petitioner who prevails under AEDPA must still today persuade a federal habeas court that 'law and justice require' relief[,]" but left open the meaning of "law and justice," noting that "*whatever else those inquiries involve*, they continue to require federal habeas courts to apply this Court's precedents governing the appropriate exercise of equitable discretion[.]" *Davenport*, 142 S.Ct. at 1524 (emphasis added).

Shinn quoted *Davenport's* "law and justice" language and appeared to give substance to the phrase:

> [E]ven if [petitioner satisfies AEDPA's evidentiary-hearing rules], a federal habeas court still is not *required* to hold a hearing or take any evidence. Like the decision to grant habeas relief itself, the decision to permit new evidence must be *informed by principles of comity and finality* that govern every federal habeas case.

Shinn, at *8 (first emphasis in original; second emphasis added) (citing *Davenport*, 142 S. Ct. at 1524).

Under *Shinn*, a federal habeas court can decline to hold an evidentiary hearing on comity/finality grounds even if a petitioner meets all AEDPA and Court-made procedural rules. Does this passage from *Shinn*, which cites the weeks-old decision in *Davenport* for support, mean that a petitioner who hurdles both AEDPA and the Court's procedural rules *and* demonstrates constitutional error cannot obtain relief without also convincing a federal court that relief will not aggravate comity or finality concerns? If so, *Davenport* and *Shinn* together represent a new and rather muscular assertion of judicial power.

To be added at the end of note 2 on page 1095:

Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (*supra* at 115), eliminated the watershed exception and, with it, the need address the question left open in *Greene v. Fisher*—whether 28 U.S.C. §2254(d) abrogated the exception.

To replace existing subsection D.4 beginning on page 1098:

4. The Effect of State Procedural Defaults

Coleman v. Thompson

Supreme Court of the United States, 1991.
501 U.S. 722.

JUSTICE O'CONNOR delivered the opinion of the Court.

This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.

Food for Thought

The underlying criminal proceeding involved the murder of a human being, and the proposed execution of another one. It is curious that Justice O'Connor, not known as a particularly abstract think-er, would begin the majority opinion with this characterization

I

A Buchanan County, Virginia, jury convicted Roger Keith Coleman of rape and capital murder and fixed the sentence at death for the murder. The trial court imposed the death sentence, and the Virginia Supreme Court affirmed both the convictions and the sentence. This Court denied certiorari.

Coleman then filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan County, raising numerous federal constitutional claims that he had not raised on direct appeal. After a two-day evidentiary hearing, the Circuit Court ruled against Coleman on all claims.

Coleman filed his notice of appeal with the Circuit Court * * * 33 days after the entry of final judgment. Coleman subsequently filed a petition for appeal in the Virginia Supreme Court. The Commonwealth of Virginia, as appellant, filed a motion to dismiss the appeal. The sole ground for dismissal urged in the motion was that Coleman's notice of appeal had been filed late. Virginia Supreme Court Rule 5:9(a) provides that no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgment.

The Virginia Supreme Court did not act immediately on the Commonwealth's motion, and both parties filed several briefs on the subject of the motion to dismiss and on the merits of the claims in Coleman's petition. On May 19, 1987, the Virginia Supreme Court issued the following order, dismissing Coleman's appeal:

On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

This Court again denied certiorari.

Coleman next filed a petition for writ of habeas corpus in the United States District Court for the Western District of Virginia. In his petition, Coleman presented four federal constitutional claims he had raised on direct appeal in the Virginia Supreme Court and seven claims he had raised for the first time in state habeas. The District Court concluded that, by virtue of the dismissal of his appeal by the Virginia Supreme Court in state habeas, Coleman had procedurally defaulted the seven claims. The District Court nonetheless went on to address the merits of all 11 of Coleman's claims. The court ruled against Coleman on all of the claims and denied the petition.

The United States Court of Appeals for the Fourth Circuit * * * held that Coleman had defaulted all of the claims that he had presented for the first time in state habeas. Coleman argued that the Virginia Supreme Court had not "clearly and expressly" stated that its decision in state habeas was based on a procedural default, and therefore the federal courts could not treat it as such under the rule of *Harris v. Reed* (1989). The Fourth Circuit disagreed. It concluded that the Virginia Supreme Court had met the "plain statement" requirement of *Harris* by granting a motion to dismiss that was based solely on procedural grounds. The Fourth Circuit held that the Virginia Supreme Court's decision rested on independent and adequate state grounds and that Coleman had not shown cause to excuse the default. As a consequence, federal review of the claims Coleman presented only in the state habeas proceeding was barred. We granted certiorari to resolve several issues concerning the relationship between state procedural defaults and federal habeas review, and now affirm.

II

A

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies also to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. * * *

The basis for application of the independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review by this Court. When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257 it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do. This is not the case in habeas. When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254 it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*.

Nonetheless, a state prisoner is in custody *pursuant* to a judgment. When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.

In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

When the independent and adequate state ground supporting a habeas petitioner's custody is a state procedural default, an additional concern comes into play. This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights. * * *

These same concerns apply to federal claims that have been procedurally defaulted in state court. Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the State's interest in correcting their own mistakes is respected in all federal habeas cases.

B

* * *

In *Michigan v. Long* (1983), * * * in order to minimize the costs associated with resolving ambiguities in state court decisions while still fulfilling our obligation to determine if there was an independent and adequate state ground for the decision, we established a conclusive presumption of jurisdiction in these cases:

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

After *Long*, a state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption by stating "clearly and expressly that [its decision] is * * * based on bona fide separate, adequate, and independent grounds."

In *Caldwell v. Mississippi* (1985) we applied the *Long* presumption in the context of an alleged independent and adequate state procedural ground.

Long and *Caldwell* were direct review cases. We first considered the problem of ambiguous state court decisions in the application of the independent and adequate state ground doctrine in a federal habeas case in *Harris v. Reed*. * * *

The situation presented to this Court was nearly identical to that in *Long* and *Caldwell*: a state court decision that fairly appeared to rest primarily on federal law in a context in which a federal court has an obligation to determine if the state court decision rested on an independent and adequate state ground. "Faced with a common problem, we adopt[ed] a common solution." *Harris* applied in federal habeas the presumption this Court adopted in *Long* for direct review cases. Because the Illinois Appellate Court did not "clearly and expressly" rely on waiver as a ground for rejecting Harris' ineffective assistance of counsel claims, the *Long* presumption applied and Harris was not barred from federal habeas.

After *Harris*, federal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state court judgments, will presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.*

III

A

Coleman contends that the presumption of *Long* and *Harris* applies in this case, and precludes a bar to habeas, because the Virginia Supreme Court's order dismissing Coleman's appeal did not "clearly and expressly" state that it was based on state procedural grounds. Coleman reads *Harris* too broadly. A predicate to the application of the *Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law.

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* This rule does not apply if the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

* * *

Coleman urges a broader rule: that the presumption applies in all cases in which a habeas petitioner presented his federal claims to the state court. This rule makes little sense. * * * The presumption, like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases. * * *

Per se rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time. The *Long* and *Harris* presumption works because in the majority of cases in which a state court decision fairly appears to rest primarily on federal law or to be interwoven with such law, and the state court does not plainly state that it is relying on an independent and adequate state ground, the state court decision did not in fact rest on an independent and adequate state ground. We accept errors in those small number of cases where there was nonetheless an independent and adequate state ground in exchange for a significant reduction in the costs of inquiry.

The tradeoff is very different when the factual predicate does not exist. In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the "most reasonable explanation" is that the state judgment rested on federal grounds. * * * Any efficiency gained by applying a conclusive presumption, and thereby avoiding inquiry into state law, is simply not worth the cost in the loss of respect for the State that such a rule would entail.

* * *

In any event, we decline to establish such a rule here, for it would place burdens on the States and state courts in exchange for very little benefit to the federal courts. We are, as an initial matter, far from confident that the empirical assumption of the argument for such a rule is correct. It is not necessarily the case that state courts will take pains to provide a clear and express statement of procedural default in all cases, even after announcement of the rule. State courts presumably have a dignitary interest in seeing that their state law decisions are not ignored by a federal habeas court, but most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction. If a state court, in the course of disposing of cases on its overcrowded docket, neglects to provide a

clear and express statement of procedural default, or is insufficiently motivated to do so, there is little the State can do about it. Yet it is primarily respect for the State's interests that underlies the application of the independent and adequate state ground doctrine in federal habeas.

A broad presumption would also put too great a burden on the state courts. It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment. We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which its judgment rests, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case.

Nor do we believe that the federal courts will save much work by applying the *Harris* presumption in all cases. * * * In the absence of a clear indication that a state court rested its decision on federal law, a federal court's task will not be difficult.

* * *

B

The *Harris* presumption does not apply here. Coleman does not argue, nor could he, that it "fairly appears" that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with such law. The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition for appeal. That motion was based solely on Coleman's failure to meet the Supreme Court's time requirements. There is no mention of federal law in the Virginia Supreme Court's three-sentence dismissal order. It "fairly appears" to rest primarily on state law.

* * *

IV

In *Daniels v. Allen* (1953), the companion case to *Brown v. Allen*, we confronted a situation nearly identical to that here. Petitioners were convicted in a North Carolina trial court, and then were one day late in filing their appeal as of right in the North Carolina Supreme Court. That court rejected the appeals as procedurally barred. We held that federal habeas was also barred unless petitioners could prove that they were "detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."

Fay v. Noia (1963) overruled this holding. Noia failed to appeal at all in state court his state conviction, and then sought federal habeas review of his claim that his confession had been coerced. This Court held that such a procedural default in state court does not bar federal habeas review unless the petitioner has deliberately bypassed state procedures by intentionally forgoing an opportunity for state review. *Fay* thus created a presumption in favor of federal habeas review of claims procedurally defaulted in state court. The Court based this holding on its conclusion that a State's interest in orderly procedure are sufficiently vindicated by the prisoner's forfeiture of his state remedies. "Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy * * * of affording an effective remedy for restraints contrary to the Constitution."

Our cases after *Fay* that have considered the effect of state procedural default on federal habeas review have taken a markedly different view of the important interests served by state procedural rules.

* * *

We concluded in *Francis* [*v. Henderson* (1976), a case challenging grand jury composition where defendant failed to raise the issue as required by state law] that a proper respect for the States required that federal courts give to the state procedural rule the same effect they give to the federal rule * * * . We held that Francis' claim was barred in federal habeas unless he could establish cause and prejudice.

Wainwright v. Sykes (1977) applied the cause and prejudice standard more broadly. Sykes did not object at trial to the introduction of certain inculpatory statements he had earlier made to the police. Under Florida law, this failure barred state courts from hearing the claim on either direct appeal or state collateral review. We recognized that this contemporaneous objection rule served strong state interests in the finality of its criminal litigation. To protect these interests, we adopted the same presumption against federal habeas review of claims defaulted in state court for failure to object at trial that *Francis* had adopted in the grand jury context: the cause and prejudice standard. "We believe the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing."

In so holding, *Wainwright* limited *Fay* to its facts. The cause and prejudice standard in federal habeas evinces far greater respect for state procedural rules than does the deliberate bypass standard of *Fay*. These incompatible rules are based on very different conceptions of comity and of the importance of finality in state criminal litigation. In *Wainwright*, we left open the question whether the deliberate bypass standard still applied to a situation like that in *Fay*, where a

petitioner has surrendered entirely his right to appeal his state conviction. We rejected explicitly, however, "the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it."

Our cases since *Sykes* have been unanimous in applying the cause and prejudice standard. *Engle v. Isaac* (1982) held that the standard applies even in cases in which the alleged constitutional error impaired the truthfinding function of the trial. Respondents had failed to object at trial to jury instructions that placed on them the burden of proving self defense. Ohio's contemporaneous objection rule barred respondents' claim on appeal that the burden should have been on the State. We held that this independent and adequate state ground barred federal habeas as well, absent a showing of cause and prejudice.

Recognizing that the writ of habeas corpus "is a bulwark against convictions that violate fundamental fairness," we also acknowledged that "the Great Writ entails significant costs." The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails * * * . Moreover, "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." These costs are particularly high, we explained, when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court. Because these costs do not depend on the type of claim the prisoner raised, we reaffirmed that a state procedural default of any federal claim will bar federal habeas unless the petitioner demonstrates cause and actual prejudice. We also explained in *Engle* that the cause and prejudice standard will be met in those cases where review of a state prisoner's claim is necessary to correct "a fundamental miscarriage of justice." ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

* * *

We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after *Fay* that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm

to the States that results from the failure of federal courts to respect them.

* * *

V

A

Coleman maintains that there was cause for his default. The late filing was, he contends, the result of attorney error of sufficient magnitude to excuse the default in federal habeas.

