MODERN CONSTITUTION LAW

2024-2026 Supplement

BENNETT L. GERSHMAN

Chapter 1 – Judicial Review

§ 1-1 The Origins

At the end of The Federalist Papers (p. 11), add the following:

TRUMP V. CASA, INC.

145 S. Ct. 2540 (2025)

Justice BARRETT delivered the opinion of the Court.

The United States has filed three emergency applications challenging the scope of a federal court's authority to enjoin Government officials from enforcing an executive order. Traditionally, courts issued injunctions prohibiting executive officials from enforcing a challenged law or policy only against the plaintiffs in the lawsuit. The injunctions before us today reflect a more recent development: district courts asserting the power to prohibit enforcement of a law or policy against *anyone*. These injunctions—known as "universal injunctions"—likely exceed the equitable authority that Congress has granted to federal courts.1 We therefore grant the Government's applications to partially stay the injunctions entered below.

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1 Such injunctions are sometimes called "nationwide injunctions," reflecting their use by a single district court to bar the enforcement of a law anywhere in the Nation. But the term "universal" better captures how these injunctions work. Even a traditional, parties-only injunction can apply beyond the jurisdiction of the issuing court. *Steele v. Bulova Watch Co.* (1952) (When "exercising its equity powers," a district court "may command persons properly before it to cease or perform acts outside its territorial jurisdiction"). The difference between a traditional injunction and a universal injunction is not so much *where* it applies, but *whom* it protects: A universal injunction prohibits the Government from enforcing the law against *anyone*, anywhere. H. Wasserman, "Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate, 22 Lewis & Clark L. Rev. 335, 338 (2018).

I

The applications before us concern three overlapping, universal preliminary injunctions entered by three different District Courts...The plaintiffs—individuals, organizations, and States—sought to enjoin the implementation and enforcement of President Trump's Executive Order No. 14160.2. See Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (2025). The Executive Order identifies circumstances in which a person born in the United States is not "subject to the jurisdiction thereof" and is thus not recognized as an American citizen. Specifically, it sets forth the "policy of the United States" to no longer issue or accept documentation of citizenship in two scenarios: "(1) when a person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when a person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth." The Executive Order also provides for a 30-day ramp-up period. During that time, the order directs executive agencies to develop and issue public guidance regarding the order's implementation.

The plaintiffs filed suit, alleging that the Executive Order violates the Fourteenth Amendment's Citizenship Clause, § 1, as well as § 201 of the Nationality Act of 1940. In each case, the District Court concluded that the Executive Order is likely unlawful and entered a universal preliminary injunction barring various executive officials from applying the policy to *anyone* in the country. And in each case, the Court of Appeals denied the Government's request to stay the sweeping relief.

The Government has now filed three nearly identical applications seeking to partially stay the universal preliminary injunctions and limit them to the parties. The applications do not raise—and thus we do not address—the question whether the Executive Order violates the Citizenship Clause or Nationality Act. The issue before us is one of remedy: whether, under the

Judiciary Act of 1789, federal courts have equitable authority to issue universal injunctions.

II

The question whether Congress has granted federal courts the authority to universally enjoin the enforcement of an executive or legislative policy plainly warrants our review, as Members of this Court have repeatedly emphasized. On multiple occasions, and across administrations, the Solicitor General has asked us to consider the propriety of this expansive remedy...

It is easy to see why. By the end of the Biden administration, we had reached "a state of affairs where almost every major presidential act was immediately frozen by a federal district court." W. Baude & S. Bray, Comment, Proper Parties, Proper Relief, 137 Harv. L. Rev. 153, 174 (2023). The trend has continued: During the first 100 days of the second Trump administration, district courts issued approximately 25 universal injunctions. As the number of universal injunctions has increased, so too has the importance of the issue.

III

The Government is likely to succeed on the merits of its argument regarding the scope of relief. A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power. [4]

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4 Our decision rests solely on the statutory authority that federal courts possess under the Judiciary Act of 1789. We express no view on the Government's argument that Article III forecloses universal relief.

The Judiciary Act of 1789 endowed federal courts with jurisdiction over "all suits … in equity," § 11, and still today, this statute "is what authorizes the federal courts to issue equitable remedies." Though flexible, this equitable authority is not freewheeling. We have held that the statutory grant encompasses only those sorts of equitable remedies "traditionally accorded by courts of equity" at our country's inception. *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). We must therefore ask whether universal injunctions are sufficiently "analogous" to the relief issued " 'by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.' " *Grupo Mexicano.*

The answer is no: Neither the universal injunction nor any analogous form of relief was available in the High Court of Chancery in England at the time of the founding. Equity offered a mechanism for the Crown "to secure justice where it would not be secured by the ordinary and existing processes of law." Eventually, the Crown instituted the "practice of delegating the cases" that "came before" the judicial prerogative "to the chancellor for his sole decision." This "became the common mode of dealing with such controversies."

Of importance here, suits in equity were brought by and against individual parties. Indeed, the "general rule in Equity was that all persons materially interested in the suit were to be made parties to it." J. Story, *Commentaries on Equity Pleadings* § 72, p. 74 (2d ed. 1840). Injunctions were no exception…Under longstanding equity practice in England, there was no remedy "remotely like a national injunction."

Nor did founding-era courts of equity in the United States chart a different course. See 1 Pomeroy, *Equity Jurisprudence* § 41, at 33–34. If anything, the approach traditionally taken by federal courts cuts *against* the

existence of such a sweeping remedy. Consider *Scott* v. *Donald* (1897), where the plaintiff successfully challenged the constitutionality of a law on which state officials had relied to confiscate alcohol that the plaintiff kept for personal use. Although the plaintiff sought an injunction barring enforcement of the law against both himself and anyone else "whose rights were infringed and threatened" by it, this Court permitted only a narrower decree between "the parties named as plaintiff and defendants in the bill."

In the ensuing decades, we consistently rebuffed requests for relief that extended beyond the parties. As Justice Nelson put it while riding circuit, "there is scarcely a suit at law, or in equity, … in which a general statute is interpreted, that does not involve a question in which other parties are interested." *Cutting v. Gilbert*, 6 F.Cas. 1079, 1080 (No. 3,519) (CC SDNY 1865). But to allow all persons subject to the statute to be treated as parties to a lawsuit "would confound the established order of judicial proceedings."

Our early refusals to grant relief to nonparties are consistent with the party-specific principles that permeate our understanding of equity… In fact, universal injunctions were not a feature of federal-court litigation until sometime in the 20th century. The D. C. Circuit issued what some regard as the first universal injunction in 1963. See *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 535 (1963) (enjoining the Secretary of Labor "with respect to the entire [electric motors and generators] industry," not just the named plaintiffs to the lawsuit). Yet such injunctions remained rare until the turn of the 21st century, when their use gradually accelerated.) One study identified approximately 127 universal injunctions issued between 1963 and 2023. See District Court Reform: Nationwide Injunctions, 137 Harv. L. Rev. 1701, 1705 (2024). Ninety-six of them—over three quarters—were issued during the administrations of President George W. Bush, President Obama, President Trump, and President Biden.

The bottom line? The universal injunction was conspicuously nonexistent for most of our Nation's history. Its absence from 18th- and 19th-century equity practice settles the question of judicial authority. That the

absence continued into the 20th century renders any claim of historical pedigree still more implausible. Even during the "deluge of constitutional litigation that occurred in the wake of *Ex parte Young* (1908), throughout the *Lochner* Era, and at the dawn of the New Deal," universal injunctions were nowhere to be found. Had federal courts believed themselves to possess the tool, surely they would not have let it lie idle.

Respondents raise several counterarguments, which the principal dissent echoes. First, they insist that the universal injunction has a sufficient historical analogue: a decree resulting from a bill of peace. Second, they maintain that universal injunctions are consistent with the principle that a court of equity may fashion complete relief for the parties. Third, they argue that universal injunctions serve important policy objectives.

In an effort to satisfy *Grupo Mexicano*'s historical test, respondents claim that universal injunctive relief *does* have a founding-era forebear: the decree obtained on a "bill of peace," which was a form of group litigation permitted in English courts. This bill allowed the Chancellor to consolidate multiple suits that involved a "common claim the plaintiff could have against multiple defendants or "some kind of common claim that multiple plaintiffs could have against a single defendant." Universal injunctions are analogous to this traditional equitable device, respondents say, so federal courts have authority under the Judiciary Act to issue them.

The analogy does not work. True, "bills of peace allowed courts of equity to adjudicate the rights of members of dispersed groups without formally joining them to a lawsuit through the usual procedures." *Arizona v. Biden*, 40 F.4th 375, 397 (CA6 2022) (Sutton, C. J., concurring). Unlike universal injunctions, which reach *anyone* affected by legislative or executive action—no matter how large the group or how tangential the effect—a bill of peace involved a "group [that] was small and cohesive," and the suit did not "resolve a question of legal interpretation for the entire realm." And unlike universal injunctions, which bind only the parties to the suit, decrees obtained on a bill of peace "would bind all members of the group, whether they were present in

the action or not." As Chief Judge Sutton aptly put it, "the domesticated animal known as a bill of peace looks nothing like the dragon of nationwide injunctions." *Arizona*, 40 F.4th at 397.

The bill of peace lives in modern form, but not as the universal injunction. It evolved into the modern class action, which is governed in federal court by Rule 23 of the Federal Rules of Civil Procedure. And while Rule 23 is in some ways "more restrictive of representative suits than the original bills of peace," it would still be recognizable to an English Chancellor. Rule 23 requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties who adequately protect the interests of the class. The requirements for a bill of peace were virtually identical. None of these requirements is a prerequisite for a universal injunction.

Rule 23's limits on class actions underscore a significant problem with universal injunctions. A "properly conducted class action," we have said, "can come about in federal courts in just one way—through the procedure set out in Rule 23. Why bother with a Rule 23 class action when the quick fix of a universal injunction is on the table?

The taxpayer suit is a similarly inadequate historical analogy. In a successful taxpayer suit, a court would enjoin the collection of an unlawful tax against "taxpayers joined as co-plaintiffs, or by one taxpayer suing on behalf of himself and all others similarly situated." To be sure, some state courts would occasionally "enjoin the enforcement and collection" of taxes against an "entire community," even when a "single taxpayer sued on his own account." But the practice of extending relief "with respect to any taxpayer" was not adopted by state courts until the mid-19th century, and even then, not all states were willing to provide such sweeping relief. This post-founding practice of some state courts thus sheds minimal light on federal courts' equitable authority under the Judiciary Act. What is more, in *Frothingham* v. *Mellon* (1923), we refused to allow a single taxpayer to challenge a federal

appropriations act. That counsels against placing much, if any, reliance on taxpayer suits as justification for the modern universal injunction.

Respondents contend that universal injunctions—or at least *these* universal injunctions—are consistent with the principle that a court of equity may fashion a remedy that awards complete relief. We agree that the complete-relief principle has deep roots in equity. But to the extent respondents argue that it justifies the award of relief to nonparties, they are mistaken.

"Complete relief" is not synonymous with "universal relief." It is a narrower concept: The equitable tradition has long embraced the rule that courts generally "may administer complete relief *between the parties*." While party-specific injunctions sometimes "advantage nonparties," they do so only incidentally.

Consider an archetypal case: a nuisance in which one neighbor sues another for blasting loud music at all hours of the night. To afford the plaintiff complete relief, the court has only one feasible option: order the defendant to turn her music down—or better yet, off. That order will necessarily benefit the defendant's surrounding neighbors too; there is no way "to peel off just the portion of the nuisance that harmed the plaintiff." But while the court's injunction might have the *practical effect* of benefiting nonparties, "that benefit is merely incidental." As a matter of law, the injunction's protection extends only to the suing plaintiff—as evidenced by the fact that only the plaintiff can enforce the judgment against the defendant responsible for the nuisance. If the nuisance persists, and another neighbor wants to shut it down, she must file her own suit.

The individual and associational respondents are therefore wrong to characterize the universal injunction as simply an application of the complete-relief principle. Under this principle, the question is not whether an injunction offers complete relief to *everyone* potentially affected by an allegedly unlawful act; it is whether an injunction will offer complete relief *to the plaintiffs before the court*. Here, prohibiting enforcement of the Executive

Order against the child of an individual pregnant plaintiff will give that plaintiff complete relief: Her child will not be denied citizenship. Extending the injunction to cover all other similarly situated individuals would not render *her* relief any more complete.

The complete-relief inquiry is more complicated for the state respondents, because the relevant injunction does not purport to directly benefit nonparties. Instead, the District Court for the District of Massachusetts decided that a universal injunction was necessary to provide the States *themselves* with complete relief. The States maintain that the District Court made the right call.

As the States see it, their harms—financial injuries and the administrative burdens flowing from citizen-dependent benefits programs—cannot be remedied without a blanket ban on the enforcement of the Executive Order. Children often move across state lines or are born outside their parents' State of residence. Given the cross-border flow, the States say, a "patchwork injunction" would prove unworkable, because it would require them to track and verify the immigration status of the parents of every child, along with the birth State of every child for whom they provide certain federally funded benefits.

The Government—unsurprisingly—sees matters differently. It retorts that even if the injunction is designed to benefit only the States, it is "more burdensome than necessary to redress" their asserted harms. After all, to say that a court *can* award complete relief is not to say that it *should* do so. Complete relief is not a guarantee—it is the maximum a court can provide.

Leaning on these principles, the Government contends that narrower relief is appropriate. For instance, the District Court could forbid the Government to apply the Executive Order within the respondent States, including to children born elsewhere but living in those States. Or, the Government says, the District Court could direct the Government to "treat covered children as eligible for purposes of federally funded welfare benefits." It asks us to stay the injunction insofar as it sweeps too broadly.

We decline to take up these arguments in the first instance. The lower courts should determine whether a narrower injunction is appropriate; we therefore leave it to them to consider these and any related arguments.

Respondents also defend universal injunctions as a matter of policy. They argue that a universal injunction is sometimes the only practical way to quickly protect groups from unlawful government action. Respondents also contend that universal injunctions are an appropriate remedy to preserve equal treatment among individuals when the Executive Branch adopts a facially unlawful policy. And they suggest that forcing plaintiffs to proceed on an individual basis can result in confusion or piecemeal litigation that imposes unnecessary costs on courts and others. So, they insist, universal injunctions must be permitted for the good of the system.

The Government advances policy arguments running the other way. The Government asserts that avoiding a patchwork enforcement system is a justification that "lacks a limiting principle and would make nationwide injunctions the rule rather than the exception" for challenges to many kinds of federal law. It stresses—as the principal dissent also observes—that universal injunctions incentivize forum shopping, since a successful challenge in one jurisdiction entails relief nationwide. In a similar vein, the Government observes that universal injunctions operate asymmetrically: A plaintiff must win just one suit to secure sweeping relief. But to fend off such an injunction, the Government must win everywhere. Moreover, the Government contends, the practice of universal injunctions means that highly consequential cases are often decided in a "fast and furious" process of "rushed, high-stakes, and low-information" decision-making. When a district court issues a universal injunction, thereby halting the enforcement of federal policy, the Government says that it has little recourse but to proceed to the court of appeals for an emergency stay. The loser in the court of appeals will then seek a stay from this Court. This process forces courts to resolve significant and difficult questions of law on a highly expedited basis and without full briefing.

The upshot: As with most disputed issues, there are arguments on both sides. But as with most questions of law, the policy pros and cons are beside the point. Under our well-established precedent, the equitable relief available in the federal courts is that "traditionally accorded by courts of equity" at the time of our founding. *Grupo Mexicano*. Nothing like a universal injunction was available at the founding, or for that matter, for more than a century thereafter. Thus, under the Judiciary Act, federal courts lack authority to issue them.

The principal dissent focuses on conventional legal terrain, like the Judiciary Act of 1789 and our cases on equity. Justice JACKSON, however, chooses a startling line of attack that is tethered neither to these sources nor, frankly, to any doctrine whatsoever. Waving away attention to the limits on judicial power as a "mind-numbingly technical query," she offers a vision of the judicial role that would make even the most ardent defender of judicial supremacy blush. In her telling, the fundamental role of courts is to "order everyone (including the Executive) to follow the law—full stop." And, she warns, if courts lack the power to "require the Executive to adhere to law universally," courts will leave a "gash in the basic tenets of our founding charter that could turn out to be a mortal wound."

Rhetoric aside, Justice JACKSON's position is difficult to pin down. She might be arguing that universal injunctions are appropriate—even required—whenever the defendant is part of the Executive Branch. If so, her position goes far beyond the mainstream defense of universal injunctions. As best we can tell, though, her argument is more extreme still, because its logic does not depend on the entry of a universal injunction: Justice JACKSON appears to believe that the reasoning behind *any* court order demands "universal adherence," at least where the Executive is concerned. Once a single district court deems executive conduct unlawful, it has stated what the law requires. And the Executive must conform to that view, ceasing its enforcement of the law against anyone, anywhere.

We will not dwell on Justice JACKSON's argument, which is at odds with more than two centuries' worth of precedent, not to mention the Constitution

itself. We observe only this: Justice JACKSON decries an imperial Executive while embracing an imperial Judiciary.