Murray v. Carrier (1986) considered the circumstances under which attorney error constitutes cause. Carrier argued that his attorney's inadvertence in failing to raise certain claims in his state appeal constituted cause for the default sufficient to allow federal habeas review. We rejected this claim, explaining that the costs associated with an ignorant or inadvertent procedural default are no less than where the failure to raise a claim is a deliberate strategy: it deprives the state courts of the opportunity to review trial errors. When a federal habeas court hears such a claim, it undercuts the State's ability to enforce its procedural rules just as surely as when the default was deliberate. We concluded: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."

Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. * * *

Coleman attempts to avoid this reasoning by arguing that *Carrier* does not stand for such a broad proposition. He contends that *Carrier* applies by its terms only in those situations where it is possible to state a claim for ineffective assistance of counsel. Where there is no constitutional right to counsel, Coleman argues, it is enough that a petitioner demonstrate that his attorney's conduct would meet the *Strickland* standard, even though no independent Sixth Amendment claim is possible.

* * *

Attorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." Attorney error that constitutes ineffective assistance of counsel is cause, however. This is not because, as Coleman contends, the error is so bad that "the lawyer ceases to be an agent of the petitioner." In a case such as this, where the alleged attorney error is inadvertence in failing to file a timely notice, such a rule would be contrary to well-settled principles of agency law. Rather, as *Carrier*

explains, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i.e.*, "imputed to the State."

Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as *Carrier* says explicitly.

B

Among the claims Coleman brought in state habeas, and then again in federal habeas, is ineffective assistance of counsel during trial, sentencing, and appeal. Coleman contends that, at least as to these claims, attorney error in state habeas must constitute cause. This is because, under Virginia law at the time of Coleman's trial and direct appeal, ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in state habeas. Coleman argues that attorney error in failing to file timely in the first forum in which a federal claim can be raised is cause.

We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation. * * * [T]here is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, there must be an exception to the rule * * * in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court. The effectiveness of Coleman's counsel before that court is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause to excuse his default. We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

* * *

Coleman has had his "one and only appeal," if that is what a state collateral proceeding may be considered; the Buchanan County

Circuit Court, after a two-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims. What Coleman requires here is a right to counsel on appeal from that determination. Our case law will not support it.

* * *

Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas. As Coleman does not argue in this Court that federal review of his claims is necessary to prevent a fundamental miscarriage of justice, he is barred from bringing these claims in federal habeas. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

Federalism; comity; state sovereignty; preservation of state resources; certainty: the majority methodically inventories these multifarious state interests before concluding that the plain-statement rule of *Michigan v. Long* does not apply to a summary order. One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death. Nor does the majority even allude to the "important need for uniformity in federal law," which justified this Court's adoption of the plain-statement rule in the first place. Rather, displaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.

I

The Court cavalierly claims that "[t]his is a case about federalism," and proceeds without explanation to assume that the purposes of federalism are advanced whenever a federal court refrains from reviewing an ambiguous state court judgment. Federalism, however, has no inherent normative value: it does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. * * * In this context, it cannot lightly be assumed that the interests of federalism

are fostered by a rule that impedes federal review of federal constitutional claims.

Moreover, the form of federalism embraced by today's majority bears little resemblance to that adopted by the Framers of the Constitution and ratified by the original States. The majority proceeds as if the sovereign interests of the States and the Federal Government were co-equal. Ours, however, is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not of sovereign States. The citizens expressly declared: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land." * * * The ratification of the Fourteenth Amendment by the citizens of the several States expanded federal powers even further, with a corresponding diminution of state sovereignty. Thus, "the sovereignty of the States is limited by the Constitution itself."

Federal habeas review of state court judgments, respectfully employed to safeguard federal rights, is no invasion of State sovereignty. Since 1867, Congress has acted within its constitutional authority to " 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.' " Justice Frankfurter, in his separate opinion in *Brown v. Allen*, recognized this: "Insofar as [federal habeas] jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law." Thus, the considered exercise by federal courts—in vindication of fundamental constitutional rights—of the habeas jurisdiction conferred on them by Congress exemplifies the full expression of this Nation's federalism.

* * *

II

* * *

B

* * * In its attempt to justify a blind abdication of responsibility by the federal courts, the majority's opinion marks the nadir of the Court's recent habeas jurisprudence, where the discourse of rights is routinely replaced with the functional dialect of interests. The Court's habeas jurisprudence now routinely, and without evident reflection, subordinates fundamental constitutional rights to mere utilitarian interests. Such unreflective cost-benefit analysis is inconsistent with the very idea of rights. The Bill of Rights is not, after all, a collection of technical interests, and "surely it is an abuse to deal too casually

and too lightly with rights guaranteed" therein. *Brown v. Allen* (opinion of Frankfurter, J.).

It is well settled that the existence of a state procedural default does not divest a federal court of jurisdiction on collateral review. Rather, the important office of the federal courts in vindicating federal rights gives way to the States' enforcement of their procedural rules to protect the States' interest in being an equal partner in safeguarding federal rights. This accommodation furthers the values underlying federalism in two ways. First, encouraging a defendant to assert his federal rights in the appropriate state forum makes it possible for transgressions to be arrested sooner and before they influence an erroneous deprivation of liberty. Second, thorough examination of a prisoner's federal claims in state court permits more effective review of those claims in federal court, honing the accuracy of the writ as an implement to eradicate unlawful detention. The majority ignores these purposes in concluding that a State need not bear the burden of making clear its intent to rely on such a rule. When it is uncertain whether a state court judgment denying relief from federal claims rests on a procedural bar, it is inconsistent with federalism principles for a federal court to exercise discretion to decline to review those federal claims.

* * *

The majority's attempt to distinguish between the interests of state courts and the interests of the States in this context is inexplicable. States do not exist independent of their officers, agents, and citizens. Rather, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *See also Ex parte Virginia* ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way"). The majority's novel conception of dichotomous interests is entirely unprecedented.

* * *

III

* * * Whether unprofessional attorney conduct in a state postconviction proceeding should bar federal habeas review of a state prisoner's conviction and sentence of death is not a question of costs to be allocated most efficiently. It is, rather, another circumstance where this Court must determine whether federal rights should yield to state interests. * * *

The majority first contends that this Court's decision in *Murray v. Carrier* expressly resolves this issue. Of course, that cannot be so, as the procedural default at issue in *Murray* occurred on direct review, not collateral attack, and this Court has no authority to resolve issues not before it. Moreover, notwithstanding the majority's protestations to the contrary, the language of *Murray* strongly suggests that

the Court's resolution of the issue would have been the same regardless of when the procedural default occurred. The Court in *Murray* explained: "A State's procedural rules serve vital purposes at trial, on appeal, and *on state collateral attack* " (emphasis added). Rejecting Carrier's argument that, with respect to the standard for cause, procedural defaults on appeal should be treated differently from those that occur during the trial, the Court stated that "the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at *each successive stage of the judicial process*" (emphasis added).

The rule foreshadowed by this language, which the majority today evades, most faithfully adheres to a principled view of the role of federal habeas jurisdiction. As noted above, federal courts forgo the exercise of their habeas jurisprudence over claims that are procedurally barred out of respect for the state interests served by those rules. Recognition of state procedural forfeitures discourages petitioners from attempting to avoid state proceedings, and accommodates the State's interest in finality. No rule, however, can deter gross incompetence. To permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner's federal claims in no way serves the State's interest in preserving the integrity of its rules and proceedings. The interest in finality, standing alone, cannot provide a sufficient reason for a federal habeas court to compromise its protection of constitutional rights.

The majority's conclusion that Coleman's allegations of ineffective assistance of counsel, if true, would not excuse a procedural default that occurred in the state post-conviction proceeding is particularly disturbing because, at the time of Coleman's appeal, state law precluded defendants from raising certain claims on direct appeal. As the majority acknowledges, under state law as it existed at the time of Coleman's trial and appeal, Coleman could raise his ineffective assistance of counsel claim with respect to counsel's conduct during trial and appeal only in state habeas.

* * *

* * * "[F]undamental fairness is the central concern of the writ of habeas corpus." It is the quintessence of inequity that the Court today abandons that safeguard while continuing to embrace the cause and prejudice standard.

I dissent.

Notes and Questions

1. (a) The majority notes that the adequate-and-independent-state-ground rule is a jurisdictional limitation of direct review and links that assertion to the inhibition against advisory opinions. Although the Court's disinclination to render advisory opinions is two centuries old, why is it a jurisdictional bar? From what constitutional provision does it derive?

(b) The Court clearly feels that the rule is not jurisdictional in cases of collateral review. Why not? Why should the presence of a state ground for decision either always or never preclude review? If there is a distinction, does it shed any light on whether the rule is *always* jurisdictional in the context of direct review?

(c) The Court reaffirmed the non-jurisdictional nature of the state-procedural-default rule in the habeas context in *Trest v. Cain*, 522 U.S. 87 (1997), holding that "a procedural default, that is, a critical failure to comply with state procedural law, is not a jurisdictional matter." Justice Breyer's opinion for a unanimous Court viewed state procedural default as a defense that the state must preserve. The Court also recognized that there is uncertainty about whether a habeas court may raise the issue *sua sponte*, but declined to reach that question because the Fifth Circuit had thought itself compelled to raise the issue, the petition for certiorari had not embraced that question, and the factual record was inadequate to permit the court to adjudicate that issue.

(d) In *Beard v. Kindler*, 558 U.S. 53 (2009), the Justices ruled that a state court's refusal to entertain a habeas claim because the prisoner had escaped served as an adequate and independent ground barring federal habeas review despite the discretionary nature of the determination.

2. (a) *Coleman* reaffirms *Harris v. Reed*'s directive to apply the rules of *Michigan v. Long* (text at 902) and *Caldwell v. Mississippi* (assuming Supreme Court jurisdiction on direct review when confronting state-court decisions not clearly resting on wholly state grounds) to habeas corpus cases. Thus, both the Supreme Court and district courts faced with an ambiguous state court decision will presume there is no independent and adequate state ground barring federal review if the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" unless the adequacy and independence of any possible state law ground is clear from the face of the state court opinion. While there clearly is logic in the Court's determination when "[f]aced with a common problem [to] adopt a common solution," there also is irony. The *Michigan v. Long* standard expanded the Supreme Court's jurisdiction. Presuming the state court decision did not rest upon an adequate and independent state ground enabled the Court in *Long* to review and reverse a state court ruling that granted the defendant relief on the grounds his Fourth Amendment rights were violated. The *Michigan v. Long* standard, however, also expands the scope of habeas corpus, making it easier for district courts to review state court decisions denying petitioners' federal constitutional claims. This expansion runs counter to the Court's apparent desire to limit the scope of habeas corpus.

(b) The Court of Appeals and the Supreme Court both concluded the Virginia Supreme Court decision rested on an adequate and independent state ground, so Coleman could not rely on *Long*. Do you agree?

(c) Justice Blackmun, dissenting, accuses the majority of embracing a federalism that "blindly protect[s] the interests of the States from any incursion by the federal courts." He contends federal habeas review, "respectfully employed to safeguard federal rights, is no invasion of State sovereignty." Who is right?

3. *Wainwright v. Sykes*, 433 U.S. 72 (1977), upon which *Coleman* so heavily relies, deserves extended consideration. Sykes challenged a conviction based in part upon his own statement. Counsel had not objected to the introduction of the statement, violating the state's contemporaneous objection rule. Sykes argued in the federal proceeding that he had not understood his *Miranda* rights and persuaded the district court to order a hearing on the question of the voluntariness of his statement. The Supreme Court denied habeas relief, adopting the cause-and-prejudice standard echoed in *Coleman*.

(a) In rejecting the "deliberate bypass" standard in favor of the "cause and prejudice" standard, *Sykes* noted (and *Coleman* echoes) that "proper respect" for the states and their adjudicative processes compels the latter standard. From whence do either the cause-and-prejudice standard or the deliberate-bypass standard derive? Are they constitutionally compelled or are they prudential limitations on federal judicial power?

(b) The *Sykes* Court adopted the cause-and-prejudice standard because it worried that a more lenient rule encouraged "sandbagging."

> We think that the [deliberate bypass] rule of *Fay v. Noia*, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off. The refusal of federal habeas courts to honor contemporaneous-objection rules may also make state courts themselves less stringent in their enforcement. Under the rule of *Fay v. Noia*, state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas court will decide the question without the benefit of their views.

Justice Brennan's dissent insisted that sandbagging was unlikely because it would violate even the deliberate-bypass standard. He argued that the majority's new rule was inconsistent with proper respect for constitutional rights and established law regarding their abandonment. Apart from questions of the proper standard for surrender of important constitutional rights, discussed below, consider whether sandbagging is practical. Assuming defense counsel could conceal deliberate failure to raise an issue, what does it profit the defense in a criminal case to hold it back?

(c) *Sykes* and *Coleman* also raise questions about the ease or difficulty of losing constitutional rights. In *Sykes*, the petitioner sought to assert a Fifth Amendment right. In *Coleman*, petitioner urged several constitutional defects in the state proceedings[7] that the Court barred because Coleman's counsel had filed a state notice of appeal three days late. In both cases, the Court found that the asserted constitutional rights had been waived. In *Sykes*, Justice Brennan took sharp issue with the majority, arguing that *Johnson v. Zerbst*, 304 U.S. 458 (1938), which required a knowing and deliberate waiver by the defendant, should continue to govern waiver of constitutional rights. The majority, shifting away from that standard, noted:

> We leave open for resolution in future decisions the precise definition of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in *Fay v. Noia*, which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention.

Thus, the majority clearly repudiated *Johnson v. Zerbst* in this context.

In *Sykes*, the defendant's failure to object contemporaneously to introduction of his statement waived his right to do so. In *Edelman v. Jordan*, 415 U.S. 651 (1974) (text at 669), the Court ruled on whether Illinois's participation in a federal program waived the state's Eleventh Amendment immunity. Refusing to find waiver, the majority said:

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."[a]

Plainly, *Sykes, Coleman* and *Edelman* are flatly inconsistent as to the conduct necessary to waive a constitutional right. Are the different standards for state and individual waiver justifiable?

4. The Court notes that a petitioner must exhaust available state remedies as a prerequisite to federal habeas review. How does this relate to the rule that a state procedural default constitutes an adequate and independent state ground barring habeas review? Note that *all* procedurally defaulted claims are by definition exhausted, because there is no state court currently available to hear the merits of them. On the other hand, not all unexhausted

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[7] Coleman argued, *inter alia*, the following: pre-judgment of his case by one juror, ineffective assistance of counsel, exclusion of jurors opposed to the death penalty, in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), and the prosecution's failure to disclose exculpatory evidence.

[a] [AUTHORS' NOTE] The Court did note that the Eleventh Amendment concerns an area in which sovereignties collide, paying homage to the special position of the Eleventh Amendment. Nonetheless, the Court's thoughts on waiver were expressed in terms far broader than necessary merely to defer to the Eleventh Amendment.

claims are necessarily defaulted—for example, newly-discovered evidence claims. State post-conviction courts are always available to hear claims of new exculpatory evidence, but they are not exhausted until brought to state court.

5. *Coleman* raises questions on many levels, some concerning the "federalism" on which Justice O'Connor focuses. Lurking in the background, however, is a more general issue about federal habeas corpus. Perhaps only by considering what the institution of federal habeas is supposed to do can one sensibly approach federalism and other problems. Justice Blackmun's dissent suggests as much. Is he correct? Is there a "chicken and egg" problem with respect to which issue drives the inquiry?

a. What constitutes "cause"?

Coleman explains "cause" for overcoming a procedural default as "something *external* to the petitioner, something that cannot fairly be attributed to him[.]" In most cases where the petitioner tries to overcome a procedural default, the claimed "cause" is ineffective assistance of counsel—at trial, on direct appeal, or, as in *Coleman*, on state post-conviction review. *Murray v. Carrier*, 477 U.S. 478 (1986), held, however, that only *constitutionally* ineffective assistance (governed generally by *Strickland v. Washington* (1984)) constitutes cause. Since post-conviction petitioners have no constitutional right to counsel, they also lack a right to effective assistance, leading *Coleman* to hold that blunders by post-conviction counsel will not constitute cause to excuse a default.

A series of decisions carved out exceptions to *Coleman*. *Maples v. Thomas*, 565 U.S. 266 (2012), held that *Coleman*'s "general rule" does not apply "when an attorney abandons his client without notice, and thereby occasions the default." In such an instance, counsel's abandonment constitutes cause. *Martinez v. Ryan*, 566 U.S. 1 (2012), decided the same term as *Maples*, announced a "narrow exception" to *Coleman*, holding that a lack of post-conviction counsel, or ineffective assistance of such counsel, constitutes cause to excuse failure to raise an ineffective assistance of trial counsel claim, but only when state

Food for Thought

Martinez expressly declined to answer the question *Coleman* left open: whether a petitioner has a constitutional right to counsel in state post-conviction proceedings "which [*sic*] provide the first occasion to raise a claim of ineffective assistance at trial." As Justice Scalia's dissent pointed out, did Court implicitly answer the question by allowing ineffective assistance, within *Strickland*, to constitute cause? Petitioners who have no right to counsel likewise have no right to effective assistance of counsel and cannot rely on counsel's deficient performance as cause. Is the opposite true? If ineffective assistance (measured by *Strickland*) constitutes cause, does that mean the petitioner has a constitutional right to counsel?

Justice Scalia's larger concern, however, was that *Martinez* would end up expanding far beyond ineffective-assistance-of-counsel claims raised for the first time on collateral review, despite the majority's contrary claim. As he bluntly stated: "There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised[.] * * * The Court's soothing assertion * * * that its holding 'addresses only the constitutional claims presented in this case' insults the reader's intelligence."

Does *Shinn*, *infra* at 137, alleviate Justice Scalia's concern about *Martinez*'s expansion?

law "requires a prisoner to raise" such claims in an "initial-review collateral proceeding" rather than on direct review. One year later, *Trevino v. Thaler*, 569 U.S. 413 (2013), extended *Martinez* to states whose systems practically, if not formally, require petitioners to raise ineffective assistance claims for the first time on collateral review. *Trevino* arose in Texas, which formally permits a petitioner to raise ineffective assistance on direct review. By a 5-4 vote, however, the Court held that *Martinez* applies to Texas because, as a practical matter, it is "nearly impossible" to raise a claim of ineffective assistance by trial counsel on direct review. The ultimate question, stated the majority, is whether the state system provides a "fair, meaningful opportunity" to assert an ineffective assistance claim on direct review. The majority cited several factors that made it highly impractical to raise ineffective assistance claims on direct review in Texas. If trial counsel was ineffective, the trial record is unlikely to be adequate to demonstrate such ineffectiveness. Time limits and the unavailability of trial transcripts exacerbate the likely deficiencies in the record.

The Court stepped on the brakes in *Davila v. Davis*, 582 U.S. 521 (2017), holding, 5–4, that although there is a constitutional entitlement to counsel on direct appeal, if appellate counsel is constitutionally ineffective within the meaning of *Strickland* and post-conviction counsel defaults in raising the ineffectiveness of counsel's appellate predecessor, that default cannot constitute cause for *Coleman* purposes. Thus, a prisoner asserting injury from the defective

representation first of appellate counsel and second of post-conviction counsel has no remedy.

Martinez and *Trevino* opened a much-needed pathway to relief for petitioners saddled with ineffective assistance of *both* trial and post-conviction counsel. *Shinn v. Ramirez*, decided a mere ten years after *Martinez*, nearly washed that pathway out.

SHINN v. RAMIREZ

Supreme Court of the United States, 2022

142 S.Ct. 1718.

JUSTICE THOMAS delivered the opinion of the Court.

A federal habeas court generally may consider a state prisoner's federal claim only if he has first presented that claim to the state court in accordance with state procedures. When the prisoner has failed to do so, and the state court would dismiss the claim on that basis, the claim is "procedurally defaulted." To overcome procedural default, the prisoner must demonstrate "cause" to excuse the procedural defect and "actual prejudice" if the federal court were to decline to hear his claim. In *Martinez v. Ryan*, this Court explained that ineffective assistance of postconviction counsel is "cause" to forgive procedural default of an ineffective-assistance-of-trial-counsel claim, but only if the State required the prisoner to raise that claim for the first time during state postconviction proceedings.

Often, a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to

introduce new evidence to support it. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the standard to expand the state-court record is a stringent one. If a prisoner has "failed to develop the factual basis of a claim in State court proceedings," a federal court "shall not hold an evidentiary hearing on the claim" unless the prisoner satisfies one of two narrow exceptions, *see* 28 U.S.C. § 2254(e)(2)(A), and demonstrates that the new evidence will establish his innocence "by clear and convincing evidence," § 2254(e)(2)(B). In all but these extraordinary cases, AEDPA "bars evidentiary hearings in federal habeas proceedings initiated by state prisoners.".

The question presented is whether the equitable rule announced in *Martinez* permits a federal court to dispense with § 2254(e)(2)'s narrow limits because a prisoner's state postconviction counsel negligently failed to develop the state-court record. We conclude that it does not.

I

* * *

A

* * * A jury convicted Ramirez of two counts of premeditated first-degree murder. The trial court sentenced Ramirez to death, and the Arizona Supreme Court affirmed on direct review.

Ramirez then filed his first petition for state postconviction relief. That petition raised myriad claims, but it did not raise the one at issue here: that Ramirez's trial counsel provided ineffective assistance for "failing to conduct a complete mitigation investigation" or "obtai[n] and present available mitigation evidence at sentencing." Ramirez did not raise this ineffective-assistance claim until he subsequently filed a successive state habeas petition, which the state court summarily denied as untimely under Arizona law.

Ramirez also petitioned the U.S. District Court for the District of Arizona for a writ of habeas corpus under 28 U.S.C. § 2254. As relevant here, the District Court held that Ramirez had procedurally defaulted his ineffective-assistance claim by failing to raise it before the Arizona courts in a timely fashion. Ramirez responded that the District Court should forgive the procedural default because his state postconviction counsel was himself ineffective for failing to raise the trial-ineffective-assistance claim and develop the facts to support it.

The District Court permitted Ramirez to file several declarations and other evidence not presented to the state court to support his request to excuse his procedural default. Assessing the new evidence, the District Court excused the procedural default but rejected Ramirez's ineffective-assistance claim on the merits.

The Ninth Circuit reversed and remanded. Like the District Court, it held that Ramirez's state postconviction counsel's failure to raise and develop the trial-ineffective-assistance claim was cause to forgive the procedural default. The Ninth Circuit also held that Ramirez's underlying trial-ineffective-assistance claim was substantial, and that Ramirez therefore had suffered prejudice. But, unlike the District Court, the Court of Appeals declined to decide the merits of Ramirez's claim. The court remanded the case for further factfinding because, in its view, Ramirez was "entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim."

* * *

B

* * * A jury convicted Jones of sexual assault, three counts of child abuse, and felony murder. The trial judge sentenced Jones to death, and the Arizona Supreme Court affirmed on direct review.

Jones then petitioned for state postconviction relief. He alleged ineffective assistance by his trial counsel, but not the specific trial-ineffective-assistance claim at issue here: that his counsel "fail[ed] to conduct sufficient trial investigation." The Arizona Supreme Court summarily denied relief.

Jones next filed a habeas petition in the U.S. District Court for the District of Arizona. The District Court held that Jones' trial-ineffective-assistance claim was procedurally defaulted, so Jones, like Ramirez, invoked his postconviction counsel's ineffective assistance as grounds to forgive the default. To bolster his case for cause and prejudice, Jones also moved to supplement the undeveloped state-court record. The District Court held a 7-day evidentiary hearing with more than 10 witnesses and ultimately decided to forgive Jones' procedural default. The court then relied on the new evidence from the cause-and-prejudice hearing to hold, on the merits, that Jones' trial counsel had provided ineffective assistance.

Arizona appealed, arguing that § 2254(e)(2) did not permit the evidentiary hearing. The Ninth Circuit affirmed, holding that § 2254(e)(2) did not apply because Jones' state postconviction counsel was ineffective for failing to develop the state-court record for Jones' trial-ineffective-assistance claim.

* * *

[Subsection C omitted]

II

A state prisoner may request that a federal court order his release by petitioning for a writ of habeas corpus. The writ may issue "only

on the ground that [the prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." To respect our system of dual sovereignty, the availability of habeas relief is narrowly circumscribed, *see* *Brown v. Davenport*. Among other restrictions, only rarely may a federal habeas court hear a claim or consider evidence that a prisoner did not previously present to the state courts in compliance with state procedural rules.

A

"From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States." The power to convict and punish criminals lies at the heart of the States' "residuary and inviolable sovereignty." Thus, "[t]he States possess primary authority for defining and enforcing the criminal law," and for adjudicating "constitutional challenges to state convictions[]".

Because federal habeas review overrides the States' core power to enforce criminal law, it "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." That intrusion "imposes special costs on our federal system." Here, two of those costs are particularly relevant.

First, a federal order to retry or release a state prisoner overrides the State's sovereign power to enforce "societal norms through criminal law." That is so because habeas relief "frequently cost[s] society the right to punish admitted offenders." "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike."

Second, federal intervention imposes significant costs on state criminal justice systems. It "disturbs the State's significant interest in repose for concluded litigation," and undermines the States' investment in their criminal trials. If the state trial is merely a " 'tryout on the road' " to federal habeas relief, that "detract[s] from the perception of the trial of a criminal case in state court as a decisive and portentous event."