No one disputes that the Executive has a duty to follow the law. But the Judiciary does not have unbridled authority to enforce this obligation—in fact, sometimes the law prohibits the Judiciary from doing so. See, *e.g.*, *Marbury v. Madison* (1803) (concluding that James Madison had violated the law but holding that the Court lacked jurisdiction to issue a writ of mandamus ordering him to follow it). But see JACKSON, J., dissenting ("If courts do not have the authority to require the Executive to adhere to law universally, … compliance with law sometimes becomes a matter of Executive prerogative"). Observing the limits on judicial authority - including, as relevant here, the boundaries of the Judiciary Act of 1789 - is required by a judge's oath to follow the law.

Justice JACKSON skips over that part. Because analyzing the governing statute involves boring "legalese," she seeks to answer a far more basic question of enormous practical significance: May a federal court in the United States of America order the Executive to follow the law? In other words, it is unnecessary to consider whether Congress has constrained the Judiciary; what matters is how the Judiciary may constrain the Executive. Justice JACKSON would do well to heed her own admonition: "Everyone, from the President on down, is bound by law." That goes for judges too.

Finally, the Government must show a likelihood that it will suffer irreparable harm absent a stay. When a federal court enters a universal injunction against the Government, it "improperly intrudes" on "a coordinate branch of the Government" and prevents the Government from enforcing its policies against nonparties. That is enough to justify interim relief.

The principal dissent disagrees, insisting that "it strains credulity to treat the Executive Branch as irreparably harmed" by these injunctions, even if they are overly broad. That is so, the principal dissent argues, because the Executive Order is unconstitutional. Thus, "the Executive Branch has no right to enforce it against anyone."

The principal dissent's analysis of the Executive Order is premature because the birthright citizenship issue is not before us. And because the birthright citizenship issue is not before us, we take no position on whether the dissent's analysis is right. The dissent is wrong to say, however, that a stay applicant cannot demonstrate irreparable harm from a threshold error without also showing that, at the end of the day, it will prevail on the underlying merits. For instance, when we are asked to stay an execution on the grounds of a serious legal question, we ask whether the capital defendant is likely to prevail on the merits of the issue before us, not whether he is likely to prevail on the merits of the underlying suit. The same is true when an applicant seeks a stay in other contexts. So too here.

The question before us is whether the Government is likely to suffer irreparable harm from the District Courts' entry of injunctions that likely exceed the authority conferred by the Judiciary Act. The answer to that question is yes. And the balance of equities does not counsel against awarding the Government interim relief: Partial stays will cause no harm to respondents because they will remain protected by the preliminary injunctions to the extent necessary and appropriate to afford them complete relief.

* * *

Some say that the universal injunction "gives the Judiciary a powerful tool to check the Executive Branch." But federal courts do not exercise general oversight of the Executive Branch; they resolve cases and controversies consistent with the authority Congress has given them. When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too.

The Government's applications to partially stay the preliminary injunctions are granted, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing to

sue. The lower courts shall move expeditiously to ensure that, with respect to each plaintiff, the injunctions comport with this rule and otherwise comply with principles of equity. The injunctions are also stayed to the extent that they prohibit executive agencies from developing and issuing public guidance about the Executive's plans to implement the Executive Order. Consistent with the Solicitor General's representation, § 2 of the Executive Order shall not take effect until 30 days after the date of this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, concurring.

For good reason, the Court today puts an end to the increasingly common practice of federal courts issuing universal injunctions. The Court also makes clear that the complete-relief principle provides a ceiling on federal courts' authority, which must be applied alongside other "principles of equity" and our holding that universal injunctions are impermissible. Lower courts should carefully heed this Court's guidance and cabin their grants of injunctive relief in light of historical equitable limits. If they cannot do so, this Court will continue to be "dutybound" to intervene.

Justice ALITO, with whom Justice THOMAS joins, concurring.

I join the opinion of the Court but write separately to note two related issues that are left unresolved and potentially threaten the practical significance of today's decision: the availability of third-party standing and class certification.

First, the Court does not address the weighty issue whether the state plaintiffs have third-party standing to assert the Citizenship Clause claims of their individual residents. In limited circumstances, the Court has permitted a party to assert the rights of a third party. Admittedly, the Court has not pinned down the precise circumstances in which third-party standing is

permissible. At a minimum, we have said that a litigant seeking to assert the legal rights or interests of others must demonstrate ordinary Article III standing for itself *and* answer the additional "threshold question whether it has standing to raise the rights of others.

Today's decision only underscores the need for rigorous and evenhanded enforcement of third-party-standing limitations. The Court holds today that injunctive relief should generally extend only to the suing plaintiff. That will have the salutary effect of bringing an end to the practice of runaway "universal" injunctions, but it leaves other questions unanswered. Perhaps most important, when a State brings a suit to vindicate the rights of individual residents and then procures injunctive relief, does the injunction bind the defendant with respect to all residents of that State? If so, States will have every incentive to bring third-party suits on behalf of their residents to obtain a broader scope of equitable relief than any individual resident could procure in his own suit. Left unchecked, the practice of reflexive state third-party standing will undermine today's decision as a practical matter.

Second, today's decision will have very little value if district courts award relief to broadly defined classes without following "Rule 23's procedural protections" for class certification. The class action is a powerful tool, and we have accordingly held that class certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. These requirements are more than a mere pleading standard, and a hasty application of Rule 23 can have drastic consequences, creating "potential unfairness" for absent class members and confusion (and pressure to settle) for defendants.

Putting the kibosh on universal injunctions does nothing to disrupt Rule 23's requirements. Of course, Rule 23 may permit the certification of nationwide classes in some discrete scenarios. But district courts should not view today's decision as an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23. Otherwise, the universal injunction will return from the grave under the guise of "nationwide class

relief," and today's decision will be of little more than minor academic interest.

Justice KAVANAUGH, concurring.

I write separately simply to underscore that this case focuses on only one discrete aspect of the preliminary litigation relating to major new federal statutes and executive actions—namely, what *district courts* may do with respect to those new statutes and executive actions in what might be called "the interim before the interim." Although district courts have received much of the attention (and criticism) in debates over the universal-injunction issue, those courts generally do not have the last word when they grant or deny preliminary injunctions. The courts of appeals and this Court can (and regularly do) expeditiously review district court decisions awarding or denying preliminary injunctive relief. The losing party in the district court—the defendant against whom an injunction is granted, or the plaintiff who is denied an injunction—will often go to the court of appeals to seek a temporary stay or injunction. And then the losing party in the court of appeals may promptly come to this Court with an application for a stay or injunction. This Court has therefore often acted as the ultimate decider of the interim legal status of major new federal statutes and executive actions.

After today's decision, that order of operations will not change. In justiciable cases, this Court, not the district courts or courts of appeals, will often still be the ultimate decisionmaker as to the interim legal status of major new federal statutes and executive actions—that is, the interim legal status for the several-year period before a final decision on the merits.

That preliminary-injunction litigation—which typically takes place at a rapid-fire pace long before the merits litigation culminates several years down the road—raises a question: What should the *interim* legal status of the

significant new federal statute or executive action at issue be during the several-year period before this Court's final ruling on the merits?

That interim-status question is itself immensely important. The issue of whether a major new federal statute or executive action is enforceable during the several years while the parties wait for a final merits ruling raises a separate question of extraordinary significance to the parties and the American people.

The interim-status issue in turn raises two other critical questions: Should there be a *nationally uniform* answer on the question of whether a major new federal statute or executive action can be legally enforced in the often years-long interim period until this Court reaches a final decision on the merits? If so, *who decides* what the nationally uniform interim answer is?

First, in my view, there often (perhaps not always, but often) should be a nationally uniform answer on whether a *major* new federal statute, rule, or executive order can be enforced throughout the United States during the several-year interim period until its legality is finally decided on the merits.

Second, if one agrees that the years-long interim status of a highly significant new federal statute or executive action should often be uniform throughout the United States, who decides what the interim status is?

The answer typically will be this Court, as has been the case both traditionally and recently. This Court's actions in resolving applications for interim relief help provide clarity and uniformity as to the interim legal status of major new federal statutes, rules, and executive orders. In particular, the Court's disposition of applications for interim relief often will effectively settle, *de jure* or *de facto*, the interim legal status of those statutes or executive actions nationwide.

When a stay or injunction application arrives here, this Court should not and cannot hide in the tall grass. When we receive such an application, we must grant or deny. And when we do—that is, when this Court makes a decision on the interim legal status of a major new federal statute or executive

action—that decision will often constitute a form of precedent (*de jure* or *de facto*) that provides guidance throughout the United States during the years-long interim period until a final decision on the merits.

One of this Court's roles, in justiciable cases, is to resolve major legal questions of national importance and ensure uniformity of federal law. So a default policy of off-loading to lower courts the final word on whether to green-light or block major new federal statutes and executive actions for the several-year interim until a final ruling on the merits would seem to amount to an abdication of this Court's proper role.

Some might argue that preliminary disputes over the legality of major new statutes and executive actions can draw this Court into difficult or controversial matters earlier than we might like, as distinct from what happens on our slower-moving merits docket. That is an understandable concern. But when it comes to the interim status of major new federal statutes and executive actions, it is often important for reasons of clarity, stability, and uniformity that this Court be the decider. And Members of the Court have life tenure so that we can make tough calls without fear or favor. As with the merits docket, the Court's role in resolving applications for interim relief is to neutrally referee each matter based on the relevant legal standard. Avoiding controversial or difficult decisions on those applications is neither feasible nor appropriate.

The volume of preliminary-injunction and other pre-enforcement litigation over new federal laws and executive actions coming to this Court has been growing in recent years. That trend is in part the result of the increasing number of major new executive actions by recent Presidential administrations (of both political parties) that have had difficulty passing significant new legislation through Congress. Meanwhile, applications for stays or injunctions in capital-punishment cases, election disputes, and other time-sensitive matters (including numerous COVID–19-related disputes in the few years beginning in 2020) have also continued to come to this Court on a steady basis, as they traditionally have.

Today's decision on district court injunctions will not affect this Court's vitally important responsibility to resolve applications for stays or injunctions with respect to major new federal statutes and executive actions. Deciding those applications is not a distraction from our job. It is a critical part of our job. With that understanding, I join the Court's opinion in full.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

Children born in the United States and subject to its laws are United States citizens. That has been the legal rule since the founding, and it was the English rule well before then. This Court once attempted to repudiate it, holding in *Dred Scott v. Sandford* (1857), that the children of enslaved black Americans were not citizens. To remedy that grievous error, Congress passed in 1866 and the States ratified in 1868 the Fourteenth Amendment's Citizenship Clause, which enshrined birthright citizenship in the Constitution. There it has remained, accepted and respected by Congress, by the Executive, and by this Court. Until today.

It is now the President who attempts, in an Executive Order (Order or Citizenship Order), to repudiate birthright citizenship. Every court to evaluate the Order has deemed it patently unconstitutional and, for that reason, has enjoined the Federal Government from enforcing it. Undeterred, the Government now asks this Court to grant emergency relief, insisting it will suffer irreparable harm unless it can deprive at least some children born in the United States of citizenship.

The Government does not ask for complete stays of the injunctions, as it ordinarily does before this Court. Why? The answer is obvious: To get such relief, the Government would have to show that the Order is likely constitutional, an impossible task in light of the Constitution's text, history, this Court's precedents, federal law, and Executive Branch practice. So the Government instead tries its hand at a different game. It asks this Court to hold that, no matter how illegal a law or policy, courts can never simply tell the

Executive to stop enforcing it against anyone. Instead, the Government says, it should be able to apply the Citizenship Order (whose legality it does not defend) to everyone except the plaintiffs who filed this lawsuit.

The gamesmanship in this request is apparent and the Government makes no attempt to hide it. Yet, shamefully, this Court plays along. A majority of this Court decides that these applications, of all cases, provide the appropriate occasion to resolve the question of universal injunctions and end the centuries-old practice once and for all. In its rush to do so the Court disregards basic principles of equity as well as the long history of injunctive relief granted to nonparties.

No right is safe in the new legal regime the Court creates. Today, the threat is to birthright citizenship. Tomorrow, a different administration may try to seize firearms from law-abiding citizens or prevent people of certain faiths from gathering to worship. The majority holds that, absent cumbersome class-action litigation, courts cannot completely enjoin even such plainly unlawful policies unless doing so is necessary to afford the formal parties complete relief. That holding renders constitutional guarantees meaningful in name only for any individuals who are not parties to a lawsuit. Because I will not be complicit in so grave an attack on our system of law, I dissent.

What grave harm does the Executive face that prompts a majority of this Court to grant it relief? The answer, the Government says, is the inability to enforce the Citizenship Order against nonparties. For the majority, that answer suffices.

The problem, however, is that the Executive Branch has no right to enforce the Citizenship Order against anyone. It defies logic to say that maintaining a centuries-long status quo for a few months longer will irreparably injure the Government. The President's mandate to exercise his executive power does not permit him to rewrite the Constitution or statutory provisions at a whim. By forging ahead and granting relief to the Government anyway, this Court endorses the radical proposition that the President is

harmed, irreparably, whenever he cannot do something he wants to do, even if what he wants to do is break the law.

The majority claims that it can sidestep "analysis of the Executive Order" altogether because (in its view) every overbroad injunction necessarily causes irreparable harm sufficient to warrant emergency intervention. Yet where a purportedly overbroad injunction orders the Government to do only what this Court has expressly held it is required to do, it is hard to see how it could cause any harm. At oral argument, the Government conceded it was bound to follow this Court's precedent. This Court's precedent establishes beyond a shade of doubt that the Executive Order is unconstitutional. Thus, by enjoining the Government from violating settled law, the District Courts' orders do not cause the Government any harm.

The majority's contrary position is self-refuting. Suppose an executive order barred women from receiving unemployment benefits or black citizens from voting. Is the Government irreparably harmed, and entitled to emergency relief, by a district court order universally enjoining such policies? The majority, apparently, would say yes.

Simply put, it strains credulity to treat the Executive Branch as irreparably harmed by injunctions that direct it to continue following settled law. The injunctions do no more harm to the Executive than the Constitution and federal law do.

A majority of this Court nonetheless rushes to address the merits of the Government's applications, holding that universal injunctions "likely exceed the equitable authority that Congress has granted to federal courts." A majority that has repeatedly pledged its fealty to "history and tradition" thus eliminates an equitable power firmly grounded in centuries of equitable principles and practice. By stripping all federal courts, including itself, of that power, the Court kneecaps the Judiciary's authority to stop the Executive from enforcing even the most unconstitutional policies. That runs directly counter to the point of equity: empowering courts to do complete justice, including

through flexible remedies that have historically benefited parties and nonparties alike.

The rule of law is not a given in this Nation, nor any other. It is a precept of our democracy that will endure only if those brave enough in every branch fight for its survival. Today, the Court abdicates its vital role in that effort. With the stroke of a pen, the President has made a "solemn mockery" of our Constitution. *Peters.* Rather than stand firm, the Court gives way. Because such complicity should know no place in our system of law, I dissent.

Justice JACKSON, dissenting.

I write separately to emphasize a key conceptual point: The Court's decision to permit the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law.

It is important to recognize that the Executive's bid to vanquish so-called "universal injunctions" is, at bottom, a request for this Court's permission to engage in unlawful behavior. When the Government says "do not allow the lower courts to enjoin executive action universally as a remedy for unconstitutional conduct," what it is actually saying is that the Executive wants to continue doing something that a court has determined violates the Constitution—please allow this. That is some solicitation. With its ruling today, the majority largely grants the Government's wish. But, in my view, if this country is going to persist as a Nation of laws and not men, the Judiciary has no choice but to deny it.

Stated simply, what it means to have a system of government that is bounded by law is that everyone is constrained by the law, no exceptions. And for that to actually happen, courts must have the power to order everyone (including the Executive) to follow the law—full stop. To conclude otherwise is to endorse the creation of a zone of lawlessness within which the Executive has the prerogative to take or leave the law as it wishes, and where individuals

who would otherwise be entitled to the law's protection become subject to the Executive's whims instead.

To hear the majority tell it, this suit raises a mind-numbingly technical query: Are universal injunctions "sufficiently 'analogous' to the relief issued 'by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act' " to fall within the equitable authority Congress granted federal courts in the Judiciary Act of 1789? But that legalese is a smokescreen. It obscures a far more basic question of enormous legal and practical significance: May a federal court in the United States of America order the Executive to follow the law?

To ask this question is to answer it. In a constitutional Republic such as ours, a federal court has the power to order the Executive to follow the law—and it must. It is axiomatic that the Constitution of the United States and the statutes that the People's representatives have enacted govern in our system of government. Thus, everyone, from the President on down, is bound by law. By duty and nature, federal courts say what the law is (if there is a genuine dispute), and require those who are subject to the law to conform their behavior to what the law requires. This is the essence of the rule of law.