B

In light of these significant costs, we have recognized that federal habeas review cannot serve as "a substitute for ordinary error correction through appeal." The writ of habeas corpus is an "extraordinary remedy" that guards only against "extreme malfunctions in the state criminal justice systems." To ensure that federal habeas corpus retains its narrow role, AEDPA imposes several limits on habeas relief, and we have prescribed several more. *See, e.g.*, *Brown*. And even if a prisoner overcomes all of these limits, he is never entitled to habeas

relief. He must still "persuade a federal habeas court that law and justice require [it]."

As relevant here, both Congress and federal habeas courts have set out strict rules requiring prisoners to raise all of their federal claims in state court before seeking federal relief. First, AEDPA requires state prisoners to "exhaus[t] the remedies available in the courts of the State" before seeking federal habeas relief. 28 U.S.C. § 2254(b)(1)(A). Ordinarily, a state prisoner satisfies this exhaustion requirement by raising his federal claim before the state courts in accordance with state procedures. If he does so, a federal habeas court may hear his claim, but its review is highly circumscribed. In particular, the federal court may review the claim based solely on the state-court record, and the prisoner must demonstrate that, under this Court's precedents, no "fairminded [*sic*] juris[t]" could have reached the same judgment as the state court.

State prisoners, however, often fail to raise their federal claims in compliance with state procedures, or even raise those claims in state court at all. If a state court would dismiss these claims for their procedural failures, such claims are technically exhausted because, in the habeas context, "state-court remedies are * * * 'exhausted' when they are no longer available, regardless of the reason for their unavailability." But to allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule. Thus, federal habeas courts must apply "an important 'corollary' to the exhaustion requirement": the doctrine of procedural default. Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts "consistent with [the State's] own procedural rules."

Together, exhaustion and procedural default promote federal-state comity. Exhaustion affords States "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," and procedural default protects against "the significant harm to the States that results from the failure of federal courts to respect" state procedural rules. Ultimately, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without [giving] an opportunity to the state courts to correct a constitutional violation," and to do so consistent with their own procedures.

C

* * * When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. Likewise, if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal court is appropriate.

1

"Out of respect for finality, comity, and the orderly administration of justice," federal courts may excuse procedural default only if a prisoner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." To establish cause, the prisoner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Then, to establish prejudice, the prisoner must show not merely a substantial federal claim, such that " 'the errors at * * * trial created a *possibility* of prejudice," but rather that the constitutional violation "worked to his *actual* and substantial disadvantage.' "

With respect to cause, "[a]ttorney ignorance or inadvertence" cannot excuse procedural default. "[T]he attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." That said, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." That is not because a constitutional error "is so bad that the lawyer ceases to be an agent" of the prisoner, but rather because a violation of the right to counsel "must be seen as an external factor" to the prisoner's defense. "It follows, then, that in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default."

In *Martinez*, this Court recognized a "narrow exception" to the rule that attorney error cannot establish cause to excuse a procedural default unless it violates the Constitution. There, the Court held that ineffective assistance of state postconviction counsel may constitute "cause" to forgive procedural default of a trial-ineffective-assistance claim, but only if the State requires prisoners to raise such claims for the first time during state collateral proceedings. One year later, in *Trevino v. Thaler*, this Court held that this "narrow exception" applies if the State's judicial system effectively forecloses direct review of trial-ineffective-assistance claims. Otherwise, attorney error where there is no right to counsel remains insufficient to show cause.

2

There is an even higher bar for excusing a prisoner's failure to develop the state-court record. Shortly before AEDPA, we held that a prisoner who "negligently failed" to develop the state-court record must satisfy *Coleman*'s cause-and-prejudice standard before a federal court can hold an evidentiary hearing. *Keeney v. Tamayo-Reyes* (1992). In *Keeney*, we explained that "little [could] be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum."

And, consistent with *Coleman*, we held that evidentiary development would be inappropriate "where the cause asserted is attorney error."

Four years later, Congress enacted AEDPA and replaced *Keeney*'s cause-and-prejudice standard for evidentiary development with the even "more stringent requirements" now codified at 28 U.S.C. § 2254(e)(2). Section 2254(e)(2) provides that, if a prisoner "has failed to develop the factual basis of a claim in State court proceedings," a federal court may hold "an evidentiary hearing on the claim" in only two limited scenarios. Either the claim must rely on (1) a "new" and "previously unavailable" "rule of constitutional law" made retroactively applicable by this Court, or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence." If a prisoner can satisfy either of these exceptions, he also must show that further factfinding would demonstrate, "by clear and convincing evidence," that "no reasonable factfinder" would have convicted him of the crime charged. Finally, even if all of these requirements are satisfied, a federal habeas court still is not *required* to hold a hearing or take any evidence. Like the decision to grant habeas relief itself, the decision to permit new evidence must be informed by principles of comity and finality that govern every federal habeas case.

Even though AEDPA largely displaced *Keeney*, § 2254(e)(2) retained "one aspect of *Keeney*'s holding." Namely, § 2254(e)(2) applies only when a prisoner "has failed to develop the factual basis of a claim." We interpret "fail," consistent with *Keeney*, to mean that the prisoner must be "at fault" for the undeveloped record in state court. A prisoner is "at fault" if he "bears responsibility for the failure" to develop the record.

III

* * *

A

Respondents' primary claim is that a prisoner is not "at fault," and therefore has not "failed to develop the factual basis of a claim in State court proceedings," if state postconviction counsel negligently failed to develop the state record for a claim of ineffective assistance of trial counsel. But under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner.

1

As stated above, a prisoner "bears the risk in federal habeas for all attorney errors made in the course of the representation," unless counsel provides "constitutionally ineffective" assistance. And, because there is no constitutional right to counsel in state

postconviction proceedings, a prisoner ordinarily must "bea[r] responsibility" for all attorney errors during those proceedings. Among those errors, a state prisoner is responsible for counsel's negligent failure to develop the state postconviction record.

Both before and after AEDPA, our prior cases have made this point clear. First, in *Keeney*, "material facts had not been adequately developed in the state postconviction court, apparently due to the negligence of postconviction counsel." We required the prisoner to demonstrate cause and prejudice to forgive postconviction counsel's deficient performance, and recognized that counsel's negligence, on its own, was not a sufficient cause.

Second, in *Michael Williams*, we confirmed that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney*'s [cause-and-prejudice] test * * * are now controlled by § 2254(e)(2)." In other words, because *Keeney* held a prisoner responsible for state postconviction counsel's negligent failure to develop the state-court record, the same rule applied under § 2254(e)(2). For that reason, "a failure to develop the factual basis of a claim," as § 2254(e)(2) requires, "is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." ([E]mphasis added). We then applied that rule and held that state postconviction counsel's "failure to investigate * * * in anything but a cursory manner trigger[ed] the opening clause of § 2254(e)(2)."

Third, in *Holland v. Jackson* (2004) (*per curiam*), we again held a prisoner responsible for state postconviction counsel's negligent failure to develop the state-court record. Seven years after the prisoner's conviction, and after he had already been denied state postconviction relief, the prisoner found a new witness to provide impeachment testimony. The prisoner claimed that he discovered the witness so late because "state postconviction counsel did not heed his pleas for assistance." Citing *Coleman* and *Michael Williams*, we rejected the prisoner's claim. "Attorney negligence," we held, "is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied."

In sum, under § 2254(e)(2), a prisoner is "at fault" even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements.

2

Respondents dispute none of this. Instead, they rely almost exclusively on *Martinez*'s holding that ineffective assistance of postconviction counsel can be "cause" to forgive procedural default of a trial-ineffective-assistance claim if a State forecloses direct review of that

claim, as Arizona concededly does. Respondents contend that where, per *Martinez*, a prisoner is not responsible for state postconviction counsel's failure to raise a claim, it makes little sense to hold the prisoner responsible for the failure to develop that claim. Thus, respondents propose extending *Martinez* so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record under § 2254(e)(2).

Congress foreclosed respondents' proposed expansion of *Martinez* when it passed AEDPA. * * * [Section] 2254(e)(2) is a statute that we have no authority to amend. "Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect." For example, in *McQuiggin* [*v. Perkins*] we explained that we have no power to layer a miscarriage-of-justice or actual-innocence exception on top of the narrow limitations already included in § 2254(e)(2).

The same follows here. We have no power to redefine when a prisoner "has failed to develop the factual basis of a claim in State court proceedings." Before AEDPA, *Keeney* held that "attorney error" during state postconviction proceedings was not cause to excuse an undeveloped state-court record. And, in *Michael Williams*, we acknowledged that § 2254(e)(2) "raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings," while reaffirming that prisoners are responsible for attorney error. Yet here, respondents claim that attorney error alone permits a federal court to expand the federal habeas record. That result makes factfinding more readily available than *Keeney* envisioned pre-AEDPA and ignores *Michael Williams*' admonition that "[c]ounsel's failure" to perform as a "diligent attorney" "triggers the opening clause of § 2254(e)(2)." We simply cannot square respondents' proposed result with AEDPA or our precedents.

Respondents propose that Congress may have actually invited their judicial update. According to respondents, *Martinez* explained that *Coleman* left open whether ineffective assistance of state postconviction counsel might one day be cause to forgive procedural default, at least in an "initial-review collateral proceeding," "where state collateral review is the first place a prisoner can present a challenge to his conviction," Respondents contend that Congress might have enacted § 2254(e)(2) with the expectation that this Court one day would open that door.

We do not agree. First, "[g]iven our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief * * * it is implausible that, without saying so," Congress intended this Court to liberalize the availability of habeas relief generally, or access to federal factfinding specifically. Second, in Coleman, we "reiterate[d] that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation," and surmised that a

hypothetical constitutional right to initial-review postconviction counsel could give rise to a corresponding claim for cause. Since then, however, we have repeatedly reaffirmed that there is no constitutional right to counsel in state postconviction proceedings.

We also reject respondents' equitable rewrite of § 2254(e)(2) because it lacks any principled limit. This Court's holding in *Martinez* addressed only one kind of claim: ineffective assistance of trial counsel. We limited our holding in that way to reflect our "equitable judgment" that trial-ineffective-assistance claims are uniquely important. Respondents propose that we similarly should permit factual development under § 2254(e)(2) only for trial-ineffective-assistance claims. But § 2254(e)(2) applies whenever any state prisoner "failed to develop the factual basis of *a claim*," (emphasis added), without limitation to any specific claim. There would be no reason to limit respondents' reconstruction of § 2254(e)(2) as they propose. * * * [I]f a prisoner were not "at fault" under § 2254(e)(2) simply because postconviction counsel provided ineffective assistance, the prisoner's blamelessness necessarily would extend to *any claim* that postconviction counsel negligently failed to develop. Not even *Martinez* sweeps that broadly.

Finally, setting aside that we lack authority to amend § 2254(e)(2)'s clear text, *Martinez* itself cuts against respondents' proposed result. *Martinez* was "unusually explicit about the narrowness of our decision." The Court left no doubt that "[t]he rule of *Coleman* governs in *all* but the limited circumstances recognized here." ([E]mphasis added). * * * In short, *Martinez* foreclosed any extension of its holding beyond the "narrow exception" to procedural default at issue in that case.

To be sure, *Martinez* recognized that state prisoners often need "evidence outside the trial record" to support their trial-ineffective-assistance claims. But *Martinez* did not prescribe largely unbounded access to new evidence whenever postconviction counsel is ineffective, as respondents propose. Rather, *Martinez* recognized our overarching responsibility "to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." In particular, the Court explained that its "holding * * * ought not to put a significant strain on state resources," because a State "faced with the question whether there is cause for an apparent default * * * may answer" that the defaulted claim "is wholly without factual support." . That assurance has bite only if the State can rely on the state-court record. Otherwise, "federal habeas courts would routinely be required to hold evidentiary hearings to determine" whether state postconviction counsel's factfinding fell short. .

The cases under review demonstrate the improper burden imposed on the States when *Martinez* applies beyond its narrow scope.

The sprawling evidentiary hearing in *Jones* is particularly poignant. Ostensibly to assess cause and prejudice under *Martinez*, the District Court ordered a 7-day hearing that included testimony from no fewer than 10 witnesses, including defense trial counsel, defense postconviction counsel, the lead investigating detective, three forensic pathologists, an emergency medicine and trauma specialist, a biomechanics and functional human anatomy expert, and a crime scene and bloodstain pattern analyst. Of these witnesses, only one of the forensic pathologists and the lead detective testified at the original trial. The remainder testified on virtually every disputed issue in the case, including the timing of Rachel Gray's injuries and her cause of death.. This wholesale relitigation of Jones' guilt is plainly not what *Martinez* envisioned.

B

Martinez aside, respondents propose a second reading of § 2254(e)(2) that supposedly permits consideration of new evidence in their habeas cases. Their interpretation proceeds in two steps. First, respondents argue that because § 2254(e)(2) bars only "an evidentiary hearing on the claim," a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice. In respondents' view, a so-called "*Martinez* hearing" is not a "hearing *on the claim*." ([E]mphasis added). Second, with that evidence admitted for cause and prejudice, respondents contend that the habeas court may then consider the new evidence to evaluate the merits of the underlying ineffective-assistance claim. By considering already admitted evidence, respondents reason, the habeas court is not holding a "hearing" that § 2254(e)(2) otherwise would prohibit.