The power to compel the Executive to follow the law is particularly vital where the relevant law is the Constitution. When the Executive transgresses an Act of Congress, there are mechanisms through which Congress can assert its check against the Executive unilaterally—such as, for example, asserting the power of the purse… But when the Executive violates the Constitution, the only recourse is the courts. Eliminate that check, and our government ceases to be one of limited powers…After all, a limit that "does not confine the person on whom it is imposed" is no limit at all. *Marbury.* ..

Do remember: The Executive has not asked this Court to determine whether Executive Order No. 14160 complies with the Constitution. Rather, it has come to us seeking the right to continue enforcing that order *regardless*—*i.e.*, even though six courts have now said the order is likely unconstitutional. What the Executive wants, in effect, is for this Court to bless

and facilitate its desire to operate in two different zones moving forward: one in which it is required to follow the law (because a particular plaintiff has secured a personal injunction prohibiting its unlawful conduct), and another in which it can choose to violate the law with respect to certain people (those who have yet to sue).

I am not the first to observe that a legal system that operates on two different tracks (one of which grants to the Executive the prerogative to disregard the law) is anathema to the rule of law. Thus, the law-free zone that results from this Court's near elimination of universal injunctions is not an unfamiliar archetype. Also eerily echoing history's horrors is the fact that today's prerogative zone is unlikely to impact the public in a randomly distributed manner. Those in the good graces of the Executive have nothing to fear; the new prerogative that the Executive has to act unlawfully will not be exercised with respect to *them*. Those who accede to the Executive's demands, too, will be in the clear. The wealthy and the well connected will have little difficulty securing legal representation, going to court, and obtaining injunctive relief in their own name if the Executive violates their rights.

Consequently, the zone of lawlessness the majority has now authorized will disproportionately impact the poor, the uneducated, and the unpopular—*i.e.*, those who may not have the wherewithal to lawyer up, and will all too often find themselves beholden to the Executive's whims. This is yet another crack in the foundation of the rule of law, which requires "equality and justice in its application." *Papachristou v. Jacksonville* (1972). In the end, though, everyone will be affected, because it is law's evenhanded application—"to minorities as well as majorities, to the poor as well as the rich"—that "holds society together."

This leads me to another potentially destructive aspect of today's decision—the Court's dismissive treatment of the solemn duties and responsibilities of the lower courts. Sworn judicial officers must now put on blinders and take a see-no-evil stance with respect to harmful executive

conduct, even though those same officials have already announced that such conduct is likely unconstitutional. Yes, certain named plaintiffs have brought particular lawsuits seeking protection of their legal rights. But their claim is that Executive Order No. 14160 violates the Constitution. If the court agrees with them, why on Earth must it permit that unconstitutional government action to take effect at all?

I view the demise of the notion that a federal judge can order the Executive to adhere to the Constitution—full stop—as a sad day for America. The majority's unpersuasive effort to justify this result makes it sadder still. It is the responsibility of each and every jurist to hold the line. But the Court now requires judges to look the other way after finding that the Executive is violating the law, shamefully permitting unlawful conduct to continue unabated.

Perhaps the degradation of our rule-of-law regime would happen anyway. But this Court's complicity in the creation of a culture of disdain for lower courts, their rulings, and the law (as they interpret it) will surely hasten the downfall of our governing institutions, enabling our collective demise. At the very least, I lament that the majority is so caught up in minutiae of the Government's self-serving, finger-pointing arguments that it misses the plot. The majority forgets (or ignores) that "with all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown Sheet and Tube v. Sawyer* (1952)(opinion of R. JACKSON, J.). Tragically, the majority also shuns this prescient warning: Even if "such institutions may be destined to pass away," "it is the duty of the Court to be last, not first, to give them up."

QUESTIONS: How broadly will the Court apply the standard of "complete relief"? Can plaintiffs use the nationwide injunctive class action – including

the pre-certification injunction protecting a putative class – to achieve the same result as the universal injunction? The court did not discuss the federal courts' power to issue preliminary injunctions that protect classes that are not yet certified. Critics of nationwide injunctions have argued that a court may give injunctive relief to certified parties in a class action because only certified classes can bind the whole class. Moreover, is *Casa* consistent with *Trump v. International Refugee Assistance Project* (2017), where the Court upheld a nationwide injunction against an executive order issued by the first Trump administration. The court said it was necessary to balance the equities — the harms to the parties "as well as the interests of the public at large." That balancing left in place the injunctions that went well beyond giving "complete relief" to the plaintiffs.

§ 1-2.5 Standing

At the end of *Note* 1 (p. 54), add the following:

Food and Drug Administration v. Alliance for Hippocratic Medicine, 144 S. Ct. 1540 (2024). Four pro-life medical associations and several individual doctors moved for a preliminary injunction requiring FDA to rescind approval of the drug mifepristone used to terminate a pregnancy. The District Court rule for plaintiffs and the Fifth Circuit affirmed. The Supreme Court per Kavanaugh, J., held that plaintiffs lacked standing to challenge the FDA's actions. Plaintiffs' claim that FDA's relaxed regulation of mifepristone may cause downstream conscience injuries to the individual doctors does not establish standing. Even if FDA's relaxed regulation of mifepristone may cause more pregnant women to require emergency abortions and that some women would likely seek treatment from these plaintiff doctors, the plaintiff doctors have not shown that they could be forced to participate in an abortion or provide abortion-related medical treatment over their conscience objections. Federal

conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences. Moreover, the alleged monetary injuries the doctors claim they will suffer because of FDA's actions— diverting resources and time from other patients to treat patients with mifepristone complications, increasing risk of liability suits from treating those patients, and potentially increasing insurance costs - are too speculative, lack support in the record, and are too attenuated to establish standing. Nor can the medical association plaintiffs establish organizational standing simply based on the intensity of their interest in the litigation or because of strong opposition to the government's conduct. Moreover, the fact that these medical associations incurred costs in opposing FDA's actions is not a proper basis for standing. The Court rejected the associations' argument that the FDA "caused" the associations to conduct their own studies on mifepristone so that the associations could better inform their members and the public about mifepristone's risks. The argument that the FDA "forced" the associations to "expend considerable time, energy, and resources" drafting citizen petitions to FDA, as well as engaging in public advocacy and public education, all to the detriment of other spending priorities, is also not a basis to support standing. An organization that has not suffered a concrete injury caused by a defendant's action "cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action."

Chapter 3 – State Powers in Light of the Commerce Clause

§ 3-5 Preemption

At the end of *Note 3* (p. 200), add the following:

Monsanto Co. v. Durnell, 2026 WL 1825691(2026). Monsanto Company manufactures and distributes Roundup, a glyphosate-based herbicide designed to control weeds. The Environmental Protection Administration (EPA) repeatedly evaluated glyphosate and repeatedly concluded that glyphosate is not likely to cause cancer. EPA's assessment is shared by many other regulatory bodies around the world. In accordance with EPA's view that glyphosate is not likely to cause cancer in humans, EPA has not required labels on glyphosate-based pesticides like Roundup to include a cancer warning. In 2019, John Durnell sued Monsanto in Missouri state court, alleging that he had used Monsanto's Roundup products for about 20 years and that they had caused his non-Hodgkin's lymphoma. Durnell brought a failure-to-warn tort claim, asserting that Monsanto should have included a cancer warning on Roundup's label. A jury agreed and awarded Durnell more than $1 million on the failure-to-warn theory. On appeal, the Missouri Court of Appeals affirmed. The Court of Appeals rejected Monsanto's argument that the Federal Insecticide, Fungicide, and Rodenticide Act expressly preempted Durnell's failure-to-warn claim.

The Supreme Court, per Kavanaugh, J., reversed, with Gorsuch and Jackson, J.J., dissenting, holding that the federal statute expressly preempts Durnell's state-law failure-to-warn claim because the claim would require Monsanto to add a cancer warning to Roundup's label. Federal law requires Monsanto to sell Roundup with the label that EPA approved and that EPA subsequently re-approved on multiple occasions—that is, the label without a cancer warning. Meanwhile, as the Court's precedents make clear and as the parties agree, state tort duties constitute state labeling requirements. See *Bates v. Dow Agrosciences LLC*. Durnell's state tort claim would require Monsanto to add a cancer warning to its labels, which is "in addition to" and "different from" Monsanto's federal-law labeling obligations. The Court's decision in *Riegel v. Medtronic, Inc.,* further confirms that Durnell's failure-to-warn claim is expressly preempted.

Chapter 4 – Federal Powers Under the Commerce Clause

§ 4-3 The Taxing and Spending Power

At the end of *Notes and Questions* (p. 258), add the following:

Consumer Financial Protection Bureau et al. v. Community Financial Services Association of America, Ltd., 144 S. Ct. 1474 (2024). The Constitution gives Congress control over the public fisc subject to the command that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. For most federal agencies, Congress provides funding through annual appropriations. For the Consumer Financial Protection Bureau (CFPB), however, Congress provided a standing source of funding outside the ordinary annual appropriations process. Specifically, Congress authorized the Bureau to draw from the Federal Reserve System an amount that its director deems "reasonably necessary to carry out" the Bureau's duties, subject only to an inflation-adjusted cap. Several trade associations representing payday lenders and credit-access businesses challenged regulations issued by CFPB pertaining to high-interest consumer loans on statutory and constitutional grounds. The Fifth Circuit accepted the associations' argument that CFPB's funding mechanism violates the Appropriations Clause. The Supreme Court (7-2) reversed, holding that Congress' statutory authorization allowing CFPB to draw money from the earnings of the Federal Reserve System to carry out its duties satisfies the Appropriations Clause. Roberts, CJ, joined by Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson, J.J., noted that under the Appropriations Clause an appropriation is a law that authorizes expenditures from a specified source of public money for designated purposes. CFPB's funding is "drawn from the Treasury" and is therefore subject to the requirements of the Appropriations Clause. CFPB's funding mechanism constitutes an "Appropriation made by Law." The Appropriations Clause itself specifies that an appropriation must authorize withdrawals from a particular source, the "Treasury." And the proviso limiting Congress' power to "raise and support Armies"—that "no Appropriation of Money to that Use shall be for a longer Term than two

Years”—indicates that appropriations assign funds for specific uses. “At a minimum, appropriations were understood as a legislative means of authorizing expenditures from public funds for designated purposes.”

Pre-founding history supports the conclusion that an identified source and purpose are all that is required for a valid appropriation. The concept of legislative appropriations grew out of the broader struggle between Parliament and the Crown for popular control of the purse in England. Parliament had little claim to direct how the Crown's hereditary revenues were spent, but “extraordinary revenues” required parliamentary authorization because they were financed through various forms of taxation. In granting these revenues, Parliament began exercising an attendant power to specify how the Crown used the funds. The ensuing power struggle culminated in Parliament stripping away the remnants of the Crown's hereditary revenues. Subsequently, Parliament's usual practice was to appropriate government revenue to particular purposes and to limit the duration of its revenue grants. But not all appropriations were time limited. Some statutes granting money gave the Crown broad discretion regarding how much to spend within an appropriated sum. The appropriations practice in the Colonies and the First Congress was much the same. Many early state constitutions vested the legislative body with power over appropriations, and state legislative bodies often opted for open-ended, discretionary appropriations.

Alito, J, joined by Gorsuch, J, in a lengthy dissent, argued that “the powerful CFPB may bankroll its own agenda without any congressional control or oversight.” Under the Courts’ interpretation, “the Clause imposes no temporal limit that would prevent Congress from authorizing the Executive to spend public funds in perpetuity.” Nor is Congress required to set an upper limit on the amount of money that the Executive may take. Moreover, the Appropriations Clause would permit an agency to be funded entirely by private sources. “In short, there is apparently nothing wrong with a law that empowers the Executive to draw as much money as it wants from any identified source for any permissible purpose until the end of time.” The Court’s holding “has the virtue of clarity, but such clarity comes at too high a

price. There are times when it is our duty to say simply that a law that blatantly attempts to circumvent the Constitution goes too far. This is such a case. Today's decision is not faithful to the original understanding of the Appropriations Clause and the centuries of history that gave birth to the appropriations requirements."

Chapter 5 – The President and Congress

§ 5-1.5 Acquisition and Loss of Citizenship

TRUMP V. BARBARA

2026 WL 1870543 (2026)

Chief Justice ROBERTS delivered the opinion of the Court.

At issue in this case is whether the Constitution guarantees citizenship to children born of parents unlawfully or temporarily present in the United States.

The Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

On January 20, 2025, President Trump issued Executive Order No. 14160, titled Protecting the Meaning and Value of American Citizenship. The Order provides that children born of persons unlawfully or temporarily present in the United States are not "subject to the jurisdiction" of the United States—and thus do not qualify for citizenship under the Fourteenth Amendment or the Immigration and Nationality Act (INA), which uses the same language.

Several parents filed suit, some on their own behalf, others on behalf of (and in the name of) their children. They argued that the Executive Order violates the Fourteenth Amendment and the INA. The District Court agreed. It provisionally certified a nationwide class of children who would be denied citizenship by the Order and preliminarily enjoined the Order's enforcement. We granted certiorari before judgment.

II

To understand the Citizenship Clause of the Fourteenth Amendment, it is first necessary to understand the context in which it arose—and the opinion of this Court, *Dred Scott v. Sandford* (1857), that it rejected.

The story of citizenship in the United States begins with the English common law. Before the Revolution, the American colonists—like all in the British Empire—were considered subjects of the sovereign. That arose not from royal fiat, but from what the common law conceived as the relationship between the sovereign and the people. The sovereign's power (and thus his duty) was limited in various respects; so too was the scope of this rule. He could not demand allegiance from—for he could not protect—those born in lands that he did not control. And the same held true for ambassadors (and their families), who were considered—by a fiction of extraterritoriality—to remain on foreign soil and thus under the allegiance of their home country.

In all other respects, however, the sovereign's power—and his claim to the people's allegiance—was complete. A foreign mother could enter the British Isles, give birth, and leave with her child the very next day, and that child would remain a British subject. Why? Because the child owed an implied allegiance to the sovereign who protected him at his birth—no matter how momentary and uncertain his presence in the King's realms.

This view crossed the Atlantic with the colonists—and was adopted with little fanfare after the Revolution, as "subjects" of the sovereign became "citizens" of the States. See *State v. Manuel*, 20 N.C. 144, 152 (1838). This common law of citizenship—known as *jus soli*, or right of the soil— prevailed in each and all of the states" after American independence, and continued to emphasize reciprocal "allegiance" and "protection." 2 J. Kent, Commentaries on American Law 38–39. By "the doctrine of natural allegiance," all "who were born within the jurisdiction of a State" were citizens. W. Yates, Rights of Colored Men 36 (1838).

The common law made no distinction on account of race or color. But the slave States did. As the Civil War approached, more and more Southern States

sought to deny citizenship to black Americans—and openly rejected the common law to reach that result. It was "not the place of a man's birth" that made him a citizen, these States said, "but the rights and privileges he may be entitled to enjoy." *Amy v. Smith*, 11 Ky. 326, 332 (1822). Not even emancipation could "confer *citizenship*," these States held, because free African Americans still suffered from "social and civil degradation" based on "the taint of blood." With the common law abandoned, almost 500,000 free black Americans in the South were left little more than "strangers."

In the odious decision of *Dred Scott v. Sandford*, this Court imposed the Southern States' beliefs onto the Nation. Chief Justice Taney, writing for the Court, concluded that "the words 'people of the United States' and 'citizens'" had an unexpressed (and atextual) racial component—one that excluded all those descended from slaves. Even if Massachusetts or Connecticut chose to grant citizenship to the freedmen, they still could not participate in national affairs. They were "born in the country," Chief Justice Taney acknowledged, and thus "did owe allegiance to the Government"—the precise criteria for citizenship at common law. But they were "not included, and were not intended to be included, under the word 'citizens' in the Constitution." For them, blood, not soil, was made the rule.

Dred Scott was met with shock. Ever since "the Declaration of Independence," Justice Curtis wrote, "the received general doctrine has been, in conformity with the common law"—that all "free persons born within" a State are "citizens of the United States." (dissenting opinion). Justice McLean said much the same. "Being born under our Constitution and laws," he explained, "makes him a citizen." (dissenting opinion). Northern newspapers condemned *Dred Scott* as "a wicked and false judgment," "an atrocious doctrine," "a deliberate iniquity," and a "willful perversion." The decision was, in Lincoln's famous words, an "astonisher in legal history."

III

The Fourteenth Amendment was intended to repudiate *Dred Scott*. This time, however, the goal was even grander—to put the "great question of citizenship" "beyond the legislative power" altogether, to settle the issue once and for all.

The Fourteenth Amendment achieved its aim. The Citizenship Clause mirrored the common law's criteria for citizenship. The Clause starts, like the common law, with territory—a child must be "born … in the United States," not elsewhere (even to American parents). And the Clause ends, again like the common law, with sovereign power—a child must be "subject to the jurisdiction" of the United States, unlike (say) the families of foreign ministers. A child born on American soil and subject to American law was made an American citizen.

Even putting the common law to one side, the Citizenship Clause's key phrase—"subject to the jurisdiction"—requires the same result. The word "jurisdiction" was hardly unknown to the drafters and ratifiers of the Fourteenth Amendment. Congress chose to use an established legal term and the Clause must be interpreted in that light.