There are good reasons to doubt respondents' first point, but we need not address it because our precedent squarely forecloses the second. In *Holland*, we explained that § 2254(e)(2)'s "restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence without an evidentiary hearing." ([E]mphasis deleted). The basis for our decision was obvious: A contrary reading would have countenanced an end-run around the statute. Federal habeas courts could have accepted any new evidence so long as they avoided labeling their intake of the evidence as a "hearing." Therefore, when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise admits or reviews new evidence for any purpose, it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in § 2254(e)(2) are satisfied.

Respondents all but concede that their argument amounts to the same kind of evasion of § 2254(e)(2) that we rejected in *Holland*. They nonetheless object that *Holland* renders many *Martinez* hearings a nullity, because there is no point in developing a record for cause and prejudice if a federal court cannot later consider that evidence on the merits. While we agree that any such *Martinez* hearing would serve

no purpose, that is a reason to dispense with *Martinez* hearings altogether, not to set § 2254(e)(2) aside. Thus, if that provision applies and the prisoner cannot satisfy its "stringent requirements," a federal court may not hold an evidentiary hearing—or otherwise consider new evidence—to assess cause and prejudice under *Martinez*.

* * * [H]olding a *Martinez* hearing when the prisoner cannot "satisfy AEDPA's demanding standards" in § 2254(e)(2) would "prolong federal habeas proceedings" with no purpose. And because a federal habeas court may *never* "needlessly prolong" a habeas case, particularly given the "essential" need to promote the finality of state convictions, a *Martinez* hearing is improper if the newly developed evidence never would "entitle [the prisoner] to federal habeas relief."

C

Ultimately, respondents' proposed expansion of factfinding in federal court, whether by *Martinez* or other means, conflicts with any appropriately limited federal habeas review. In our dual-sovereign system, federal courts must afford unwavering respect to the centrality "of the trial of a criminal case in state court." . That is the moment at which "[s]ociety's resources have been concentrated * * * in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." Such intervention is also an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them. Federal courts, years later, lack the competence and authority to relitigate a State's criminal case.

The dissent contends that we "overstat[e] the harm to States that would result from allowing" prisoners to develop evidence outside § 2254(e)(2)'s narrow exceptions. Not so. Serial relitigation of final convictions undermines the finality that "is essential to both the retributive and deterrent functions of criminal law." Further, broadly available habeas relief encourages prisoners to " 'sandba[g]' " state courts by "select[ing] a few promising claims for airing" on state postconviction review, "while reserving others for federal habeas review" should state proceedings come up short. State prisoners already have a strong incentive to save claims for federal habeas proceedings in order to avoid the highly deferential standard of review that applies to claims properly raised in state court. Permitting federal factfinding would encourage yet more federal litigation of defaulted claims.

* * *

Because we have no warrant to impose any factfinding beyond § 2254(e)(2)'s narrow exceptions to AEDPA's "genera[l] ba[r on] evidentiary hearings," we reverse the judgments of the Court of Appeals.

It is so ordered.

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

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel at trial. This Court has recognized that right as "a bedrock principle" that constitutes the very "foundation for our adversary system" of criminal justice. Today, however, the Court hamstrings the federal courts' authority to safeguard that right. The Court's decision will leave many people who were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel.

In reaching its decision, the Court all but overrules two recent precedents that recognized a critical exception to the general rule that federal courts may not consider claims on habeas review that were not raised in state court. Just 10 years ago, the Court held that a federal court may consider a habeas petitioner's substantial claim of ineffective assistance of trial counsel (a "trial-ineffectiveness" claim), even if not presented in state court, if the State barred the petitioner from asserting that claim until state postconviction proceedings, and the petitioner's counsel in those proceedings was also ineffective. * * *

This decision is perverse. It is illogical: It makes no sense to excuse a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings, * * * but to fault the same petitioner for that postconviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim. In so doing, the Court guts *Martinez*'s and *Trevino's* core reasoning. The Court also arrogates power from Congress: The Court's analysis improperly reconfigures the balance Congress struck in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) between state interests and individual constitutional rights.

By the Court's telling, its holding (however implausible) is compelled by statute. Make no mistake. Neither AEDPA nor this Court's precedents require this result. I respectfully dissent.

I

* * *

A

Respondent Barry Lee Jones was charged with the murder of his girlfriend's 4-year-old daughter, Rachel Gray. The State argued that Rachel died as a result of an injury she sustained while in Jones' care. Jones' trial counsel failed to undertake even a cursory investigation and, as a result, did not uncover readily available medical evidence that could have shown that Rachel sustained her injuries when she

was not in Jones' care. Having heard none of this evidence, the jury convicted Jones and the trial judge sentenced him to death.

Jones filed for postconviction review in Arizona state court. Under Arizona law, Jones was not permitted to argue on direct appeal that his trial counsel rendered constitutionally ineffective assistance; accordingly, state postconviction review was his first opportunity to raise his trial-ineffectiveness claim. At this stage, however, Jones was met with another egregious failure of counsel. Arizona state law sets minimum qualifications that attorneys must meet to be appointed in capital cases like Jones', but the Arizona Supreme Court waived those requirements in Jones' case, and the state court appointed postconviction counsel who lacked those qualifications. Jones' new counsel conducted almost no investigation outside of the evidence in the trial record. In short, Jones' postconviction counsel failed to investigate the ineffective assistance of Jones' trial counsel. Counsel moved for the appointment of an investigator, but did so under the wrong provision of Arizona law. The motion was denied. Counsel ultimately filed a petition for postconviction relief that failed to advance any argument that Jones' trial counsel was ineffective for failing to investigate the State's medical evidence. Arizona courts denied the petition.

Jones then sought federal habeas relief, at last represented by competent counsel, and alleged that his trial counsel provided ineffective assistance by failing adequately to investigate his case. The District Court held an evidentiary hearing at which Jones presented evidence that the injuries to Rachel could not have been inflicted at the time the State alleged that Jones was with her, and that this evidence would have been readily available to Jones' trial and state postconviction counsel, had they investigated the case. The District Court concluded that Jones' postconviction counsel had rendered ineffective assistance in failing to raise this claim in state postconviction proceedings and therefore held that Jones could raise it for the first time in federal court under *Martinez*. The District Court also relied on this evidence to hold, on the merits, that Jones received ineffective assistance at trial. The court found that there was a "reasonable probability that the jury would not have unanimously convicted [Jones] of any of the counts" if Jones' trial counsel had "adequately investigated and presented medical and other expert testimony to rebut the State's theory" of Jones' guilt.

Arizona moved to stay the granting of the habeas writ by arguing that 28 U.S.C. § 2254(e)(2), a provision enacted as part of AEDPA, barred the District Court from considering on the merits the evidence that Jones developed to satisfy *Martinez*'s requirements. The District Court denied the motion, and the Ninth Circuit affirmed in relevant part. Relying on *Martinez*'s recognition that " '[c]laims of ineffective assistance at trial often require investigative work,' " the Ninth Circuit concluded that "§ 2254(e)(2) does not prevent a district court from

considering new evidence, developed to overcome a procedural default under *Martinez v. Ryan*, when adjudicating the underlying claim on de novo review."

B

Respondent David Ramirez was convicted for the capital murders of his girlfriend and her daughter. At the sentencing phase, the state court appointed a psychologist to conduct a mental health evaluation. Ramirez's counsel failed to provide the psychologist with evidence that Ramirez had an intellectual disability and failed to develop a claim of intellectual disability to present in mitigation against the imposition of a death sentence and in support of the imposition of a sentence of life without parole. Ramirez was sentenced to death.

As in Jones' case, an Arizona state court appointed Ramirez counsel for his state postconviction claim. And as in Jones' case, state postconviction proceedings were Ramirez's first opportunity to raise a claim of trial ineffectiveness. Ramirez's postconviction attorney, however, did not conduct any investigation beyond the existing trial record, despite being aware of indications that Ramirez might have intellectual disabilities, including that his mother drank when she was pregnant with him and that he demonstrated developmental delays as a child. Nor did Ramirez's postconviction counsel argue that Ramirez's trial counsel provided ineffective assistance by failing to develop and present this mitigating evidence. Arizona courts denied Ramirez's postconviction petition.

Citing " 'concerns regarding the quality' " of Ramirez's prior counsel, a Federal District Court appointed the Arizona Federal Public Defender to represent him in federal habeas proceedings. In his habeas petition, Ramirez raised a claim concerning the ineffectiveness of his trial counsel. In support of his claim, Ramirez submitted evidence from family members, whom trial counsel and state postconviction counsel had never contacted, revealing the depths of abuse and neglect Ramirez experienced as a child and the life-long manifestations of his possible disability. The evidence showed that Ramirez grew up eating on the floor and sleeping on dirty mattresses in houses filthy with animal feces; that Ramirez's mother would beat him with electrical cords; and that Ramirez displayed multiple apparent developmental delays, including "delayed walking, potty training, and speech" and inability to maintain basic hygiene or to use utensils to eat. In addition, the court-appointed psychologist who evaluated Ramirez during the sentencing phase of trial averred to the habeas court that if trial counsel had provided him with Ramirez's school records and prior IQ scores, he would have thought they suggested intellectual disability and insisted on more comprehensive testing.[1] Finally, Ramirez's trial counsel submitted an affidavit stating that she had not been "prepared to handle 'the representation of someone as mentally disturbed as * * * Ramirez' " and explaining that the

evidence from Ramirez's family members, had she uncovered it in an investigation, " 'would have changed the way [she] handled both [Ramirez's] guilt phase and his sentencing phase.' " . In light of this evidence, Ramirez sought an opportunity to develop his trial-ineffectiveness claim further.

The District Court denied relief on Ramirez's trial-ineffectiveness claim and declined to allow further evidentiary development. On appeal, Arizona conceded that Ramirez's postconviction counsel performed deficiently. The Ninth Circuit reversed and remanded, holding that Ramirez had satisfied the requirements of *Martinez* because postconviction counsel had provided ineffective representation and Ramirez's trial-ineffectiveness claim was substantial. The Ninth Circuit directed the District Court to allow evidentiary development of Ramirez's trial-ineffectiveness claim, recognizing that he had been "precluded from such development because of his post-conviction counsel's ineffective representation."

II

Martinez and *Trevino* afford habeas petitioners like Jones and Ramirez the opportunity to bring certain trial-ineffectiveness claims for the first time in federal court. The question before the Court is whether Jones and Ramirez can make good on that opportunity by developing evidence in support of these claims, or whether AEDPA nevertheless requires them to rely on the state-court records, constructed by ineffective trial and postconviction counsel, because they "failed to develop the factual basis of [the ineffective assistance] claim[s] in State court proceedings." 28 U.S.C. § 2254(e)(2).

Under this Court's precedents, the answer is clear. *Martinez* and *Trevino* establish that petitioners are not at fault for any failure to raise their claims in state court in these circumstances. * * *

A

* * *

As a general matter, attorney error does not constitute cause to excuse procedural default because courts attribute attorneys' errors to their clients. In certain situations, however, attorney error will instead "be seen as an external factor" and therefore constitute cause. * * * In *Coleman*, we explained that "[a]ttorney error that constitutes ineffective assistance of counsel" * * * demonstrates cause to excuse procedural default in the context of a direct appeal. *Coleman* explained that error that "constitutes a violation of petitioner's right to counsel * * * must be seen as an external factor, *i.e.,* 'imputed to the State' " because the Sixth Amendment places the burden of guaranteeing effective assistance of counsel on the State.

Coleman left unanswered the question whether ineffective assistance of counsel at the postconviction stage, where defendants

generally do not have a constitutional right to counsel, could also constitute cause to excuse default. This question is critical in Arizona and other States that do not allow defendants to raise trial-ineffectiveness claims on direct appeal, where individuals are constitutionally entitled to effective counsel, and instead require them to raise these claims for the first time in collateral proceedings, in which this Court has not recognized a constitutional right to counsel.

Martinez held that in these States, postconviction counsel's failure to raise a substantial trial-ineffectiveness claim could constitute cause to excuse a procedural default. The Court observed that where a state collateral proceeding is the first time that a petitioner can press a trial-ineffectiveness claim, the collateral proceeding is "the equivalent of a prisoner's direct appeal," and constitutes the petitioner's " 'one and only appeal' " as to that claim. Because this result was occasioned by the State's "deliberat[e] cho[ice] to move [such] claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," the Court held that the general attorney-attribution rule did not apply where postconviction counsel rendered ineffective assistance, just as it would not if appellate counsel on direct review had done so. Instead, *Martinez* held, for a habeas petitioner with a "substantial" underlying trial-ineffectiveness claim who also has the misfortune of being represented by ineffective postconviction counsel, the failure of postconviction counsel to raise the trial-ineffectiveness claim is not properly attributable to the petitioner. .