In 1868, as today, "jurisdiction" (in the context of a sovereign) refers to the "power of governing or legislating." N. Webster, An American Dictionary of the English Language 732. To be "subject to" the jurisdiction of the United States, then, is to "live under" its "dominion," J. Worcester, Dictionary of the English Language 1435 (1860), a meaning reinforced by the Clause's territorial focus on those born "in" the United States. The Citizenship Clause uses jurisdiction in its ordinary sense—referring to the power of the United States to govern those within its territory.

The scope of that power was well settled in 1868, largely by the "celebrated case" of *Schooner Exchange v. McFaddon*. Expounding on "general principles," Chief Justice Marshall explained that "jurisdiction" referred to "the full and complete power of a nation within its own territories." That "absolute" power was "susceptible of no limitation not imposed" by the nation itself. All sovereigns, however, were understood to have impliedly waived their jurisdiction in "certain peculiar circumstances"—in essence, where exercising jurisdiction would "degrade the dignity" of "foreign sovereigns." As in the context of *jus soli*, those peculiar circumstances arose most frequently in the case of "foreign ministers." "Every sovereign would hazard his own dignity," after all, if his officials abroad were made to "owe temporary and local allegiance to a foreign prince." Just like *jus soli*, a

sovereign's jurisdiction made no exception for those only temporarily present within the sovereign's territory. Instead, nearly everyone within the territorial boundaries of the United States was "amenable to" the Nation's jurisdiction.

The ordinary legal meaning of the text of the Clause thus neatly captures the common law rule, with its broad reach and narrow exceptions. The same groups included (and excluded) by *jus soli* were included (and excluded) by the conventional understanding of jurisdiction. Excluded by both were the children of foreign ministers and members of 19th-century Indian tribes over whom the United States had ceded a part of its territorial jurisdiction to preserve its relationship with a foreign sovereign (or quasi-sovereign).

No such intersovereign concerns apply to children born of parents unlawfully or temporarily present in the United States; no foreign sovereign would "have any motive for wishing" them outside this Nation's authority. Those children are thus subject to the jurisdiction of the United States. They satisfy both elements of the Citizenship Clause: they are "born … in the United States" and "subject to the jurisdiction thereof." Under the Constitution, they are citizens at birth.

IV

Our precedent—the seminal case of *United States v. Wong Kim Ark* (1898)—confirms this rule. At issue was the citizenship of Wong Kim Ark, born in San Francisco to Chinese parents. In Wong's telling, the case was not close. "There can be no just doubt," he argued, "that the Amendment was intended to be based upon the doctrine derived from the common law, that the character of a natural born citizen is incidental to birth only." The Government disagreed. It admitted that "the opinions of the Attorneys-General, the decisions of the Federal and State courts, and, up to 1885, the rulings of the State Department all concurred in the view that birth in the United States conferred citizenship," based on "the common law doctrine of allegiance" and "the authority of the decision of Chancellor Sandford in *Lynch v. Clarke*." But the Executive no longer endorsed that view. "The common-

law doctrine of England," it argued, had in fact never been "the doctrine of the United States," and was not made the law by virtue of the Citizenship Clause.

In an opinion by Justice Gray, the Court rejected the Government's position. Justice Gray explained that the Fourteenth Amendment was merely "declaratory" of the "fundamental rule of citizenship by birth" that prevailed at common law. That "same rule," he wrote, "was in force in all the English Colonies"—"and continued to prevail under the Constitution." And its contours were clear. It excluded those recognized as exempt "from the jurisdiction of this country"—the "children of ambassadors" and other representatives of foreign sovereigns, as well as those born in the "alien nations" of Indian tribes. All others were citizens at birth, whether born to permanent residents or temporary visitors.

What the Court held in *Wong Kim Ark* was simple: the Citizenship Clause incorporated the common law and granted citizenship to nearly all children born in the United States. Not surprisingly, then, in the 128 years since, we have repeatedly understood the rule of *Wong Kim Ark* to guarantee citizenship to all children born in the United States and subject to its power. We see no reason to depart from that view today.

V

The Government and the principal dissent share many of our premises. They agree that the Citizenship Clause was intended to incorporate the "background principles" of the common law. They agree that, under the common law, "citizenship turns on allegiance." And they agree that "*Dred Scott* departed from that traditional, allegiance-based view of citizenship"—a departure that Congress "repudiated" in the Clause. Where the Government and the principal dissent err is with their definition of "allegiance." Natural allegiance, they contend, was no longer sufficient for citizenship; some greater quantum of allegiance was required.

How much? The Government offers a smorgasbord of formulations: "primary allegiance," "sufficient allegiance," "full allegiance," "requisite allegiance." What all these formulations supposedly share is that they turn on domicile—the place of one's permanent home. At some point before the ratification of the Fourteenth

Amendment, the argument goes, it became "deeply rooted" in this country that "domicile is the key concept that creates allegiance."

The trouble is that there is scant evidence for this dramatically revisionist view. The only evidence the Government and the principal dissent can muster to show that some alternative ("primary") conception of allegiance displaced the common law is a "funeral oration" for President Lincoln. Of course, domicile was relevant to naturalization and expatriation. But that by no means suggests it was a prerequisite to national citizenship at birth. The principal dissent's reliance on cases concerning *changes* to a person's *state* citizenship is thus misplaced. And the Government's remaining support for the idea that a domicile "qualification" to birthright citizenship was "widely accepted" in the United States before the Civil War, consists of a single state-court case about citizenship in the Republic of Texas, a proposed (but never adopted) model code for the State of New York, and another treatise that discussed that discussed the subject only in terms of "the principles of natural reason," which it expressly distinguished from "the *common law*."

The congressional debates over the Civil Rights Act of 1866 and the Fourteenth Amendment confirm our view. If Congress intended to hinge citizenship on each individual's domicile—a question that is sometimes a matter of great difficulty to decide, it is reasonable to expect there would have been at least *some* discussion of the topic. Yet the word "domicile" appears just twice in the discussion of the relevant provision of the Civil Rights Act. And it appears in only one speech from the Citizenship Clause debates—as part of an explanation of why State citizenship is distinct from national citizenship under the Constitution.

In any case, postenactment history cannot override the text. If Congress intended to limit American citizenship to the children of those domiciled in the United States, nothing in the succinct language of the Citizenship Clause conveyed that design. Words appearing frequently in the Executive Order—"mother," "father," "lawful," "temporary"—are absent from the Clause. For a simple reason: they did not matter. And while the Clause does ensure *state* citizenship attaches for U. S. citizens in "the State wherein they reside, the explicit invocation of residence for *state* citizenship only highlights its absence from the criteria for *U. S.* citizenship.

See *Slaughter-House Cases* (1873) (a person can "be a citizen of the United States without being a citizen of a State").

For the dissents and the Government, *Wong Kim Ark* is essentially irrelevant. They attempt to narrow that precedent by noting that the Court's opinion repeatedly referred to the domicile of Wong's parents. That is true. But "the reasoning underlying" the holding of *Wong Kim Ark* cannot be squared with a domicile requirement of the sort the Government envisions. As we have already explained, the Court exhaustively canvassed the text and history of the Citizenship Clause. It traced an unbroken line from the English common law, into the founding and antebellum eras, and through the debates, to the Clause's ratification. Yet at no point did the Court identify any evidence in the historical record that the ratifiers of the Fourteenth Amendment thought themselves to be imposing a domicile limitation.

Again and again, the dissents cast the common law as "feudal," "medieval"—a remnant of "the darkness of the middle ages." That was not the view of the Reconstruction Congress. Where the dissents see feudalism, the Framers of the Fourteenth Amendment saw emancipation. By the time of the Glorious Revolution in 1688, in fact, the tie created by birth was less a "duty" than a "right"—the foundation of the "ancient liberties" of "free-born subjects." That is why the colonists demanded the "rights of Englishmen" more than 250 years ago. And that is why abolitionists lauded the "ancient and universal" rule of citizenship by birth alone as "an ordinance of Heaven."

Citizenship, then and now, was the right to have rights—to freely participate in our political community. The Framers of the Fourteenth Amendment extended that promise to "every free-born person in this land." We keep that promise today.

The judgment of the District Court for the District of New Hampshire is affirmed.

It is so ordered.

Justice JACKSON, with whom Justice SOTOMAYOR joins, concurring.

I join the Court's opinion in full. I write separately to respond to some of the themes in the principal dissent. Despite his longstanding endorsement of a "colorblind" Constitution, Justice THOMAS now surprisingly suggests that the Citizenship Clause was a race-conscious remedial measure, relating only to "freed slaves such as Dred Scott," and those who shared with them certain characteristics, ("no other homeland"); ("called America home"). It is for this reason, he says, that "children who were born in the United States but [to parents] not domiciled here" are not entitled to claim birthright citizenship. But that narrow vision of the Fourteenth Amendment bears little relationship to the history of its ratification. Even worse, Justice THOMAS's telling elides the entire point of the Second Founding: The Reconstruction Amendments were an anticaste, antisubordination reset for the Nation, not a mere spot treatment for the dark stain of slavery.

Justice KAVANAUGH, concurring in the judgment and dissenting in part.

Executive Order No. 14160 establishes new exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country. The Court today holds that the Order violates the Fourteenth Amendment to the Constitution. I respectfully disagree with the Court's constitutional holding. In my view, the Executive Order does not violate the Fourteenth Amendment. But the Order does contravene a federal statute, 8 U.S.C. § 1401(a). Congress could—consistent with the Fourteenth Amendment—amend § 1401(a) or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country. But Congress has not yet done so.

Initially enacted in 1940, § 1401(a) of Title 8 provides that persons "born in the United States, and subject to the jurisdiction thereof " "shall be nationals and citizens of the United States at birth." That statutory language mirrors the text of § 1 of the Fourteenth Amendment, which was ratified in 1868 and similarly

provides: "All persons born … in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

This Court's 1898 *Wong Kim Ark* decision interpreted the "subject to the jurisdiction" language of the Fourteenth Amendment. That decision adopted a general rule of birthright citizenship for those born in the United States—with four disparate exceptions for "children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory" and "children of members of the Indian tribes." Importantly, the *Wong Kim Ark* decision treated those four exceptions as a closed set for constitutional purposes, meaning that Congress could not create other exceptions to birthright citizenship, although Congress could eliminate one or more of those four exceptions.

In 1940 and 1952, Congress employed the exact language from the Fourteenth Amendment—"subject to the jurisdiction thereof "—in comprehensive new immigration and naturalization laws that provided for birthright citizenship.

Because § 1401(a) uses the same language as the Fourteenth Amendment, the statute has long been interpreted to adopt *Wong Kim Ark*'s general rule of birthright citizenship, subject to the exceptions identified in that case. If Congress in 1940 or 1952 wanted to create new exceptions—and thereby test *Wong Kim Ark*'s statement treating the four exceptions as a closed set—Congress presumably would not have repeated the precise language that this Court had interpreted in *Wong Kim Ark* to contain only those four exceptions. Stated more doctrinally, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.

Importantly, moreover, from the time of those statutory enactments in 1940 and 1952 all the way through 2025, the Executive Branch consistently interpreted § 1401(a) to encompass only those *Wong Kim Ark* exceptions to birthright citizenship. (The Government here does not contest that historical point.) That long and consistent Executive Branch interpretation further indicates that § 1401(a) incorporates only those exceptions.

In 2025, however, Executive Order No. 14160 sought to add two new exceptions to birthright citizenship for children born to foreign citizens who are either illegally or temporarily in the United States. In doing so, the Executive Order goes beyond what § 1401(a) authorizes. For the Executive Order to be lawful, therefore, Congress would need to amend § 1401(a) or otherwise enact new legislation to encompass those two new exceptions. As of now, Congress has not done so. Over the last 30 years, Congress has considered numerous proposed bills to alter birthright citizenship, but Congress has never actually passed such legislation

Unless and until Congress enacts such legislation, the Executive Order contravenes the federal statute, § 1401(a).

Justice THOMAS, with whom Justice GORSUCH joins, dissenting.

This Court's decision in *Dred Scott v. Sandford* would have permanently denied citizenship to blacks as "a subordinate and inferior class." After the Civil War, the Reconstruction Congress overruled *Dred Scott*, first with the Civil Rights Act of 1866, then with the Citizenship Clause of the Fourteenth Amendment. Both the Civil Rights Act and the Citizenship Clause guaranteed citizenship to persons born and domiciled in the United States regardless of their race. Neither guaranteed citizenship to persons who were not domiciled in the United States.

Blacks were entitled to citizenship because they were Americans. They had no other homeland, owed no allegiance to any foreign power, and were subject to no other authority. They "fought and bled in the same battles," "gained and gloried in the same victories," and were "liable to be called upon to defend America in time of war" alongside every other citizen. 2 Life and Writings of Frederick Douglass 256, 266 (P. Foner ed. 1950). The Citizenship Clause thus guaranteed them the "dignity and glory of American citizenship," so as to ensure that they would never be treated as second class under the law. *Plessy v. Ferguson* (1896) (Harlan, J., dissenting).

The same could not be said for the children of foreign temporary visitors. Foreign temporary visitors were attached to their home country, lacked

similar bonds to this country, and would not be called upon in time of war. Americans, consistent with their settler ethos, believed that citizens were the people who called a place home. Accordingly, domicile—a person's legal home—played a key role in both state and national citizenship in America. A person was a "citizen" of the state where he had his "domicil." *Barber v. Barber* (1859). When foreigners temporarily visited, their "national character" was unchanged. *The Venus* (1814). Such visitors were "strangers," not "subjects." A person born here but domiciled in a foreign land was therefore considered "as much a stranger to the country as his father."

That is why, when Dred Scott went to court, he argued that to be a "citizen," "it is only necessary that he should have acquired a domicil." After this Court held that Scott was not a citizen because he was black, Republicans in Congress, such as Representative John Bingham, stated that a person was a citizen if he was "born and domiciled" in the United States. Scott was a citizen, in their view, because he was born to Americans, not to "temporary sojourners." As Frederick Douglass had put it, the freedmen sought citizenship "*not* as aliens nor as exiles," but as "Americans."

Congress implemented the principle that citizenship follows birth and domicile in the Civil Rights Act of 1866 and then in the Citizenship Clause of the Fourteenth Amendment. The Civil Rights Act guaranteed citizenship to persons who were both "born in the United States" and, as relevant here, "not subject to any foreign power." The phrase "not subject to any foreign power" excluded from citizenship children of foreign temporary visitors, who were subject to the power of their home nation. The Citizenship Clause, which the same Congress passed shortly after the Civil Rights Act, was understood to have the same meaning. It guaranteed citizenship to persons who were both "born … in the United States" and "subject to the jurisdiction thereof."

A person was subject to the jurisdiction of the government of his domicile. "Domicil" was "the foundation of jurisdiction over persons." The government of a person's domicile had broad power over that person, including with respect to his personal affairs, his conduct abroad, his personal taxes, and the mutual duties of

protection and allegiance. So, as the Senator who introduced the Citizenship Clause explained, "the word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction … the same jurisdiction in extent and quality as applies to every citizen of the United States now." After all, Congress "would have no right to make citizens" of "persons temporarily resident."

The Citizenship Clause was consistently interpreted not to apply to the children of foreign temporary visitors, who were by definition not domiciled in the United States. Regardless of administration or party, the Federal Government for decades after ratification regularly denied claims to citizenship by children who were born in the United States but not domiciled here. When a child was "born" in the United States to parents "domiciled" abroad, he was "not, therefore, under the statute and the Constitution a citizen of the United States by birth.. Scholars agreed: A child "born within the territory of the United States, of alien parents" was not a citizen unless his parents were "permanently domiciled within the United States." This Court agreed: The Citizenship Clause "exclude[d] from its operation children of … citizens or subjects of foreign States born within the United States." *Slaughter-House Cases* (1873). And Congress agreed: The Citizenship Clause did not extend to a child born here but "subject to any foreign power." See Enforcement Act of 1870, § 18, 16 Stat. 144 (reenacting Act of Apr. 9, 1866, 14 Stat. 27). As Justice Harlan would write in his dissent in *Plessy v. Ferguson*, the Citizenship Clause "gave citizenship to all born or naturalized in the United States and residing here."