A year later, in *Trevino* , the Court reaffirmed and extended Martinez's core holding. *Trevino* held that where a State does not offer "a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal," a defendant whose collateral-review counsel renders ineffective assistance has demonstrated cause to excuse the procedural default of his trial-ineffectiveness claim.

B

There is no dispute here that respondents' trial-ineffectiveness claims clear the procedural default hurdle under *Martinez* and *Trevino*. The question is whether a habeas petitioner can be faultless for a procedural default under *Martinez* and nonetheless barred by AEDPA's § 2254(e)(2) from seeking an evidentiary hearing in federal court, subject to exceptions not applicable here, because the petitioner "failed to develop the factual basis of [the procedurally defaulted] claim in State court proceedings."

* * * In *Williams v. Taylor* this Court examined what it means to have "failed to develop the factual basis of a claim" under § 2254(e)(2). The Court concluded that this language imposes a fault-based standard, meaning that it erects a bar only to those who bear some responsibility for a lack of evidentiary development in state-court proceedings. * * *

* * * *Williams* * * * reasoned that when it enacted AEDPA, Congress had "raised the bar *Keeney* imposed on prisoners who were *not* diligent" (*i.e.,* those who were at fault) "in state-court proceedings." ([E]mphasis added). At the same time, however, "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." Phrased differently, under AEDPA, "[i]f there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements."

* * * Under *Williams*, whether petitioners who satisfy *Martinez* are nevertheless subject to § 2254(e)(2) turns on whether they were at fault for not developing evidence in support of their trial-ineffectiveness claims in state postconviction proceedings. All agree that a habeas petitioner is not at fault when the responsibility for an error is properly imputed to the State or to some other external factor. *Martinez* cases are among the rare ones in which attorney error constitutes such an external factor. That is because a State's "deliberat[e] cho[ice]" to move trial ineffectiveness claims outside of direct appeal and into postconviction review "significantly diminishes prisoners' ability to file such claims." There is nothing nefarious about this choice, but it is "not without consequences." Together, *Martinez*, *Trevino*, and *Williams* demonstrate that when a State both provides a criminal defendant with ineffective trial counsel and decides to remove his trial-ineffectiveness claim from appellate review, postconviction counsel's ineffectiveness cannot fairly be attributed to the defendant, and he therefore has not "failed to develop the factual basis of [his] claim." .

Any other reading hollows out *Martinez* and *Trevino*. *Martinez* repeatedly recognized that to prove a trial-ineffectiveness claim (or even to show that it is "substantial"), habeas petitioners frequently must introduce evidence outside of the trial record. Ineffective-assistance claims frequently turn on errors of omission: evidence that was not obtained, witnesses that were not contacted, experts who were not retained, or investigative leads that were not pursued. Demonstrating that counsel failed to take each of these measures by definition requires evidence beyond the trial record. Indeed, the very reason States like Arizona might choose to reserve a trial-ineffectiveness claim for a collateral proceeding is to allow development of the factual basis for the claim. To hold a petitioner at fault for not developing a factual basis because of postconviction counsel's ineffectiveness in the *Martinez* context, however, would be to eliminate altogether such evidentiary development and doom many meritorious trial-ineffectiveness claims that satisfy *Martinez*. Such a rule is not only inconsistent with the reasoning of *Martinez* and *Trevino* but renders those decisions meaningless in many, if not most, cases.

[Subsection C omitted]

* * *

III

* * *

The Court's analysis rests on two fundamental errors. First, the Court eviscerates *Martinez* and *Trevino* and mischaracterizes other precedents. Second, the Court relies upon its own mistaken understanding of AEDPA's policies and the state interests at issue, recycling claims rejected by the *Martinez* Court and ignoring the careful balance struck by Congress. In doing so, the Court gives short shrift to the egregious breakdowns of the adversarial system that occurred in these cases, breakdowns of the type that federal habeas review exists to correct.

A

The doctrinal consequence of the Court's distortion of precedent is to render *Martinez* and *Trevino* dead letters in the mine run of cases. As explained, those precedents are premised on the understanding that a habeas petitioner is not responsible for a postconviction attorney's ineffective failure to assert a substantial trial-ineffectiveness claim in States that do not offer petitioners a meaningful opportunity to raise such claims on direct appeal. The Court, however, does not grapple with this logic on its own terms. Instead, the Court limits *Martinez* and *Trevino* to their facts, emptying them of all meaning in the ordinary case (where, as those precedents explain, a trial-ineffectiveness claim will necessarily rely on evidence beyond the trial record). Tellingly, the Court relies on the *dissent* in *Trevino* to support its disregard of these cases' reasoning.

The Court's analysis also rests on a misplaced view of *Williams*. The Court fixates on *Williams*' statement that § 2254(e)(2) "raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings." The Court emphasizes the first part of that statement while ignoring its qualification: that § 2254(e)(2) raised the bar for "prisoners who were not diligent." In other words, it is undisputed that the "bar for excusing a prisoner's failure to develop the state-court record" is an onerous one; the question is whether, in this context, a habeas petitioner has failed to develop the record in the first place. *Martinez* and *Trevino* make clear that habeas petitioners in Jones' and Ramirez's position do not lack diligence and are not at fault for the failures of their ineffective trial and postconviction counsel.

* * *

B

Much of the Court's opinion focuses not on the text of § 2254(e)(2), nor on the relevant precedents, but on what the Court views as AEDPA's unyielding purpose: ensuring that federal courts "afford unwavering respect" to state court criminal proceedings. The Court seriously errs by suggesting that AEDPA categorically prioritizes maximal deference to state-court convictions over vindication of the constitutional protections at the core of our adversarial system.

It is of course true that AEDPA's rules are designed to "ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." The enacting Congress, however, did not pursue these aims at all costs. AEDPA does not render state judgments unassailable, but strikes a balance between respecting state-court judgments and preserving the necessary and vital role federal courts play in "guard[ing] against extreme malfunctions in the state criminal justice systems." Indeed, " 'Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.' " Absent that role, what this Court regularly calls "the Great Writ" hardly would be worthy of the label.

The Court today supplants the balance Congress struck with its single-minded focus on finality. In doing so, it overstates the harm to States that would result from allowing petitioners to develop facts in support of *Martinez* claims. * * *

In the same vein, the Court bemoans the "sprawling evidentiary hearing" conducted by the District Court in Jones' case. Of course, the scope of the District Court's hearing (including evidence from medical experts, forensic experts, law enforcement personnel, and others) was necessary only because trial counsel failed to present any of that evidence during the guilt phase of Jones' capital case. F'ar from constituting an inappropriate and "wholesale relitigation of Jones's guilt," *ibid.*, the District Court's hearing was wide-ranging precisely because the breakdown of the adversarial system in Jones' case was so egregious.

The Court suggests that evidentiary hearings like Jones' will "encourag[e] prisoners" to " 'sandba[g]' state courts" by strategically holding back claims from state postconviction review to present them for the first time in federal court. That claim is odd, particularly in this context. It is a State's decision to divert trial-ineffectiveness claims from direct appeal to postconviction review, and then to provide ineffective postconviction counsel, that results in the failure to raise or develop such claims before state courts. No habeas petitioner or postconviction counsel could possibly perceive a strategic benefit

from failing to raise a meritorious trial-ineffectiveness claim in an available forum. Indeed, the whole thrust of Jones' and Ramirez's argument is that their Sixth Amendment claims were so obvious that their state postconviction attorneys were ineffective in failing to assert them.

On the other side of the ledger, the Court understates, or ignores altogether, the gravity of the state systems' failures in these two cases. To put it bluntly: Two men whose trial attorneys did not provide even the bare minimum level of representation required by the Constitution may be executed because forces outside of their control prevented them from vindicating their constitutional right to counsel. It is hard to imagine a more "extreme malfunctio[n]," than the prejudicial deprivation of a right that constitutes the "foundation for our adversary system."

Nor will the damage be limited to these two cases. Even before *Martinez*, this Court recognized that a trial record is "often incomplete or inadequate" to demonstrate inadequate assistance of counsel. A trial record "may contain no evidence of alleged errors of omission," like a failure sufficiently to investigate a case. For a court to discern "whether [any] alleged error was prejudicial," too, it is obvious that "additional factual development" may be required. The on-the-ground experience of capital habeas attorneys confirms this commonsense notion. The Court's decision thus reduces to rubble many habeas petitioners' Sixth Amendment rights to the effective assistance of counsel.

Contrary to the Court's account, the fundamental fairness concerns that arise from this particular type of breakdown are not unconditionally eclipsed by the need to accord finality and respect to state-court judgments. Finality interests are at their apex when the "essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." The effective assistance of counsel is one of those essential elements. When the effective assistance of counsel is absent, leaving a severely diminished basis for presuming fairness and accuracy, "finality concerns are somewhat weaker." Neither statute nor precedent supports the Court's assertion that the virtues of finality override fundamental fairness to such a degree that meaningful review of life-or-death judgments obtained through such deeply flawed proceedings should be foreclosed.

Ultimately, the Court's decision prevents habeas petitioners in States like Arizona from receiving any guaranteed opportunity to develop the records necessary to enforce their Sixth Amendment right to the effective assistance of counsel. For the subset of these petitioners who receive ineffective assistance both at trial and in state postconviction proceedings, the Sixth Amendment's guarantee is now an empty one. Many, if not most, individuals in this position will have

no recourse and no opportunity for relief. The responsibility for this devastating outcome lies not with Congress, but with this Court.

* * *

Text and precedent instruct that in States that limit review of trial-ineffectiveness claims to postconviction proceedings, habeas petitioners who receive ineffective assistance of both trial and postconviction counsel are not responsible for any failure to raise their substantial claim of trial ineffectiveness, nor for any "fail[ure] to develop" evidence in support of that claim under AEDPA's § 2254(e)(2). By holding otherwise, the Court not only extinguishes the central promise of *Martinez* and *Trevino*, but it makes illusory the protections of the Sixth Amendment. I respectfully dissent.

Notes and Questions

1. If *Davila v. Davis*, 582 U.S. 521 (2017), stepped on the brakes in the leeway granted to habeas petitioners, then *Shinn* puts the car in reverse and slams on the gas. *Martinez* and *Trevino* were ground-breaking decisions, allowing petitioners with ineffective post-conviction counsel to proceed with defaulted ineffective-assistance-of-trial-counsel claims. Just ten years later, *Shinn* makes it almost impossible to prove cause to excuse the default by prohibiting *Martinez* hearings to develop evidence supporting post-conviction ineffectiveness unless the evidence meets the strictures of § 2254(e)(2). And even if a petitioner somehow manages to prove cause on the state-court record, *Shinn* interprets § 2254(e)(2) to prohibit, except in very narrow circumstances, development of new evidence to support the underlying trial-ineffectiveness claim. In short, as Justice Sotomayor pointed out, *Shinn* "eviscerates" the gains achieved in *Martinez* and *Trevino*.

2. Why did the majority not simply overrule *Martinez*? *Martinez* was a 7-2 decision written by Justice Kennedy and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan. Did something change between 2012 and 2022 to cause the Chief Justice and Justice Alito to abandon Justices Breyer, Sotomayor, and Kagan and join Justice Thomas in such a drastic limitation of *Martinez*? The majority's reasoning suggests that *Martinez* is different because it involved application of the Court's equitable procedural-default doctrine, while *Shinn* involved interpretation of legislation designed to limit habeas review. Does this distinction hold water?

The majority explained that the "failed to develop" trigger for § 2254(e)(2) codified the Court's "standard of diligence" developed in cases prior to AEDPA—the familiar "cause and prejudice" standard. According to the majority, however, the codification extended only to the standard applied in the failure-to-develop-evidence context. Perhaps so. But when cause relates to post-conviction counsel's handling of an ineffective-assistance-of-trial-counsel claim, should not *Martinez* supply the applicable standard? After all, *Martinez* and *Shinn* involve the very same question—who is to blame for default relating to post-conviction counsel's handling of an ineffective-assistance-of-trial-counsel claim. How can cause exist in the *Martinez* context but not the *Shinn* context? As Justice Sotomayor emphasized, "[i]It

makes no sense to excuse a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings . . . but to fault the same petitioner for that postconviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim."

3. According to the majority, respondents "propose extending *Martinez* so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record under § 2254(e)(2)." Is respondent's argument really that broad? Can it be limited to the situation in *Shinn*, where post-conviction ineffectiveness excuses failure to develop the record relating to an ineffective-assistance-of-trial-counsel claim?