The Court offers a different account. American citizenship, the Court says, was based on a medieval English "feudal" principle, according to which each person "owed personal service to the lord of the soil" as his "master"—a perpetual servitude that was "born with the child and only ended in the grave." Americans, the Court says, adopted this feudal principle as a rule of American citizenship "with little fanfare." Then, according to the Court, the Reconstruction Congress codified that feudal principle with the words "not subject to any foreign power" in the Civil Rights Act and "subject to the jurisdiction thereof " in the Citizenship Clause. Then, the Court says, the Clause's meaning was definitively settled by dicta in *United States v. Wong Kim Ark.*

With due respect, the Court's account is not historically accurate. The Court says that the Citizenship Clause incorporated the English feudal principle that subjects owed lifetime servitude to the King who owned the soil on which they were born, but Americans—unsurprisingly—rejected this feudal principle. The Court's theory of American citizenship is based on the opinion of a New York assistant vice chancellor in an inheritance dispute called *Lynch v. Clarke* (1844). But, the assistant vice chancellor's reasoning, whatever it was worth, was not even followed in New York by the time of the Citizenship Clause. Finally, the Court reasons that dicta in *Wong Kim Ark* settled the meaning of the Clause. But, *Wong Kim Ark* itself emphasized that its holding was limited to persons domiciled in the United States. And, scholars and government officials continued to agree after *Wong Kim Ark* that the Citizenship Clause did not extend to the children of foreign temporary visitors. The rule remained what it always was: A child born on American soil of "a stranger or traveler passing through the country, or temporarily residing here," was "not a citizen." H. Black, Handbook of American Constitutional Law 634 (3d ed. 1910).

The Court today takes the extraordinary step of holding facially unconstitutional the President's Order excluding from citizenship the children of foreign temporary visitors and illegal aliens. In doing so, the Court adds to the sad history of the Fourteenth Amendment, which was designed and understood to secure equal rights for the freed blacks but has instead been repurposed for political projects that the Reconstruction Congress did not support. Because many potential applications of the President's Order are consistent with the original public meaning of the Citizenship Clause, I respectfully dissent.

Justice ALITO, dissenting.

This is one of the most important decisions in the history of the Court, and in my judgment, the Court has made a serious mistake. As interpreted by the Court today, the Fourteenth Amendment confers citizenship on virtually everyone who happens to be born in this country, including the children of "birth tourists," women who come here solely for the purpose of giving birth to a child and then promptly return home. Careful analysis of the text of the Fourteenth Amendment and the process that led to its adoption shows that it does not degrade the concept of

United States citizenship in this way. Instead, the Fourteenth Amendment confers citizenship on only those children who, at birth, owe allegiance solely to this country.

Justice GORSUCH, dissenting.

Perhaps *Wong Kim Ark* does not squarely foreclose the government's position. After all, that case addressed a child born to parents who lawfully resided in this country. Still, I wonder: Is a child born here to parents who have long chosen to make this Nation their permanent home not a citizen under the Fourteenth Amendment solely because his parents' presence violates statutory law? If those parents are not domiciled here, then where *are* they domiciled? And if the answer is nowhere, how can we reconcile that conclusion with this Court's longstanding recognition that every person is domiciled somewhere? See *Desmare v. United States* (1877). Because the executive order is not facially invalid, these questions may not be properly before us. But their answers are undeniably important to a Nation committed to a view of citizenship open to all children born here to parents who can call this country their home.

§ 5-2 Executive Privilege and Immunity

At the end of *Notes and Questions* (p. 443), add the following:

TRUMP V. UNITED STATES

144 S. Ct. 2312 (2024)

Chief Justice Roberts delivered the opinion of the Court.

This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in

office. We consider the scope of a President's immunity from criminal prosecution.

I

From January 2017 until January 2021, Donald J. Trump served as President of the United States. On August 1, 2023, a federal grand jury indicted him on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.

According to the indictment, Trump advanced his goal through five primary means. First, he and his co-conspirators "used knowingly false claims of election fraud to get state legislators and election officials to … change electoral votes for [Trump's] opponent, Joseph R. Biden, Jr., to electoral votes for [Trump]." Second, Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states" and "caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6." Third, Trump and his co-conspirators attempted to use the Justice Department "to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome." Fourth, Trump and his co-conspirators attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." And when that failed, on the morning of January 6, they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding." Fifth, when "a large and angry crowd … violently attacked the Capitol and halted the proceeding," Trump and his co-conspirators "exploited the disruption by redoubling efforts

to levy false claims of election fraud and convince Members of Congress to further delay the certification."

Based on this alleged conduct, the indictment charged Trump with (1) conspiracy to defraud the United States in violation of 18 U.S.C. § 371, (2) conspiracy to obstruct an official proceeding in violation of § 1512(k), (3) obstruction of and attempt to obstruct an official proceeding in violation of § 1512(c)(2), § 2, and (4) conspiracy against rights in violation of § 241.[1]

Trump moved to dismiss the indictment based on Presidential immunity. In his view, the conduct alleged in the indictment, properly characterized, was that while he was President he (1) "made public statements about the administration of the federal election"; (2) communicated with senior Justice Department officials "about investigating election fraud and about choosing the leadership" of the Department; (3) "communicated with state officials about the administration of the federal election and their exercise of official duties with respect to it"; (4) "communicated with the Vice President" and with "Members of Congress about the exercise of their official duties regarding the election certification"; and (5) "authorized or directed others to organize contingent slates of electors in furtherance of his attempts to convince the Vice President to exercise his official authority in a manner advocated for by President Trump." Trump argued that all of the indictment's allegations fell within the core of his official duties. And he contended that a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official responsibilities, to ensure that he can undertake the especially sensitive duties of his office with bold and unhesitating action.

The District Court denied the motion to dismiss, holding that "former Presidents do not possess absolute federal criminal immunity for any acts committed while in office." The District Court recognized that the President is immune from damages liability in civil cases, to protect against the chilling effect such exposure might have on the carrying out of his responsibilities. See Nixon v. Fitzgerald (1982). But it reasoned that "the possibility of vexatious

post-Presidency litigation is much reduced in the criminal context" in light of "the robust procedural safeguards attendant to federal criminal prosecutions."

The D. C. Circuit affirmed. Citing *Marbury v. Madison* (1803), the court distinguished between two kinds of official acts: discretionary and ministerial. It observed that "although discretionary acts are 'only politically examinable,' the judiciary has the power to hear cases" involving ministerial acts that an officer is directed to perform by the legislature. *Marbury.* From this distinction, the D. C. Circuit concluded that the "separation of powers doctrine, as expounded in *Marbury* and its progeny, necessarily permits the Judiciary to oversee the federal criminal prosecution of a former President for his official acts because the fact of the prosecution means that the former President has allegedly acted in defiance of the Congress's laws." In the court's view, the fact that Trump's actions "allegedly violated generally applicable criminal laws" meant that those actions "were not properly within the scope of his lawful discretion." The D. C. Circuit thus concluded that Trump had "no structural immunity from the charges in the Indictment." Like the District Court, the D. C. Circuit declined to analyze the actions described in the indictment to determine whether they involved official acts.

II

This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency. We are called upon to consider whether and under what circumstances such a prosecution may proceed. Doing so requires careful assessment of the scope of Presidential power under the Constitution. We undertake that responsibility conscious that we must not confuse "the issue of a power's validity with the cause it is invoked to promote," but must instead focus on the "enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet & Tube Co. v. Sawyer (1952)* (Jackson, J., concurring).

The parties before us do not dispute that a former President can be subject to criminal prosecution for unofficial acts committed while in office. They also agree that some of the conduct described in the indictment includes actions taken by Trump in his unofficial capacity.

They disagree, however, about whether a former President can be prosecuted for his official actions. Trump contends that just as a President is absolutely immune from civil damages liability for acts within the outer perimeter of his official responsibilities, he must be absolutely immune from criminal prosecution for such acts. Brief for Petitioner 10. And Trump argues that the bulk of the indictment's allegations involve conduct in his official capacity as President. Although the Government agrees that some official actions are included in the indictment's allegations, it maintains that a former President does not enjoy immunity from criminal prosecution for any actions, regardless of how they are characterized.

We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

No matter the context, the President's authority to act necessarily "stems either from an act of Congress or from the Constitution itself." *Youngstown*. In the latter case, the President's authority is sometimes "conclusive and preclusive. When the President exercises such authority, he may act even when the measures he takes are "incompatible with the expressed or implied will of Congress." The exclusive constitutional authority of the President "disables the Congress from acting upon the subject." And the courts have "no power to control [the President's] discretion" when he

acts pursuant to the powers invested exclusively in him by the Constitution. *Marbury*.

If the President claims authority to act but in fact exercises mere "individual will" and "authority without law," the courts may say so. In *Youngstown*, for instance, we held that President Truman exceeded his constitutional authority when he seized most of the Nation's steel mills. But once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination.

Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

The President "occupies a unique position in the constitutional scheme," *Fitzgerald*, as "the only person who alone composes a branch of government." The Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." They deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty."

The Framers accordingly vested the President with "supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*. He must make "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." There accordingly "exists the greatest public interest" in providing the President with "the maximum ability

to deal fearlessly and impartially with' the duties of his office." Appreciating the "unique risks to the effective functioning of government" that arise when the President's energies are diverted by proceedings that might render him "unduly cautious in the discharge of his official duties," we have recognized Presidential immunities and privileges "rooted in the constitutional tradition of the separation of powers and supported by our history."

By contrast, when prosecutors have sought evidence from the President, we have consistently rejected Presidential claims of absolute immunity. For instance, during the treason trial of former Vice President Aaron Burr, Chief Justice Marshall rejected President Thomas Jefferson's claim that the President could not be subjected to a subpoena. Marshall reasoned that "the law does not discriminate between the president and a private citizen." *United States v. Burr*.

Similarly, when a subpoena issued to President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisers, this Court rejected his claim of "absolute privilege," given the "constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States v. Nixon* (1974).

Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in *Burr* and *Nixon*. The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the "bold and unhesitating action" required of an independent Executive. Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decision-making than the potential payment of civil damages.

We must, however, "recognize the countervailing interests at stake." *Trump v. Vance* (2020). Federal criminal laws seek to redress "a wrong to the public" as a whole, not just "a wrong to the individual." There is therefore a compelling "public interest in fair and effective law enforcement." The President, charged with enforcing federal criminal laws, is not above them.

Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. Indeed, if presumptive protection for the President is necessary to enable the "effective discharge" of his powers when a prosecutor merely seeks evidence of his official papers and communications, it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions. At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*.

But as we explain below, the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute. Because we need not decide that question today, we do not decide it. "One case" in more than "two centuries does not afford enough experience" to definitively and comprehensively determine the President's scope of immunity from criminal prosecution.

As for a President's unofficial acts, there is no immunity. The principles we set out in *Clinton* v. *Jones* (1997) confirm as much. When Paula Jones brought a civil lawsuit against then-President Bill Clinton for acts he allegedly committed prior to his Presidency, we rejected his argument that he enjoyed

temporary immunity from the lawsuit while serving as President. Although Presidential immunity is required for *official* actions to ensure that the President's decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct.

III

Determining whether a former President is entitled to immunity from a particular prosecution requires applying the principles we have laid out to his conduct at issue. The first step is to distinguish his official from unofficial actions. In this case, however, no court has thus far considered how to draw that distinction, in general or with respect to the conduct alleged in particular.

Critical threshold issues in this case are how to differentiate between a President's official and unofficial actions, and how to do so with respect to the indictment's extensive and detailed allegations covering a broad range of conduct. We offer guidance on those issues below. Certain allegations—such as those involving Trump's discussions with the Acting Attorney General—are readily categorized in light of the nature of the President's official relationship to the office held by that individual. Other allegations—such as those involving Trump's interactions with the Vice President, state officials, and certain private parties, and his comments to the general public—present more difficult questions. Although we identify several considerations pertinent to classifying those allegations and determining whether they are subject to immunity, that analysis ultimately is best left to the lower courts to perform in the first instance.

Distinguishing the President's official actions from his unofficial ones can be difficult. When the President acts pursuant to "constitutional and statutory authority," he takes official action to perform the functions of his office. *Fitzgerald*. Determining whether an action is covered by immunity thus begins with assessing the President's authority to take that action.

But the breadth of the President's "discretionary responsibilities" under the Constitution and laws of the United States "in a broad variety of areas, many of them highly sensitive," frequently makes it "difficult to determine

which of his innumerable 'functions' encompassed a particular action." And some Presidential conduct—for example, speaking to and on behalf of the American people, see *Trump v. Hawaii,* certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision. For those reasons, the immunity we have recognized extends to the "outer perimeter" of the President's official responsibilities, covering actions so long as they are "not manifestly or palpably beyond his authority." *Blassingame v. Trump*, 87 F.4th 1, 13 (CADC 2023).

In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect. Indeed, "it would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government" if "in exercising the functions of his office," the President was "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Fitzgerald*.

Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law. For instance, when Fitzgerald contended that his dismissal violated various congressional statutes and thus rendered his discharge outside the outer perimeter of Nixon's duties, we rejected that contention. Otherwise, Presidents would be subject to trial on "every allegation that an action was unlawful," depriving immunity of its intended effect.

With these principles in mind, we turn to the conduct alleged in the indictment.

The indictment broadly alleges that Trump and his co-conspirators sought to "overturn the legitimate results of the 2020 presidential election." According to the indictment, Trump met with the Acting Attorney General and other senior Justice Department and White House officials to discuss investigating purported election fraud and sending a letter from the

Department to those States regarding such fraud. The indictment further alleges that after the Acting Attorney General resisted Trump's requests, Trump repeatedly threatened to replace him.

The Government does not dispute that the indictment's allegations regarding the Justice Department involve Trump's "use of official power." The allegations in fact plainly implicate Trump's "conclusive and preclusive" authority. "Investigation and prosecution of crimes is a quintessentially executive function." *Morrison v. Olson* (1988)(Scalia, J., dissenting). And the Executive Branch has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. *Nixon*.

Investigative and prosecutorial decisionmaking is "the special province of the Executive Branch," *Heckler v. Chaney* (1985) and the Constitution vests the entirety of the executive power in the President, Art. II, § 1. For that reason, Trump's threatened removal of the Acting Attorney General likewise implicates "conclusive and preclusive" Presidential authority. As we have explained, the President's power to remove "executive officers of the United States whom he has appointed" may not be regulated by Congress or reviewed by the courts. The President's "management of the Executive Branch" requires him to have "unrestricted power to remove the most important of his subordinates"—such as the Attorney General—"in their most important duties."

The indictment's allegations that the requested investigations were "shams" or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials. And the President cannot be prosecuted for conduct within his exclusive constitutional authority. Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials.

The indictment next alleges that Trump and his co-conspirators "attempted to enlist the Vice President to use his ceremonial role at the

January 6 certification proceeding to fraudulently alter the election results." In particular, the indictment alleges several conversations in which Trump pressured the Vice President to reject States' legitimate electoral votes or send them back to state legislatures for review.

The Government explained at oral argument that although it "has not yet had to come to grips with how it would analyze" Trump's interactions with the Vice President, there is "support" to characterize that conduct as official. Indeed, our constitutional system anticipates that the President and Vice President will remain in close contact regarding their official duties over the course of the President's term in office.

Whenever the President and Vice President discuss their official responsibilities, they engage in official conduct. Presiding over the January 6 certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President. The indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct.

The question then becomes whether that presumption of immunity is rebutted under the circumstances. When the Vice President presides over the January 6 certification proceeding, he does so in his capacity as President of the Senate. Despite the Vice President's expansive role of advising and assisting the President within the Executive Branch, the Vice President's Article I responsibility of "presiding over the Senate" is "not an 'executive branch' function." Memorandum from L. Silberman, Deputy Atty. Gen., to R. Burress, Office of the President, Re: Conflict of Interest Problems Arising Out of the President's Nomination of Nelson A. Rockefeller To Be Vice President Under the Twenty-Fifth Amendment to the Constitution 2 (Aug. 28, 1974). With respect to the certification proceeding in particular, Congress has legislated extensively to define the Vice President's role in the counting of the electoral votes, and the President plays no direct constitutional or statutory role in that

process. So the Government may argue that consideration of the President's communications with the Vice President concerning the certification proceeding does not pose "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*.

At the same time, however, the President may frequently rely on the Vice President in his capacity as President of the Senate to advance the President's agenda in Congress. When the Senate is closely divided, for instance, the Vice President's tiebreaking vote may be crucial for confirming the President's nominees and passing laws that align with the President's policies. Applying a criminal prohibition to the President's conversations discussing such matters with the Vice President—even though they concern his role as President of the Senate—may well hinder the President's ability to perform his constitutional functions.

It is ultimately the Government's burden to rebut the presumption of immunity. We therefore remand to the District Court to assess in the first instance, with appropriate input from the parties, whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch.

The indictment's remaining allegations cover a broad range of conduct. Unlike the allegations describing Trump's communications with the Justice Department and the Vice President, these remaining allegations involve Trump's interactions with persons outside the Executive Branch: state officials, private parties, and the general public. Many of the remaining allegations, for instance, cover at great length events arising out of communications that Trump and his co-conspirators initiated with state legislators and election officials in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin regarding those States' certification of electors.

On Trump's view, the alleged conduct qualifies as official because it was undertaken to ensure the integrity and proper administration of the federal election. Of course, the President's duty to "take Care that the Laws be

faithfully executed" plainly encompasses enforcement of federal election laws passed by Congress. And the President's broad power to speak on matters of public concern does not exclude his public communications regarding the fairness and integrity of federal elections simply because he is running for re-election. Similarly, the President may speak on and discuss such matters with state officials—even when no specific federal responsibility requires his communication—to encourage them to act in a manner that promotes the President's view of the public good.

As the Government sees it, however, these allegations encompass nothing more than Trump's "private scheme with private actors." In its view, Trump can point to no plausible source of authority enabling the President to not only organize alternate slates of electors but also cause those electors—unapproved by any state official—to transmit votes to the President of the Senate for counting at the certification proceeding, thus interfering with the votes of States' properly appointed electors. Indeed, the Constitution commits to the States the power to "appoint" Presidential electors "in such Manner as the Legislature thereof may direct."

Determining whose characterization may be correct, and with respect to which conduct, requires a close analysis of the indictment's extensive and interrelated allegations. Unlike Trump's alleged interactions with the Justice Department, this alleged conduct cannot be neatly categorized as falling within a particular Presidential function. The necessary analysis is instead fact specific, requiring assessment of numerous alleged interactions with a wide variety of state officials and private persons. And the parties' brief comments at oral argument indicate that they starkly disagree on the characterization of these allegations. The concerns we noted at the outset—the expedition of this case, the lack of factual analysis by the lower courts, and the absence of pertinent briefing by the parties—thus become more prominent. We accordingly remand to the District Court to determine in the first instance—with the benefit of briefing we lack—whether Trump's conduct in this area qualifies as official or unofficial.

Finally, the indictment contains various allegations regarding Trump's conduct in connection with the events of January 6 itself. The alleged conduct largely consists of Trump's communications in the form of Tweets and a public address. The President possesses "extraordinary power to speak to his fellow citizens and on their behalf." Most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.

There may, however, be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of "content, form, and context" will necessarily inform the inquiry. But "there is not always a clear line between [the President's] personal and official affairs." *Trump v. Mazurs* (2023). The analysis therefore must be fact specific and may prove to be challenging.

We therefore remand to the District Court to determine in the first instance whether this alleged conduct is official or unofficial.

The Government does not dispute that if Trump is entitled to immunity for certain official acts, he may not "be held criminally liable" based on those acts. But it nevertheless contends that a jury could "consider" evidence concerning the President's official acts "for limited and specified purposes," and that such evidence would "be admissible to prove, for example, Trump's knowledge or notice of the falsity of his election-fraud claims." That proposal threatens to eviscerate the immunity we have recognized. It would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge. The Government's position is untenable in light of the separation of powers principles we have outlined.

If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the "intended effect" of immunity would be defeated. *Fitzgerald*. The President's immune conduct would be subject to

examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted.

IV

Trump asserts a far broader immunity than the limited one we have recognized. He contends that the indictment must be dismissed because the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution.

The implication of Trump's theory is that a President who evades impeachment for one reason or another during his term in office can never be held accountable for his criminal acts in the ordinary course of law. So if a President manages to conceal certain crimes throughout his Presidency, or if Congress is unable to muster the political will to impeach the President for his crimes, then they must forever remain impervious to prosecution.

Impeachment is a political process by which Congress can remove a President who has committed "Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4. Transforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our government.

The Government for its part takes a similarly broad view, contending that the President enjoys no immunity from criminal prosecution for any action. It maintains this view despite agreeing with much of our analysis.

Yet the Government contends that the President should not be considered immune from prosecution for those official acts. On the Government's view, as-applied challenges in the course of the trial suffice to protect Article II interests, and review of a district court's decisions on such challenges should be deferred until after trial. If the President is instead immune from prosecution, a district court's denial of immunity would be appealable before trial.

The Government asserts that the "robust safeguards" available in typical criminal proceedings alleviate the need for pretrial review. First, it points to the Justice Department's "longstanding commitment to the impartial enforcement of the law," as well as the criminal justice system's further protections: grand juries, a defendant's procedural rights during trial, and the requirement that the Government prove its case beyond a reasonable doubt. Next, it contends that "existing principles of statutory construction and as-applied constitutional challenges" adequately address the separation of powers concerns involved in applying generally applicable criminal laws to a President. Finally, the Government cites certain defenses that would be available to the President in a particular prosecution, such as the public-authority defense or the advice of the Attorney General.

Questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him "unduly cautious in the discharge of his official duties."

As for the Government's assurances that prosecutors and grand juries will not permit political or baseless prosecutions from advancing in the first place, those assurances are available to every criminal defendant and fail to account for the President's "unique position in the constitutional scheme." We do not ordinarily decline to decide significant constitutional questions based on the Government's promises of good faith. See *United States v. Stevens* (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Nor do we do so today.

As for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today—conclude that immunity extends to official discussions between the President and his Attorney General, and then remand to the lower courts to determine "in the

first instance" whether and to what extent Trump's remaining alleged conduct is entitled to immunity.

The principal dissent's starting premise—that unlike Speech and Debate Clause immunity, no constitutional text supports Presidential immunity (opinion of SOTOMAYOR, J.)—is one that the Court rejected decades ago as "unpersuasive." *Fitzgerald*. True, there is no "Presidential immunity clause" in the Constitution. But there is no " 'separation of powers clause' " either.

Given the Framers' desire for an energetic and vigorous President, the principal dissent's view that the Constitution they designed allows all his actions to be subject to prosecution—even the exercise of powers it grants exclusively to him—defies credulity.

The dissents' positions in the end boil down to ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President "feels empowered to violate federal criminal law." The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. Virtually every President is criticized for insufficiently enforcing some aspect of federal law (such as drug, gun, immigration, or environmental laws). An enterprising prosecutor in a new administration may assert that a previous President violated that broad statute. Without immunity, such types of prosecutions of ex-Presidents could quickly become routine. The enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid. Ignoring those risks, the dissents are instead content to leave the preservation of our system of separated powers up to the good faith of prosecutors.

V

This case poses a question of lasting significance: When may a former President be prosecuted for official acts taken during his Presidency? Our

Nation has never before needed an answer. But in addressing that question today, unlike the political branches and the public at large, we cannot afford to fixate exclusively, or even primarily, on present exigencies. In a case like this one, focusing on "transient results" may have profound consequences for the separation of powers and for the future of our Republic. *Youngstown* (Jackson, J., concurring). Our perspective must be more farsighted, for "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.

It is these enduring principles that guide our decision in this case. The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.

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

It is so ordered.

Justice THOMAS, concurring.

I write separately to highlight another way in which this prosecution may violate our constitutional structure. In this case, the Attorney General purported to appoint a private citizen as Special Counsel to prosecute a former President on behalf of the United States. But I am not sure that any

office for the Special Counsel has been "established by Law," as the Constitution requires. Art. II, § 2, cl. 2. By requiring that Congress create federal offices "by Law," the Constitution imposes an important check against the President—he cannot create offices at his pleasure. If there is no law establishing the office that the Special Counsel occupies, then he cannot proceed with this prosecution. A private citizen cannot criminally prosecute anyone, let alone a former President.

In this case, there has been much discussion about ensuring that a President "is not above the law." But, as the Court explains, the President's immunity from prosecution for his official acts *is* the law. The Constitution provides for "an energetic executive," because such an Executive is "essential to … the security of liberty." Respecting the protections that the Constitution provides for the Office of the Presidency secures liberty. In that same vein, the Constitution also secures liberty by separating the powers to create and fill offices. And, there are serious questions whether the Attorney General has violated that structure by creating an office of the Special Counsel that has not been established by law. Those questions must be answered before this prosecution can proceed. We must respect the Constitution's separation of powers in all its forms, else we risk rendering its protection of liberty a parchment guarantee.

Justice BARRETT, concurring in part.

I appreciate the Court's concern that allowing into evidence official acts for which the President cannot be held criminally liable may prejudice the jury. But the rules of evidence are equipped to handle that concern on a case-by-case basis. Most importantly, a trial court can exclude evidence of the President's protected conduct "if its probative value is substantially outweighed by a danger of unfair prejudice" or "confusing the issues." Fed. Rule Evid. 403; see also Rule 105 (requiring the court to "restrict the evidence to its proper scope and instruct the jury accordingly"). The balance is more likely to favor admitting evidence of an official act in a bribery prosecution, for instance, than one in which the protected conduct has little connection to the charged offense. And if the evidence comes in, the trial court can instruct the

jury to consider it only for lawful purposes. I see no need to depart from that familiar and time-tested procedure here.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

The majority makes three moves that, in effect, completely insulate Presidents from criminal liability. First, the majority creates absolute immunity for the President's exercise of "core constitutional powers." This holding is unnecessary on the facts of the indictment, and the majority's attempt to apply it to the facts expands the concept of core powers beyond any recognizable bounds. In any event, it is quickly eclipsed by the second move, which is to create expansive immunity for all "official acts." Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless. Finally, the majority declares that evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him. That holding, which will prevent the Government from using a President's official acts to prove knowledge or intent in prosecuting private offenses, is nonsensical.

The Constitution's text contains no provision for immunity from criminal prosecution for former Presidents. The omission in the text of the Constitution is worth noting, however, for at least three reasons.

First, the Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech or Debate Clause. See Art. I, § 6, cl. 1 ("Senators and Representatives … shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place"). They did not extend the same or similar immunity to Presidents.

Second, "some state constitutions at the time of the Framing specifically provided 'express criminal immunities' to sitting governors." The Framers chose not to include similar language in the Constitution to immunize the President. If the Framers "had wanted to create some constitutional privilege to shield the President … from criminal indictment," they could have done so. Memorandum from R. Rotunda to K. Starr re: Indictability of the President 18 (May 13, 1998). They did not.

Third, insofar as the Constitution does speak to this question, it actually contemplates some form of criminal liability for former Presidents. The majority correctly rejects Trump's argument that a former President cannot be prosecuted unless he has been impeached by the House and convicted by the Senate for the same conduct. The majority ignores, however, that the Impeachment Judgment Clause cuts against its own position. That Clause presumes the availability of criminal process as a backstop by establishing that an official impeached and convicted by the Senate "shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." That Clause clearly contemplates that a former President may be subject to criminal prosecution for the same conduct that resulted (or could have resulted) in an impeachment judgment—including conduct such as "Bribery," Art. II, § 4, which implicates official acts almost by definition.

Aware of its lack of textual support, the majority points out that this Court has "recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.' " *Fitzgerald*. That is true, as far as it goes. Nothing in our history, however, supports the majority's entirely novel immunity from criminal prosecution for official acts.

The historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it. For instance, Alexander Hamilton wrote that former Presidents would be "liable to prosecution and punishment in the ordinary course of law." The Federalist No. 69.

Other commentators around the time of the founding [James Wilson, Charles Pinckney, Justice Story] observed that federal officials had no immunity from prosecution, drawing no exception for the President.

Our country's history also points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts. Consider Watergate, for example. After the Watergate tapes revealed President Nixon's misuse of official power to obstruct the Federal Bureau of Investigation's investigation of the Watergate burglary, President Ford pardoned Nixon. Both Ford's pardon and Nixon's acceptance of the pardon necessarily "rested on the understanding that the former President faced potential criminal liability."

Subsequent special counsel and independent counsel investigations have also operated on the assumption that the Government can criminally prosecute former Presidents for their official acts, where they violate the criminal law.

In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now. Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.

Setting aside this evidence, the majority announces that former Presidents are "absolutely," or "at least presumptively," immune from criminal prosecution for all of their official acts. The majority purports to keep us in suspense as to whether this immunity is absolute or presumptive, but it quickly gives up the game. It explains that, "at a minimum, the President must … be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose *no dangers of intrusion* on the authority and functions of the Executive Branch." No dangers, none at all. It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes.

Quick on the heels of announcing this astonishingly broad official-acts immunity, the majority assures us that a former President can still be prosecuted for "unofficial acts." Of course he can. No one has questioned the ability to prosecute a former President for unofficial (otherwise known as private) acts. Even Trump did not claim immunity for such acts and, as the majority acknowledges, such an immunity would be impossible to square with *Clinton v. Jones*. This unremarkable proposition is no real limit on today's decision. It does not hide the majority's embrace of the most far-reaching view of Presidential immunity on offer.

So how does the majority get to its rule? With text, history, and established understanding all weighing against it, the majority claims just one arrow in its quiver: the balancing test in *Nixon v. Fitzgerald*. Yet even that test cuts against it.

On the facts before it, the Court in *Fitzgerald* concluded that a "merely private suit for damages based on a President's official acts" did not serve those interests. The Court reasoned that the "visibility of [the President's] office and the effect of his actions on countless people" made him an easy target for civil suits that "frequently could distract him from his public duties." The public interest in such private civil suits, the Court concluded, was comparatively weak ("There is a lesser public interest in actions for civil

damages than, for example, in criminal prosecutions"). Therefore, the Court held that a former President was immune from such suits.

In the context of a federal criminal prosecution of a former President, however, the danger to the functioning of the Executive Branch is much reduced. Further, as every member of the *Fitzgerald* Court acknowledged, the public interest in a criminal prosecution is far weightier. Applying the *Fitzgerald* balancing here should yield the opposite result. Instead, the majority elides any difference between civil and criminal immunity, granting Trump the same immunity from criminal prosecution that Nixon enjoyed from an unlawful termination suit. That is plainly wrong.

The majority relies almost entirely on its view of the danger of intrusion on the Executive Branch, to the exclusion of the other side of the balancing test. Its analysis rests on a questionable conception of the President as incapable of navigating the difficult decisions his job requires while staying within the bounds of the law. It also ignores the fact that he receives robust legal advice on the lawfulness of his actions.

Moreover, there are many facets of criminal liability, which the majority discounts, that make it less likely to chill Presidential action than the threat of civil litigation. First, in terms of probability, the threat of criminal liability is much smaller. In *Fitzgerald*, the threat of vexatious civil litigation loomed large. The Court observed that, given the "visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." The majority's bare assertion that the burden of exposure to federal criminal prosecution is more limiting to a President than the burden of exposure to civil suits does not make it true, and it is not persuasive. Second, federal criminal prosecutions require "robust procedural safeguards" not found in civil suits. Third, because of longstanding interpretations by the Executive Branch, every sitting President has so far believed himself under the threat of criminal liability after his term in office and nevertheless boldly fulfilled the duties of his office. Some amount of caution is necessary, after all. It is a far greater danger if the President feels

empowered to violate federal criminal law, buoyed by the knowledge of future immunity. I am deeply troubled by the idea, inherent in the majority's opinion, that our Nation loses something valuable when the President is forced to operate within the confines of federal criminal law.

The majority's main concern could be that Presidents will be deterred from taking necessary and lawful action by the fear that their successors might pin them with a baseless criminal prosecution—a prosecution that would almost certainly be doomed to fail, if it even made it out of the starting gate. The Court should not have so little faith in this Nation's Presidents. As this Court has said before in the context of criminal proceedings, "the chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." *Nixon*.

At the same time, the public interest in a federal criminal prosecution of a former President is vastly greater than the public interest in a private individual's civil suit. The public interest in the federal criminal prosecution of a former President alleged to have used the powers of his office to commit crimes may be greater still. "The President represents all the voters in the Nation," and his powers are given by the people under our Constitution. *Anderson v. Celebrezze* (1983). When Presidents use the powers of their office for personal gain or as part of a criminal scheme, every person in the country has an interest in that criminal prosecution. The majority overlooks that paramount interest entirely.

Not content simply to invent an expansive criminal immunity for former Presidents, the majority goes a dramatic and unprecedented step further. It says that acts for which the President is immune must be redacted from the narrative of even wholly private crimes committed while in office. They must play no role in proceedings regarding private criminal acts.

Even though the majority's immunity analysis purports to leave unofficial acts open to prosecution, its draconian approach to official-acts evidence deprives these prosecutions of any teeth. If the former President

cannot be held criminally liable for his official acts, those acts should still be admissible to prove knowledge or intent in criminal prosecutions of unofficial acts. For instance, the majority struggles with classifying whether a President's speech is in his capacity as President (official act) or as a candidate (unofficial act). Imagine a President states in an official speech that he intends to stop a political rival from passing legislation that he opposes, no matter what it takes to do so (official act). He then hires a private hitman to murder that political rival (unofficial act). Under the majority's rule, the murder indictment could include no allegation of the President's public admission of premeditated intent to support the *mens rea* of murder. That is a strange result, to say the least.

Looking beyond the fate of this particular prosecution, the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now "lies about like a loaded weapon" for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation. *Korematsu v. United States* (1944) (Jackson, J., dissenting). The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.

Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority's message today.

Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and

the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.

The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded. In the Federalist Papers, after "endeavoring to show" that the Executive designed by the Constitution "combines ... all the requisites to energy," Alexander Hamilton asked a separate, equally important question: "Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?" The Federalist No. 77. The answer then was yes, based in part upon the President's vulnerability to "prosecution in the common course of law." The answer after today is no.

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

With fear for our democracy, I dissent.

Justice JACKSON, dissenting.

Justice SOTOMAYOR has thoroughly addressed the Court's flawed reasoning and conclusion as a matter of history, tradition, law, and logic. I agree with every word of her powerful dissent. I write separately to explain, as succinctly as I can, the theoretical nuts and bolts of what, exactly, the majority has done today to alter the paradigm of accountability for Presidents of the United States. I also address what that paradigm shift means for our Nation moving forward.