4. *Shinn* reverts to pre-*Martinez* times, when the Court treated one instance of ineffective assistance as bad (Sixth Amendment) but two as fine. The Court effectively says that having incompetent post-conviction counsel somehow cures the Sixth Amendment defect of having state-supplied incompetent counsel in the criminal trial because there is no constitutional entitlement to counsel in post-conviction proceedings. Of course, a host of constitutional defects disappear when trial counsel, through tactics, mistake, or waiver, but not incompetence, fails to object to evidence. Why should a Sixth Amendment defect remain actionable when defaulted by incompetent post-conviction counsel—counsel that the Constitution does not require?

Thus, even though ineffective assistance at trial taints the guilty verdict, post-conviction ineffectiveness expunges the taint. In that event, is there an argument that § 2254, as applied, violates the Sixth Amendment? Justice Sotomayor seems to think so, arguing that "the Court not only extinguishes the central promise of *Martinez* and *Trevino*, but * * * makes illusory the protections of the Sixth Amendment."

5. Respondent Barry Lee Jones, using evidence developed on habeas, convinced the federal habeas court that, but for trial counsel's ineffective failure to investigate the case, there was "a reasonable probability that the jury would not have unanimously convicted [him.]" Had *Shinn* followed *Martinez* and allowed post-conviction counsel's ineffectiveness to excuse the defaulted trial-ineffectiveness claim, Jones likely would face retrial rather than execution. And imagine if Jones were acquitted on retrial. That is the tragedy of *Shinn*.

b. What constitutes prejudice?

Following *Strickland*, the Court reaffirmed the definition of "prejudice" as meaning that there is a "reasonable probability" that there would have been a different result if not for the constitutional violation. See *Lafler v. Cooper*, 566 U.S. 156 (2012). Note that the "result" at issue depends on the case—it could be a jury verdict of guilty; it could be a death sentence rather than life, or, as in *Lafler*, it could be that the petitioner would have taken a more favorable plea offer than the one he ultimately took if not for his lawyer's failure to communicate it to him.

5. The Problem of Successive Petitions

Sanders v. United States, 373 U.S. 1 (1963) set permissive standards for second or successive habeas petitions. The court could dismiss such petitions without reaching the merits only if an earlier petition presenting the same claim had been denied on the merits *and* the ends of justice would not be served by reaching the merits of the subsequent petition. The court could deny subsequent applications based on new grounds or on grounds not previously determined on the merits only if the petitioner was guilty of abuse of the writ. If the court found that the failure to raise the present claim in a previous application was a deliberate bypass within the meaning of *Fay v. Noia* (1963), that was an abuse. Thus, res judicata, which precludes not only claims that were litigated but also claims that might have been litigated in an earlier lawsuit, had only limited application in habeas cases. In 1966, Congress essentially codified this standard in an amendment to § 2244(b).

Coleman formally interred *Fay v. Noia*. *McCleskey v. Zant*, 499 U.S. 467 (1991) did the same to *Sanders* by applying the cause-and-prejudice standard to successive petitions:

> We conclude from the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts. We have held that a procedural default will be excused upon a showing of cause and prejudice. We now hold that the same standard applies to determine if there has been an abuse of the writ through inexcusable neglect.
>
> In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. Objective factors that constitute cause include " 'interference by officials' " that makes compliance with the state's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "ineffective assistance of counsel * * * is cause." Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Once the petitioner has established cause, he must show " 'actual prejudice' resulting from the errors of which he complains."
>
> Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We

have described this class of cases as implicating a fundamental miscarriage of justice.

The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse of the writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim. Application of the cause and prejudice standard in the abuse of the writ context does not mitigate the force of *Teague v. Lane*, which prohibits, with certain exceptions, the retroactive application of new law to claims raised in federal habeas. Nor does it imply that there is a constitutional right to counsel in federal habeas corpus.

In 1996, AEDPA amended the language of § 2244 that governed successive petitions and abuse of the writ. Whether one considers *McClesky* still to be good law depends on whether one reads the new language to codify *McClesky* or to impose even greater restrictions on successive petitions. The applicable provisions of § 2244 read as follows:

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilt of the underlying offense.

Notice that the statute does not use the language "cause and prejudice." Review the guidelines for cause and prejudice described in note 4 following *Coleman*. What similarities do you see between the guidelines and the language of the statute? What differences? Do you think the statute imposes any new restrictions on successive petitions? In an extended discussion, *Daniels v. United States*, 254 F.3d 1180, 1195–98 (10th Cir. 2001), concluded that AEDPA replaces the old cause-and-prejudice and *Teague* standards but then interprets the new language to mean almost the same thing as the old standards. Section 2244(b)(3) contains one requirement that is indisputably new. Before filing a second or successive petition permitted under (b)(2), the applicant must receive permission from the appropriate court of appeals.

As difficult as the questions in the preceding paragraph are to answer, § 2244(b) poses even more difficult questions when petitioners claim they are actually innocent. In a series of cases decided before AEDPA where petitioners claimed they could make compelling showings of innocence, the Court relied upon its general equitable powers to establish standards for entertaining a first, second or successive habeas petition despite a state procedural default or other defect that would normally preclude federal review. Moreover, if the petitioner was able to present strong evidence of innocence in a second or successive federal petition, the Court did not pay much attention to whether the petition repeated a claim raised in an earlier federal petition or presented a claim that might have been but was not raised in the earlier petition. The cases were not consistent, however, in specifying the burden of proof a petitioner must satisfy to obtain relief.

Schlup v. Delo, 513 U.S. 298 (1995), addressed this inconsistency. *Schlup* held that a person whose petition would otherwise be barred as a successive petition or for some procedural default could have the petition heard because of "actual innocence" by showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." The Court made clear it was adopting a "more likely than not" or preponderance standard rather than the "clear and convincing evidence" standard the dissenters proposed.

Consider again the language of § 2244(b). Note that (b)(1) and (b)(2) distinguish between claims presented in a second or successive petition that were presented in a prior application and claims that were not. Under (b)(1), claims that were previously presented "shall be dismissed," period. Under (b)(2), claims that were not presented can be heard if the conditions of (b)(2)(A) or (B) can be satisfied.

In *Magwood v. Patterson*, 561 U.S. 320 (2010), an oddly split Court announced one way around § 2244(b)'s apparent prohibition on second or successive petitions. Following his state conviction and death sentence for murder, Magwood obtained federal habeas relief from the sentence because the state court had not considered mitigating circumstances. The federal habeas court upheld the conviction but granted the writ conditionally because of the sentencing error. The state court held a new sentencing hearing, finding Magwood's age, mental state and lack of criminal history to be mitigating factors. It nonetheless reimposed the death penalty.

Magwood appealed within the state system, arguing that the statute failed to give him fair warning that his offense was punishable by death[8] and that his attorney at the resentencing was constitutionally ineffective. The state argued that Magwood could have raised the fair-warning claim in the federal challenge to his first sentence and that his failure to do so made that part of his challenge to the new sentence a "second or successive" petition. Justice Thomas, writing for the Court (with Justices Stevens, Scalia, Breyer and Sotomayor), held that the new sentencing gave rise to an entirely new judgment within the meaning of § 2244(a). The majority thus restricted the "second or successive" language of § 2244(b) to petitions directed at the same judgment. The majority rejected the state's (and the dissent's) argument that § 2244(b) contemplates only a single opportunity to raise a *claim*, finding instead that the phrase "second or successive" modified "application," not "claim."

The dissent argued that § 2244(b)(2)'s reference to claims rather than applications mandated rejection of Magwood's application. Thus, what separated the Justices was whether the limiting language referred to claims, applications or judgments. Perhaps the majority had the better of the argument here, on a strictly (and, the dissent argued, unrealistically) textual approach, given the statute's wording: "a claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed." Magwood could not have raised the fair-warning challenge to the second judgment in his habeas application in opposition to the first. The dissent argued that the Court's exception was actually atextual and that the Court should have treated the case under its abuse-of-the-writ jurisprudence that antedated AEDPA.

State prisoners sometimes seek to avoid the severe restrictions on successive habeas petitions by raising their claims in a plenary civil action under 42 U.S.C. § 1983. Although the federal courts generally disallow this gambit, it has been successful in a few instances. *Hill v.*

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[8] Magwood argued that the state penal statute then in effect gave insufficient warning that the death sentence was possible even in the absence of any aggravating circumstance.

McDonough, 547 U.S. 573 (2006), allowed a Florida death-row inmate to bring a § 1983 action challenging the lethal injection procedure the state was likely to use on him. Hill claimed the procedure would cause him severe pain, thus violating the Eighth Amendment's prohibition of cruel and unusual punishments. Because Hill did not challenge the lethal injection sentence as a general matter and appeared to leave the state free to use an alternative lethal injection procedure, the lawsuit would not actually bar implementation of the sentence and thus could proceed.

The proper line of demarcation between habeas corpus and § 1983 claims has concerned the Court for some time. Many of the procedural restrictions on habeas corpus do not exist in § 1983 cases, thus giving state prisoners an incentive to raise their claims under that statute. The Supreme Court first considered the issue in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). In 1973, the main impediment to access to a federal forum in habeas cases was the requirement that a prisoner exhaust available state remedies before proceeding to federal court. Because there is no exhaustion requirement in § 1983 actions,[9] they provided an attractive alternative to habeas corpus. *Preiser* set the dividing line as follows: "[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release * * * his sole federal remedy is a writ of habeas corpus." Challenges to the conditions of confinement, by contrast, were appropriate for § 1983 actions.

The *Preiser* standard worked reasonably well in the main, but applying it was sometimes uncertain. The lethal injection cases provide a dramatic example. *Nelson v. Campbell,* 541 U.S. 637 (1994), presaged *Hill v. McDonough*. Three days before he was to die by lethal injection, Nelson filed a § 1983 action in federal court. Nelson had severely compromised peripheral veins from drug abuse, and he challenged the so-called "cut-down" procedure the warden planned to use to gain access to a vein as cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eighth Amendment. The district court and court of appeals held Nelson's action the "functional equivalent" of a habeas corpus proceeding and denied relief because Nelson had filed a previous federal habeas petition and could not surmount the restrictions on successive petitions.

In her opinion for a unanimous Court, Justice O'Connor explained the difficulty in applying the *Preiser* standard to Nelson's claims. She noted that the labels "conditions of confinement" and "fact or duration" of confinement were not "particularly apt." Nor did a suit

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[9] *See* Patsy v. Board of Regents, 457 U.S. 496 1982), text at 775; Monroe v. Pape, 365 U.S. 167 (1961), text at 560.

seeking to enjoin a particular means of execution directly call into question the "fact" or "validity" of the sentence. On the other hand, when a state has directed that executions be by lethal injection, the Court may rule that a suit seeking to enjoin lethal injections permanently is a challenge to the fact of the sentence itself. In addition, while it "makes little sense" to talk about the "duration" of a death sentence, allowing a § 1983 action clearly delays imposition of the sentence. Ultimately, the Court held Nelson's lawsuit could proceed, reasoning that Nelson was not actually challenging the sentence itself. Because the "cut-down" procedure was not necessary to the lethal injection, the sentence could be implemented by other means.

The analysis in *Hill v. McDonough* proceeded along similar lines. Although Hill challenged the chemical injection sequence rather than a surgical procedure prior to the injections, he did not actually ask to stop his execution or to change the sentence. Hill, like Nelson, sought only to enjoin state officials from executing him in the manner they presently intended.

Bannister v. Davis, 140 S. Ct. 1698 (2020), held that a motion by a habeas petitioner pursuant to Fed. R. Civ. P. 59(e) is not a "second or successive application" within the meaning of 28 U.S.C. § 2244(b). Such a motion seeks to correct a habeas court's judgment immediately after its issuance and raises no new claims.

6. Statute of Limitations

Statute of Limitations AEDPA imposes a one-year limitation period for filing a federal habeas petition, measured generally (with certain limited exceptions) from the time direct state review is final. The statute tolls the limitation for the time during which a properly filed application for state collateral review is pending. The statutory provisions read as follows:

> § 2244. Finality of Determination
>
> * * * *
>
> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States if removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Several issues as to the proper interpretation of these provisions reached the Supreme Court.

McQuiggin v. Perkins, 569 U.S. 383 (2013), presented the issue of whether a showing of actual innocence affects the statute of limitations. By a 5–4 vote, the Supreme Court held that the "fundamental miscarriage of justice" exception (*i.e.*, actual innocence) applies not only to the judge-made doctrine of procedural default, but to § 2244(d)(1) as well.

Writing for the majority, Justice Ginsburg said it would be ironic not to recognize an actual innocence exception to AEDPA's statute of limitations. When a federal court recognizes an exception to the procedural default doctrine, it effectively excuses a failure to fulfill state procedure. The AEDPA limitation is a federal procedural requirement. "It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States," she wrote.

McQuiggin had filed for federal habeas relief after three exculpatory post-trial affidavits had been sworn out, but he waited almost six years after the last of the three was executed. He clearly was not entitled to "equitable tolling" of the one-year statute of limitations, for he had not acted diligently. But the Supreme Court distinguished equitable tolling from an application of the fundamental-miscarriage-of-justice exception to the statute of limitations. The latter constitutes an "equitable exception" to the statute, and therefore diligence was not required.