To fully appreciate the profound change the majority has wrought, one must first acknowledge what it means to have immunity from criminal

prosecution. Put simply, immunity is "exemption" from the duties and liabilities imposed by law. In its purest form, the concept of immunity boils down to a maxim—"the King can do no wrong"—a notion that was firmly "rejected at the birth of our Republic." *Clinton v. Jones*.

It is indisputable that immunity from liability for wrongdoing is the exception rather than the rule in the American criminal justice system. That is entirely unsurprising, for the very idea of immunity stands in tension with foundational principles of our system of Government. It is a core tenet of our democracy that the People are the sovereign, and the Rule of Law is our first and final security.

These foundational presuppositions are reflected in a procedural paradigm of rules and accountability that operates in the realm of criminal law—what I would call an individual accountability model.

The basic contours of that model are familiar, because they manifest in every criminal case. Criminal law starts with an act of the legislature, which holds the power "to define a crime, and ordain its punishment." *United States v. Wiltberger* (1820). Criminal statutes are laws of general applicability that express "the assent of the people's representatives" that certain conduct is off limits in our society.

All of this is to say that our Government has long functioned under an accountability paradigm in which no one is above the law; an accused person is innocent until proven guilty; and criminal defendants may raise defenses, both legal and factual, tailored to their particular circumstances, whether they be Government officials or ordinary citizens. For over two centuries, our Nation has survived with these principles intact.

With that understanding of how our system of accountability for criminal acts ordinarily functions, it becomes much easier to see that the majority's ruling in this case breaks new and dangerous ground. Departing from the traditional model of individual accountability, the majority has concocted something entirely different: a Presidential accountability model

that creates immunity—an exemption from criminal law—applicable only to the most powerful official in our Government.

So, how does this new Presidential accountability model work? An initial problem is the lack of clarity regarding what this new model entails. The majority announces only its most basic contours. According to the majority, whether a former President is immune depends on how his criminal conduct is classified, as among three possible categories.

First, with respect to any criminal conduct relating to a President's "core constitutional powers"—those subjects "within his 'conclusive and preclusive' constitutional authority"—the President is entitled to absolute immunity from criminal prosecution. Second, expanding outward from this "core," regarding all other "acts within the outer perimeter of the President's official responsibility," the President is entitled to "at least a *presumptive* immunity from criminal prosecution." Third, if the criminal conduct at issue comprises "unofficial acts, there is no immunity."[3]

The majority's multilayered, multifaceted threshold parsing of the character of a President's criminal conduct differs from the individual accountability model in several crucial respects. For one thing, it makes it next to impossible to know *ex ante* when and under what circumstances a President will be subject to accountability for his criminal acts. For every allegation, courts must run this gauntlet first—no matter how well documented or heinous the criminal act might be.

FN 3: It is important to note that the majority reframes the immunity question presented here as a separation of powers concern that is compelled by Article II—as if what is being asked is whether Congress can criminalize executive prerogatives. But that is not anywhere close to what is happening in this case. No one maintains that Congress has passed a law that specifically criminalizes the President's use of any power that the Constitution vests exclusively in the Executive, much less that the Judiciary is being conscripted to adjudicate the propriety of such a statute. To the contrary, the indictment here invokes criminal statutes of general applicability that everyone is supposed to follow, both on and off the job. So, the real question is: Can the President, too, be held accountable for committing crimes while he is undertaking his official duties? The nature of his authority under Article II (whether conclusive and preclusive, or shared with Congress, or otherwise) is entirely beside the point

Thus, even a hypothetical President who admits to having ordered the assassinations of his political rivals or critics, or one who indisputably instigates an unsuccessful coup, has a fair shot at getting immunity under the majority's new Presidential accountability model. That is because whether a President's conduct will subject him to criminal liability turns on the court's evaluation of a variety of factors related to the character of that particular act—specifically, those characteristics that imbue an act with the status of "official" or "unofficial" conduct (minus motive). In the end, then, under the majority's new paradigm, whether the President will be exempt from legal liability for murder, assault, theft, fraud, or any other reprehensible and outlawed criminal act will turn on whether he committed that act in his official capacity, such that the answer to the immunity question will always and inevitably be: It depends.

The majority's new Presidential accountability model is also distinct insofar as it accepts as a basic starting premise that generally applicable criminal laws do *not* apply to everyone in our society. In the majority's view, while all other citizens of the United States must do their jobs and live their lives within the confines of criminal prohibitions, the President cannot be made to do so; he must sometimes be exempt from the law's dictates depending on the character of his conduct. Indeed, the majority holds that the President, unlike anyone else in our country, is comparatively free to engage in criminal acts in furtherance of his official duties.

That point bears emphasizing. Immunity can issue for Presidents under the majority's model even for unquestionably and intentionally egregious criminal behavior. Regardless of the nature or the impact of the President's criminal conduct, so long as he is committing crimes "pursuant to the powers invested exclusively in him by the Constitution," or as needed "to carry out his constitutional duties without undue caution," he is likely to be deemed immune from prosecution.[5]

FN 5: To fully appreciate the oddity of making the criminal immunity determination turn on the character of the President's responsibilities, consider what the majority says is one of the President's "conclusive and preclusive" prerogatives: " 'the President's power to remove ... those who wield executive power on his behalf,'" quoting *Seila Law*. While the President may have the authority to decide to remove the Attorney General, for example, the question here is whether the President has the option to remove the Attorney General by, say, poisoning him to death. Put another way, the issue here is not whether the President has exclusive removal power, but whether a generally applicable criminal law prohibiting murder can restrict *how* the President exercises that authority.

Ultimately, the majority's model simply sets the criminal law to one side when it comes to crimes allegedly committed by the President. Before accountability can be sought or rendered, the Judiciary serves as a newfound special gatekeeper, charged not merely with interpreting the law but with policing whether it applies to the President *at all*. Also, under the new Presidential accountability model, the starting presumption is that the criminal law does *not* apply to Presidents, no matter how obviously illegal, harmful, or unacceptable a President's official behavior might be. Regardless of all that, courts must now ensure that a former President is *not* held accountable for any criminal conduct he engages in while he is on duty, unless his conduct consists primarily (and perhaps solely) of unofficial acts.

Under the majority's new Presidential accountability paradigm, what a prosecutor or jury does may not even matter, since the courts take center stage once charges are brought against a former President, marshaling their resources to conduct a complex and amorphous threshold immunity evaluation. Whether a former President will be entirely exempted from the dictates of the law (such that the roles of other participants in the criminal justice process become irrelevant) requires a judicial assessment, in the first instance, of his criminal conduct and the circumstances under which he acted. The President can commit crimes in the course of his job even under circumstances *in which no one thinks he has any excuse*; the law simply does not apply to him. Unlike a defendant who invokes an affirmative defense and relies on a legal determination that there was a good reason for his otherwise unlawful conduct, a former President invoking immunity relies on the premise that he can do whatever he wants, however he wants, so long as he uses his " 'official power' " in doing so. In the former paradigm, the President remains subject to law; in the latter, he is above it.

Consider two observations about the results that follow from this paradigm shift. First, by changing the accountability paradigm in this fashion, the Court has unilaterally altered the balance of power between the three coordinate branches of our government as it relates to the Rule of Law, aggrandizing power in the Judiciary and the Executive, to the detriment of Congress. Second, the majority's new Presidential accountability model undermines the constraints of the law as a deterrent for future Presidents who might otherwise abuse their power, to the detriment of us all.

If the structural consequences of today's paradigm shift mark a step in the wrong direction, then the practical consequences are a five-alarm fire that threatens to consume democratic self-governance and the normal operations of our government. From a theoretical perspective, philosophers have long considered deterrence to be a

key justification for adopting and maintaining systems that ensure accountability for criminal conduct. For that same reason, some commentators also maintain that decreasing the certainty of accountability for wrongful acts at least arguably reduces incentives to follow the law.

Under the individual accountability model, because everyone is subject to the law, the potential of criminal liability operates as a constraint on the actions and decisions of everyone, including the President. After today, that reality is no more. Consequently, our Nation has lost a substantial check on Presidents who would use their official powers to commit crimes with impunity while in office.

...As far as I can tell, the majority is mostly concerned that, without immunity, Presidents might "be chilled from taking the 'bold and unhesitating action' required of an independent Executive." The Court's opinion candidly laments that application of the law to Presidents might not be evenhanded, and that, as a result, Presidents might be less " 'vigorous' and 'energetic' " as executive officers. But that concern ignores (or rejects) the foundational principles upon which the traditional individual accountability paradigm is based. Worse still, promoting more vigor from Presidents in exercising their official duties—and, presumably, less deliberation—invites breathtaking risks in terms of harm to the American people that, in my view, far outweigh the benefits.

Having now cast the shadow of doubt over when—if ever—a former President will be subject to criminal liability for any criminal conduct he engages in while on duty, the majority incentivizes all future Presidents to cross the line of criminality while in office, knowing that unless they act "manifestly or palpably beyond their authority," they will be presumed above prosecution and punishment alike.

But the majority also tells us not to worry, because "like everyone else, the President is subject to prosecution in his *unofficial* capacity." This attempted reassurance is cold comfort, even setting aside the fact that the Court has neglected to lay out a standard that reliably distinguishes between a President's official and unofficial conduct. Why? Because there is *still* manifest inequity: Presidents alone are now free to commit crimes when they are on the job, while all other Americans must follow the law in all aspects of their lives, whether personal or professional. The official-versus-unofficial act distinction also seems both arbitrary and irrational, for it suggests that the unofficial criminal acts of a President are the only ones worthy of prosecution. Quite to the contrary, it is when the President commits crimes using his unparalleled official powers that the risks of abuse and autocracy will be most dire. So, the fact that,

"unlike anyone else, the President is" vested with "sweeping powers and duties," actually underscores, rather than undermines, the grim stakes of setting the criminal law to the side when the President flexes those very powers.

To the extent that the majority's new accountability paradigm allows Presidents to evade punishment for their criminal acts while in office, the seeds of absolute power for Presidents have been planted. And, without a doubt, absolute power corrupts absolutely. "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny." *Mine Workers* (Frankfurter, J, concurring). Likewise, "[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead* (Brandeis, J., dissenting). I worry that, after today's ruling, our Nation will reap what this Court has sown.

Stated simply: The Court has now declared for the first time in history that the most powerful official in the United States can (under circumstances yet to be fully determined) become a law unto himself. As we enter this uncharted territory, the People, in their wisdom, will need to remain ever attentive, consistently fulfilling their established role in our constitutional democracy, and thus collectively serving as the ultimate safeguard against any chaos spawned by this Court's decision. For, like our democracy, our Constitution is "the creature of their will, and lives only by their will." *Cohens v. Virginia* (1821).

For my part, I simply cannot abide the majority's senseless discarding of a model of accountability for criminal acts that treats every citizen of this country as being equally subject to the law—as the Rule of Law requires. That core principle has long prevented our Nation from devolving into despotism. Yet the Court now opts to let down the guardrails of the law for one extremely powerful category of citizen: any future President who has the will to flout Congress's established boundaries.

In short, America has traditionally relied on the law to keep its Presidents in line. Starting today, however, Americans must rely on the courts to determine when (if at all) the criminal laws that their representatives have enacted to promote individual and collective security will operate as speedbumps to Presidential action or reaction. Once self-regulating, the Rule of Law now becomes the rule of judges, with courts pronouncing which crimes committed by a President have to be let go and which can be redressed as impermissible. So, ultimately, this Court itself will decide whether the law will be any barrier to whatever course of criminality emanates

from the Oval Office in the future. The potential for great harm to American institutions and Americans themselves is obvious.

The majority of my colleagues seems to have put their trust in our Court's ability to prevent Presidents from becoming Kings through case-by-case application of the indeterminate standards of their new Presidential accountability paradigm. I fear that they are wrong. But, for all our sakes, I hope that they are right.

In the meantime, because the risks (and power) the Court has now assumed are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms, I dissent.

QUESTIONS: Could a president order the Justice Department to indict a former president for treason? Could a president cause a member of congress who refuses to support a president's agenda be arrested, or even assassinated? Could a president take a bribe to give someone a pardon?

§ 5-4 Appointment and Removal

TRUMP V. SLAUGHTER

146 S. Ct. 18 (2026)

Chief Justice ROBERTS delivered the opinion of the Court.

Nearly 250 years ago, the Framers decided to vest "[t]he executive Power" in one person—"a President of the United States of America." The choice was not made lightly. Within living memory were the "long train of abuses and usurpations" of a King who reigned as "a Tyrant." Declaration of Independence. Indeed, several delegates to the Constitutional Convention pushed for a multimember council instead of "unity in the Executive magistracy," which they feared would serve as "the foetus of monarchy." 1 Records of the Federal Convention of 1787, p. 66 (M. Farrand ed. 1911). But unity won out. Our Constitution's drafters knew from experience that a "plurality in the executive"—the model in use by most States at the time—not only "diminishes" the "activity, secrecy, and dispatch" necessary to ensure "good government" but "tends to conceal faults and destroy responsibility." The Federalist No. 70, pp. 423–424, 427. With just one President in charge, they reasoned, there would be no doubt "on whom the blame or the punishment of a pernicious measure … ought really to fall."

One hundred years ago, this Court honored the Convention's choice in the seminal case of *Myers v. United States* (1926). There, we held that the Constitution "grants to the President" the "general administrative control of those executing the laws, including the power of appointment and removal of executive officers." Because no one could "execute the laws" "alone and unaided," Chief Justice Taft explained for the Court, the President must be permitted to "select those who … act for him" and "remove those for whom he can not continue to be responsible." "To hold otherwise would make it

impossible for the President" to fulfill his constitutional obligation "to take care that the laws be faithfully executed."

Today we confront one of several regulatory agencies that deviate from this model of Presidential supervision—the Federal Trade Commission (FTC). Since its creation in 1914, the FTC has accumulated vast rulemaking, enforcement, and adjudicatory powers under more than 80 statutes. Not only does it promulgate rules that carry the force of law, but it also enforces those rules against private parties, collecting civil penalties in the billions of dollars. Its powers, however, do not belong to the President or his appointees alone; they instead belong to five Commissioners, each of whom serves for seven years and may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41.

We hold that such protection from removal is contrary to the separation of powers enshrined in the Constitution.

I

[When President Trump began his second term in January 2025, the FTC was led by two Republicans and three Democrats. On his first day in office, he designated a new Chair, replacing President Biden's pick. The former Chair resigned her seat a few weeks later, permitting President Trump to appoint a replacement. In the meantime, however, the FTC would be split down the middle. That split came to an abrupt end in March, when President Trump fired the two remaining Democratic Commissioners. He did not assert that they were "inefficient," "neglected" their "duties," or committed "malfeasance in office," as the statute required. He instead told them that their continued service on the FTC was inconsistent with his Administration's priorities and that they were removed from office pursuant to his authority under Article II of the Constitution. Rebecca Slaughter, one of the democratic commissioners who had been fired, promptly filed suit against the President seeking declaratory and injunctive relief to restore her to office. She alleged that her removal was ultra vires, violated the Administrative Procedure Act, and violated the Constitution.

The District Court granted Slaughter's motion for summary judgment. It acknowledged that It considered itself bound by *Humphrey's* Executor v. *United States* (1935). The court declared the President's "purported removal" ultra vires and issued a permanent injunction barring interference with Ms. Slaughter's right to perform her lawful duties. A divided Court of Appeals denied the Government's motion for a stay pending appeal. The Supreme Court stayed the District Court's order and granted certiorari].

II

The Constitution vests the executive Power in a President of the United States of America and instructs that he "take Care that the Laws be faithfully executed." Art. II, §§ 1, 3. To vest "the whole executive power" in just one person was not to suggest that he could execute the laws alone and unaided. The Federalist, No. 47. But it was to establish a hierarchy—a "Chief Magistrate" with whom the buck stops, and below him various "assistants or deputies" who "derive their offices from his appointment" and remain "subject to his superintendence." The Federalist, No. 72. To remain accountable to the President, those officers must be removable by the President.

The idea that one President would be in charge was by no means a foregone conclusion in 1787. Just ten years earlier, the colonists had "thrown off the Yoke" of King George III and his colonial governors. Now citizens, they had no intention of reestablishing the kingly office by another name. Thus the flurry of state constitutions that followed the Declaration of Independence made of the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of his regal ancestor. Almost every State had but a nominal Governor, who could act only with his council's consent. These early chief executives were little more than chairmen of their executive boards.

The Framers chose to depart from this model. Common was the complaint that the States' feeble and divided executives left no effectual check for the instability and encroachments of legislatures.

In opting for one President, however, the Framers did not opt for the President to work alone. They knew (as our first President would write) that it would be "impossible" for just "one man … to perform all the great business of the State." So they anticipated that Congress would "institute the great Departments" and allow the President to "appoint officers therein, to assist him in discharging the duties of his trust."

These officers were to serve as envoys of the President, not his equals. Their very purpose, after all, was to assist him to discharge *his* arduous employment, not *theirs*. In so structuring the Government, the Convention "rejected a committee-style Executive Branch in favor of a unitary and accountable President, standing under law, yet over" his department heads.