The Court made it clear that the actual-innocence exception to the statute of limitations was only a "gateway" exception, as with the actual-innocence exception to the procedural-default doctrine. In other words, when a petitioner brings forward evidence in the face of which a reasonable jury probably would not have convicted, he is entitled to proceed with his showing that one of his constitutional rights

was violated in a prejudicial manner, procedural violation notwithstanding. The *McQuiggin* Court stressed that it was not reaching the question of whether a petitioner is ever entitled to a "freestanding" claim of innocence, which would be an entitlement to habeas relief based on the proof of innocence alone without any accompanying violation of federal law. Recall that § 2254(d) limits the grant of federal habeas relief to violations of clearly established federal law.

Day v. McDonough, 547 U.S. 198 (2006), held that district courts are permitted, but not obliged, to consider the timeliness of a state prisoner's habeas petition *sua sponte*. In answering Day's petition, the state failed to raise § 2244(d)'s one-year limitation as a defense. The state mistakenly overlooked controlling Eleventh Circuit precedent, which, if applied, would require dismissal of the petition as untimely. A federal Magistrate Judge noticed the state's computation error and recommended the petition be dismissed. The district court adopted the recommendation, and the Eleventh Circuit affirmed.

Day argued that under the applicable habeas corpus rules, the Federal Rules of Civil Procedure should govern. Under Federal Rules 8(c) and 12(b), a defendant waives a statute of limitations defense that is not raised in its answer. The Court declined to apply these rules in this situation, applying a more flexible, discretionary approach. Where the state had not affirmatively decided to waive the defense and failure to raise it resulted from a mathematical error, the Court thought dismissal was appropriate. The Court noted that instead of acting on its own motion, the Magistrate Judge might have invited the state to amend its answer when the Judge noticed the computation error. Because this procedure would have resulted in dismissal of the petition, it seemed unreasonable to require a different result simply because the Magistrate Judge acted *sua sponte*.

Wood v. Milyard, 566 U.S. 463 (2012), held that federal appellate courts also have discretion "to raise a forfeited timeliness defense on their own initiative." As in *Day*, the Court drew a line between forfeiture and waiver (which it defined as "the intentional relinquishment or abandonment of a known right"), ruling that the Tenth Circuit abused its discretion when it raised on its own motion a timeliness defense that the State clearly waived in the district court. The State "chose, in no uncertain terms, to refrain from interposing a timeliness 'challenge' to Wood's petition. The District Court * * * reached and decided the merits of the petition. The Tenth Circuit should have done so as well."

Jimenez v. Quarterman, 555 U.S. 113 (2009), held that a state court's decision during collateral review to grant the defendant the right to file an out-of-time direct appeal postponed the date on which a defendant's state conviction becomes final under § 2241(d)(1)(A). A Texas court convicted Jimenez of burglary. His appellate attorney filed a motion to be relieved of the representation, pursuant to *Anders*

v. California, 386 U.S. 738 (1967), stating that he was unable to find any non-frivolous issues on which to base an appeal. He left a copy of the motion papers and a letter to Jimenez at the county jail, advising him that he was entitled to file a pro se brief. Jimenez, however, had been transferred to a state facility and did not receive the papers. He also did not receive the later appellate court order dismissing his appeal. Subsequently, Jimenez filed a state collateral proceeding claiming he was denied a meaningful appeal because he did not have a chance to file a *pro se* appellate brief. The state court agreed and allowed Jimenez to file an out-of-time direct appeal. Many years passed by the time Jimenez finished the appeal and another state collateral proceeding. When he filed a federal habeas petition, the district court held that § 2244(d)(1)'s one-year limitation period ran from one month following dismissal of Jimenez's original direct appeal because his right to seek discretionary review expired at that time. The Court of Appeals affirmed. The Supreme Court reversed, holding that Jimenez's state conviction became final for purposes of § 2241(d)(1)(A) when his actual appeal concluded.

28 U.S.C. 2244(d)(2) tolls the one-year limitation period during the time when state collateral challenges are pending. In *Carey v. Saffold*, 536 U.S. 214 (2002), the Court held that the proceeding is "pending" for § 2244(d)(2) purposes during the period from a lower state court's final judgment in a collateral proceeding to the filing of a notice of appeal to a higher court. Most states require an appellant to file a notice of appeal within a few days of final judgment, so tolling the limitation period does not undermine the reasons for having one. California follows a different procedure. It permits the petitioner to file new original petitions in successively higher state courts as long as they come within a "reasonable time." In *Carey*, petitioner promptly filed after an adverse decision in the California Superior Court, but when the California Court of Appeal ruled against him, he allowed 4½ months to elapse before seeking relief from the California Supreme Court, which denied Saffold's petition "on the merits and for lack of diligence." One week after that decision, Saffold sought federal habeas relief.

When the case reached Washington, the Court vacated the judgment for the petitioner and directed the Ninth Circuit to determine whether the California Supreme Court thought the appeal was timely and denied it on the merits or thought the appeal was untimely and denied it for that reason. The United States Supreme Court stated that the words "lack of diligence" did not necessarily mean Saffold was untimely seeking relief from the California Supreme Court, because the lack of diligence might have referred to some earlier delay not relevant to whether Saffold timely sought relief from the California Supreme Court. The five-member majority also observed that the words "on the merits" might not have necessarily meant the application was timely, because courts sometimes deny a case on the merits

even though it is untimely. Unfortunately, the Court left it unclear how the Ninth Circuit should proceed if it could not rely on any of the words the California Supreme Court used. The majority did suggest that the Ninth Circuit might want to certify the timeliness question to the California Supreme Court for clarification. This rather bizarre approach caused Justice Kennedy's dissent to heap some perhaps well-deserved scorn on the majority's method of analysis.

Rhines v. Weber, 544 U.S. 269 (2005), addressed the interplay between the rules governing mixed petitions and the one-year statute of limitations in 28 U.S.C. § 2244(d). If a state prisoner files a petition within the limitation period, and the district court determines it to be a mixed petition after the one-year period has run, may the petitioner exercise the *Rose v. Lundy* option of returning to state court to present the unexhausted claims, later to present all of his claims to the federal court, or does § 2244(d) bar a return to federal court? In *Rhines*, the district court granted the petitioner's motion to hold his habeas petition in abeyance (rather than dismiss it) while he returned to state court to present his unexhausted claims, but the Court of Appeals held the district had no authority to do this except in "truly exceptional" cases.

The Supreme Court held that a stay in these circumstances may be appropriate, although it imposed several conditions. The Court thought a stay may be appropriate because a contrary rule would put petitioners in an unfair position. If a petitioner files a timely mixed petition, and the court dismisses it under *Rose*, the petitioner is likely to forfeit federal review of any of his claims because of the one-year limitation period. Thus, the petitioner's only course would be to drop his unexhausted claims, forfeiting any chance for federal court review of those claims. The Court cautioned against too frequent use of stay and abeyance, which it thought would undermine AEDPA's twin goals of reducing delays in the execution of sentences and streamlining habeas proceedings. Thus, a stay should be granted only if (1) there was "good cause" for the failure to exhaust all claims; (2) the unexhausted claims are not plainly meritless; (3) the petitioner complies with any time limits set by the district court for pursuing state review; and (4) the petitioner does not engage in "abusive litigation tactics or intentional delay."

When a properly-filed petition for state post-conviction relief tolls the statute of limitations, it is referred to as "statutory tolling." In recent years, the Court has begun to explore tolling on the basis of fairness— referred to as "equitable tolling." In *Holland v. Florida*, 560 U.S. 631 (2010), the Court explicitly held that equitable tolling of § 2244(d)(1)'s one-year limitation period is possible, agreeing with the eleven circuits (including the Eleventh) that had previously considered the question. Following his conviction and unsuccessful attempt to get state post-conviction relief, Holland had repeatedly directed counsel to seek federal habeas relief. Apparently, counsel did not do

the research necessary to inform himself of the filing deadline, although Holland's directions to counsel even identified the applicable legal rules. Counsel also failed to respond to Holland's requests for information so Holland could monitor the case. Finally, counsel failed to communicate with Holland for several years.[10] On several occasions, Holland had attempted to get the state courts and the state bar to remove the attorney from the case. The Eleventh Circuit ruled that the facts could not constitute "extraordinary circumstances" justifying an equitable toll unless Holland could show counsel's dishonesty, bad faith, divided loyalty, mental impairment or some similar circumstance.

The Supreme Court reversed. The majority noted the Court's prior ruling that the limitation period was not jurisdictional and recognized the rebuttable presumption (not defeated here) in favor of equitable tolling. Such tolling is not automatic, however. A petitioner must "show[ ] '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." The Court found the Eleventh Circuit's restrictions unreasonably rigid and incongruent with the spirit of equity, refusing to read *Coleman v. Thompson* (page 1098) as demanding a *per se* approach. Said the Court:

> In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling. And, given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments. Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove "egregious" and can be "extraordinary" even though the conduct in question may not satisfy the Eleventh Circuit's rule.

Because neither lower court had considered equitable tolling under the proper standard, the Court remanded for further proceedings.

A petitioner is not entitled to a stay of federal habeas based on his mental incompetence. In *Ryan v. Valencia-Gonzalez*, 568 U.S. 57 (2013), the Supreme Court unanimously held that neither 18 U.S.C. § 3599 nor § 4241 creates a right to such a stay.

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[10] For an article criticizing both Holland's counsel and the state supreme Court, as well as recommending a system for monitoring capital post-conviction counsel, see Celestine Richards McConville, *Yikes! Was I Wrong? A Second Look at the Viability of Monitoring Capital Post-Conviction Counsel*, 64 ME. L. REV. 485 (2012).

The Ninth Circuit had held that § 3599, which guarantees federal habeas petitioners on death row the right to federally funded counsel, by implication created a right to effective counsel during federal habeas proceedings. That right was not fully effective unless the petitioner were able to assist counsel in the representation, according to the Ninth Circuit. The Supreme Court disagreed. Effective representation at trial requires that the petitioner be competent to assist in his defense, but habeas proceedings are limited to the record. "Given the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence," wrote Justice Thomas.

The Sixth Circuit had held that § 4241 creates a right to inmate competence during federal habeas. Justice Thomas made short work of that holding, pointing out that § 4241 by its own terms applies only to trial proceedings *prior to sentencing* and at any time *after the commencement of probation or supervised release*. A habeas petitioner has already been sentenced, and, Justice Thomas said, by definition, is incarcerated, not on probation.

7. Habeas petition v. § 1983 action

Can prisoners sidestep congressional limits on habeas simply by filing a § 1983 action instead of a habeas petition? The answer is "sometimes." The Court first addressed this issue in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), which held that claims alleging unconstitutional denial of good-time credit sound exclusively in habeas because they relate to the "fact or duration of [an inmate's] confinement[.]" *Preiser* relied on "linguistic specificity [in the habeas statute], history, and comity * * * to find an implicit exception from § 1983's otherwise broad scope for actions that lie 'within the core of habeas corpus.' " *Wilkinson v. Dotson*, 544 U.S. 74 (2005) (quoting *Preiser*). Such actions include those that "challenge[] the validity of a conviction or sentence." *Nance v. Ward*, 142 S. Ct. 2214 (2022).

Nance, the Court's latest foray into this issue, addressed the proper vehicle for method-of-execution claims. Capital inmates seeking to challenge the state's planned method of execution must not only prove that the method creates "a substantial risk of serious harm," they also "must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip v. Gross*, 576 U.S. 863 (2015). Prior to *Nance*, the Court had ruled that § 1983 was appropriate for method-of-execution challenges involving alternative methods authorized under the state's law. Such actions were not "core"; even if the inmate succeeds with the challenge, the state can implement the death sentence.

Nance concerned an alternative execution method *not* authorized under the executing-state's laws, which means that if the inmate

demonstrates that the alternative method is "feasible" and "readily implemented," the state must change its law before implementing the death sentence. Note that a method-of-execution challenge does not contest the *validity* of the death sentence itself, as *Nance* made clear:

> The prisoner is not challenging the death sentence itself; he is taking the validity of that sentence as a given. And he is providing the State with a veritable blueprint for carrying the death sentence out. If the inmate obtains his requested relief, it is because he has persuaded a court that the State could readily use his proposal to execute him. The court's order therefore does not * * * '*necessarily* prevent' the State from carrying out its execution." (Emphasis in original).

Accordingly, *Nance* held that § 1983 is an appropriate vehicle to pursue method-of-execution claims, explaining that the necessity of a statutory amendment to carry out the death sentence "does not turn [the claim] from one contesting a method of execution into one disputing the underlying death sentence."

Test Your Knowledge

To assess your understanding of the material in this chapter, take the quiz using the link at the end of Chapter 11 in the electronic copy of the text.