Because these officers were subject to the President's superintendence, they had to be removable by him at will. For one, that was just part of what it meant to wield "the executive power," as it was understood at the time of ratification. For another, the power to remove at will was a necessary corollary of the Constitution's design. The "unity" of the Executive Branch would be "destroyed," Hamilton wrote, if it were vested "ostensibly in one man, subject in whole or in part to the control and co-operation of others, in the capacity of counselors to him.

That practice began in the First Congress. When it first met in 1789, one of its first and most pressing tasks was to establish the first executive departments—and with them the first "Heads of Departments." Art. II, § 2, cl. 2. In doing so, it debated how those officers should be removed. Some felt that the Senate had to consent to all removals, as one of the two entities that "appointed" the official in the first place. Others argued that the Constitution was silent on the question, giving Congress the right to select whether an officer may be removed, and if so by whom. And a third group contended that removal was part of "the Executive power" vested in the President, which the Legislature has no right to diminish or modify.

The third group emerged victorious. [Congress enacted statutes establishing the Departments of War and Treasury] which implicitly endorsed the view that the President had a constitutional power to remove executive officers.

What text, history, and structure settle, our precedent confirms—the President may remove his subordinates at will.

Twice in the 19th century, we reaffirmed what the First Congress had held. [Although] the text of the Constitution is silent with respect to the power of removal from office, the decision of Congress in 1789, and the universal practice of the Government under it "has settled the question beyond any power of alteration."

Our landmark decision, however, came 100 years ago in *Myers v. United States.* That case arose from an unlikely source—a dispute over management of the post office in Portland, Oregon. Under an 1876 statute, the President had to receive the "advice and consent of the Senate" not only to *appoint* postmasters but also to *remove* them. For reasons that are now lost to history, President Wilson fired Portland's postmaster, Frank Myers, and did so without the Senate's consent. Myers sued for backpay.

In a scholarly opinion, Chief Justice Taft rejected Myers's suit and reaffirmed the President's power to fire his subordinates at will. That power arose, he wrote for the Court, from the Constitution's text, history, and structure, just as the First Congress had held in 1789.

While *Myers* was perhaps our best word on the subject, it was not our last. Just nine years after *Myers*, we handed down *Humphrey's Executor.* The case arose out of President Roosevelt's decision to fire one of President Hoover's appointees to the Federal Trade Commission, William Humphrey, two years into Humphrey's seven-year term. Roosevelt requested Humphrey's resignation. Humphrey refused, so Roosevelt fired him in a one-line letter that did not specify a cause for his removal—seemingly contrary to a statute permitting removal of Commissioners only for "inefficiency, neglect of duty, or malfeasance in office." Humphrey died soon thereafter, and the executor of his estate sued for backpay.

Justice Sutherland, writing for the Court, started by reaffirming that the President possesses "the exclusive and illimitable power" to remove "all purely executive officers," just as *Myers* held. He then pivoted. There are some presidentially appointed officials, he explained, who may perform "executive

functions" but exercise "no part of the executive power." And for those officials, "the decision in the *Myers* case cannot be accepted as controlling." The Court held that William Humphrey was one such official. That was because the FTC's duties were very limited—they were "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." Although the President may be the "master in his own house," he warned, he may not "impose his control in the house of another."

From the start, *Humphrey's* was tethered to a highly circumscribed and almost fictional view of the FTC's role. *Humphrey's* by its terms applied only to agencies that occupy "no place in the executive department," are "independent of executive authority," and exercise "no part of the executive power." Indeed, Justice Sutherland took pains to emphasize that "the character of the office"—executive or nonexecutive—would determine the result of future cases, and to reiterate that the Court's decision was limited "to officers of the kind here under consideration."

In later cases, although *Humphrey's* announced dividing line remained intact, more and more functions, we concluded, in fact fell on the executive side of that line—and thus within the President's exclusive control. Soon enough, we recognized that *Humphrey's* flunked even its own test. "It is hard to dispute that the powers of the FTC," even "at the time of *Humphrey's Executor*," we explained in 1988, "would at the present time be considered 'executive,' at least to some degree." *Morrison v. Olson* (1988).

Fast forward another few decades, and *Humphrey's* premises had been further undermined. In two cases, *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010) and *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), we again considered the permissibility of restrictions on the President's power of removal. In both cases, we reiterated *Myers*'s rule that the President exercises "general administrative control of those executing the laws" and thus must be able to "remove those for whom he can not continue to be responsible.

Humphrey's framework, in short, has not withstood the test of time. While *Humphrey's* was surely right to focus on "the character of the office" at issue, and surely right to say that "purely executive" powers must be controlled by

the President, we long ago abandoned the notion that there are some powers that are only *partly* executive. Forty years have now passed, in fact, since we recognized that the FTC exercises executive power—and did so even in 1935, when *Humphrey's* was decided.

At this point, all that is left of *Humphrey's* is its observation that an agency that "exercises no part of the executive power" need not fall within the rule of presidential removal. *Humphrey's* stands only for the proposition that there would be "no strict constitutional impediment to a 'branchless' agency" that exercises "no governmental power"). If Congress wishes to establish independent agencies to assist it with its functions, it may do so. But it may not foist those agencies upon the President, and thus deprive him of "the executive power vested in him by the Constitution"—something *Humphrey's* itself never purported to permit.

If anything more *is* left of *Humphrey's*, we overrule it. *Humphrey's* has for decades been a result in search of a rationale. As we have often said, *stare decisis* is not an "inexorable command," and is at its weakest in constitutional cases, where only we may readily fix our own mistakes. Our precedents about precedent teach that a number of factors are relevant. Here, every factor—the "quality" of the decision's reasoning, its "consistency" with our other cases, the "workability" of its rule, and the interests of those who have "relied" on it — counsels in favor of letting *Humphrey's* go.

The dissent contends that we ignore the reliance interests of "ordinary Americans and regulated firms alike." Quite the contrary. In its valiant search for reliance interests," it is the dissent that somehow misses maybe the most important one: the reliance interests of the American people … in the preservation of our constitutionally promised liberties.

With these principles in mind, this is not a close case. The FTC's for-cause removal provision violates the separation of powers. In its present form, the FTC enforces and administers some 80 statutes, which cover almost every facet of our Nation's economy. The tasks it undertakes are "the very essence of 'execution' of the law"—precisely the President's constitutional role.

The FTC unquestionably exercises executive power, and must therefore be controlled by the Chief Executive, in whom such power is vested. It follows, then, that Slaughter served as the President's subordinate at the FTC—and that the President was entitled to cut her tenure short. Because the FTC's activities fall well within the heartland of executive power, we have no occasion today to define the bounds of what such power entails. As our precedents recognize, not all offices created by Congress necessarily come with executive or even sovereign power attached.

Our Constitution creates three branches, but only one President. That President is not all powerful—not by any means. But he is not impotent either. He and he alone is vested with "the executive Power" of the United States. To "discharge the duties of his trust," the President must have the assistance of officers he can trust. Although it is up to the Senate to decide whether to confirm those with whom the President would *prefer* to work, neither Congress nor the courts may saddle him with those with whom he *cannot* work. Subordinates who exercise the President's power are subject to removal by him. Then, and only then, can they remain accountable to the President, and the President to the people.

The judgment of the United States District Court for the District of Columbia is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH, concurring.

To fulfill his constitutional duty to ensure the laws are faithfully executed, the Court holds, the President must have the ability to remove principal officers who exercise executive power in his name. That includes those who run independent agencies like the Federal Trade Commission. With all this, I agree.

But neither can I ignore the implications that follow. Today, independent agencies do not just exercise executive law-enforcement powers. Congress has also delegated to them vast legislative and judicial powers, effectively allowing

these agencies to make laws and decide disputes under them. And, after today's decision, the President can effectively exercise all those powers too.

It's a development that raises important questions, not least these: Would Congress have delegated so much power, including legislative and judicial power, to independent agencies had it known that the President would come to control them? How will Congress respond now—if realistically it can? And what, if anything, will this Court do about it?

Fortunately, the Constitution provides the blueprint for the job ahead. Each branch bears the authority and responsibility to exercise distinct powers. Congress must make the laws that govern us, the executive branch must faithfully execute those laws, and independent judges and juries must decide disputes that arise under them. Fortunately, this Court already has many doctrines designed to protect the Constitution's separation of powers. Just as today's decision holds that Article II requires those who exercise executive power to answer to an elected President, this Court's nondelegation doctrine recognizes that Article I vests "all" federal legislative power in Congress and no one else.

We have no shortage of tools. The only real question is whether we will use them. The Court today takes a notable step back toward the Constitution. [But] it would be a grave mistake to think that step is enough on its own. The fact remains that Congress has endowed formerly independent agencies not just with executive authority, but with enormous legislative and judicial powers as well. And now the President enjoys control over all those powers too. From here, the only sure path is to finish the journey we start today and restore legislative and judicial powers to where they belong: in Congress and the courts. We have tolerated adventurous theories long enough. It is time to return, all the way, to the Constitution.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

For most of this Nation's history, Congress and the President together have decided that some Government functions should operate at a distance from

partisan politics. Those include the management of nuclear energy; the security of the monetary supply; and the safety of American workplaces, consumer products, and chemical hazards. In these and many other areas, the wisdom of the centuries has taught that some decisions should depend not only on who is in office—much less on who is disfavored or owed a favor by those in office—but also on judgment, expertise, and the public good.

Since the founding, Congress has created agencies that in various ways have embodied this goal of independence. Over the last 140 years especially, the political branches have done so by establishing agencies like the Federal Trade Commission (FTC): bipartisan, multimember bodies with "for-cause" removal protections. This structure allows the agencies to address complex problems while enjoying some independence from Presidential removal and thus absolute partisan control. More than 90 years ago, this Court affirmed, as to the FTC specifically, that the constitutionality of its members' "for cause" removal protections "cannot well be doubted." *Humphrey's Executor* v. *United States* (1935). Ever since, Congress and more than a dozen Presidents have relied on *Humphrey's* to construct a workable Government, creating many other agencies in the FTC's tradition.

Today, this Court undoes centuries of political practice and concludes that all three branches of Government have been acting in open defiance of the Constitution all this time. Its conclusion is wrong. The text of the Constitution, along with its history, the longstanding practices of the political branches, and the precedents of this Court, make clear that Congress may limit the causes for which the heads of Commissions like the FTC can be removed by the President. In holding otherwise, the Court gives the President a power unknown even to the English Crown against which the Founders revolted, elevating him above his once-coequal branches by transforming a duty to take care that the laws be faithfully executed into a license to act in defiance of those very laws. If nothing else, the doctrine of *stare decisis*, which today's decision cursorily dismisses, should have made this a profoundly easy case under *Humphrey's*.

Perhaps worst of all, the Court today forgets its place. For most of our history, the Court has rightly left the removal question primarily to its coequal branches.

Today's majority, however, decides that it knows better: better than members of the founding generation who created agencies, like the Sinking Fund Commission and the Bank of the United States, free from unfettered Presidential control; better than a century and a half of Congresses and Presidents, starting with Grover Cleveland and continuing into the 21st century, who created agencies in the FTC's mold; better than even Hamilton, Story, Webster, Holmes, Brandeis, Frankfurter, and Rehnquist. These great statesmen and Justices knew something that today's majority apparently does not: that fealty to the Constitution means respecting not just what it says, but what it does not say and by its silence leaves to others to decide. It also means respecting precedent—not as a wooden exercise, but out of a recognition that, whatever our confidence in the theories of the present moment, the wisdom of our founding document does not belong to today's Justices alone. Because the Court ignores these foundational tenets, and in doing so upends rather than upholds the separation of powers, I respectfully dissent.

Note

In *Trump v. Cook,* 2026 WL 1855613 (2026), decided the same day as *Slaughter,* the Court held 5-4, in an opinion by Roberts, C.J., joined by Sotomayor, Kagan, Kavanaugh, and Jackson, J.J., that the president's power to summarily remove without any cause members of administrative agencies does not allow the president to remove Governors of the Federal Reserve without good cause and subject to judicial review. This exception is to preserve the independence of the Federal Reserve and to continue the long tradition of monetary policy exercised independent of executive influence. Any change in that scheme must come from Congress, not the courts. To do so would allow the President to remove a member of the Federal Reserve at any time, for any reason, without any notice before, and without any judicial check after.

In August 2025, President Trump purported to fire Lisa Cook, a member of the Board of Governors of the Federal Reserve System. Cook was the first Governor to be fired in the central bank's 111-year history. She promptly filed suit. She alleged that the attempted removal was not "for cause," as required by statute, and that the

President had in any event failed to comply with the statute's (and the Constitution's) requirement that she receive pretermination process. The District Court issued a preliminary injunction to prevent her removal. And ss the Supreme Court held, Cook was entitled to notice and some opportunity to respond before her termination. When Congress created the Federal Reserve, it gave Governors a set term in office and permitted removal only "for cause." That form of tenure—a term of years limited only by removal "for cause"—carried with it a settled interpretation at common law, one that the Court had expressly adopted just a decade before. "The rule," the Court explained in 1901, is that "notice and hearing are essential" before an officer's removal where the term of office is for a fixed period." *Reagan v. United States*.

The protection from removal enjoyed by Governors of the Federal Reserve is consistent with the Constitution. The Founders knew from experience the calamities that could arise from even the "suspicion" of political manipulation of monetary policy. So when they established the First Bank of the United States, they guaranteed its independence from Presidential control, and their successors did the same for the Second Bank. That enabled both banks to serve as the "great regulating wheel" of the early American financial system. The Federal Reserve follows this tradition, with a similar degree of independence from Presidential control. What matters is that the Federal Reserve remains consistent with the principles that underpin the First and Second Banks—namely, that monetary policy should not be subject to political interference. As the Court observed, the Federal Reserve maintains the balance struck by the founding generation under modern circumstances.

As the Court noted, the decision is narrow. The ultimate question of whether the President can remove Cook for cause will depend in part on the underlying facts. In its opinion the Court did not address the facts, as they have yet to be found or analyzed under the relevant legal standards. Rather, the Court simply addressed the parties' arguments about the appropriate legal standards under which the facts must be evaluated.

QUESTION*:* After Slaughter, could Congress empower the president to remove without cause Governors of the Federal Reserve? What would the consequences be if Congress enacted such a law? Would it eliminate the Federal Reserve's independence and expose the Federal Reserve to political influences? Would it impact the efficacy of U. S. monetary policy? Would the status of the Federal Reserve create economic uncertainty in the U.S. and the world?

What facts would be needed to remove Cook? What process is needed to make that determination? Would there be an opportunity for judicial review?

Chapter 8 – Equal Protection and Fundamental Rights

§ 8-2.4 Gender

At the end of *Notes and Questions* (p. 765), add the following:

UNITED STATES V. SKRMETTI

145 S. Ct. 1816 (2025)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In this case, we consider whether a Tennessee law banning certain medical care for transgender minors violates the Equal Protection Clause of the Fourteenth Amendment.

I

An estimated 1.6 million Americans over the age of 13 identify as transgender, meaning that their gender identity does not align with their biological sex. Some transgender individuals suffer from gender dysphoria, a medical condition characterized by persistent, clinically significant distress resulting from an incongruence between gender identity and biological sex. Left untreated, gender dysphoria may result in severe physical and psychological harms.

In 1979, the World Professional Association for Transgender Health (WPATH) (then known as the Harry Benjamin International Gender Dysphoria Association) published one of the first sets of clinical guidelines for treating gender dysphoria with sex transition treatments. See P. Walker et al., *Standards of Care: The Hormonal and Surgical Sex Reassignment of Gender Dysphoric Persons* (1979). The standards addressed two treatments in particular: hormonal sex reassignment (the use of hormones to induce the development of physical characteristics of the opposite sex) and surgical sex

reassignment (surgery of the genitalia and/or chest to approximate the physical appearance of the opposite sex). They recognized the extensive and sometimes irreversible consequences of hormonal therapy and sex reassignment surgery and acknowledged that some individuals who undergo reassignment procedures later regret their decision to do so. Among other things, the standards of care provided that hormonal and surgical sex reassignment treatments should be administered only to adults.

In 1998, WPATH revised its standards of care to permit healthcare professionals to administer puberty blockers (designed to delay the development of physical sex characteristics) and hormones to minors in "rare" circumstances. S. Levine et al., *The Standards of Care for Gender Identity Disorders* (5th ed. 1998). The current standards recognize known risks associated with the provision of sex transition treatments to adolescents, including potential adverse effects on fertility and the possibility that an adolescent will later wish to detransition. They further state that there is "limited data on the optimal timing" of sex transition treatments or "the long-term physical, psychological, and neurodevelopmental outcomes in youth," and note that "our understanding of gender identity development in adolescence is continuing to evolve."

In recent years, the number of minors requesting sex transition treatments has increased. This increase has corresponded with rising debates regarding the relative risks and benefits of such treatments. In the last three years, more than 20 States have enacted laws banning the provision of sex transition treatments to minors, while two have enacted near total bans.

Meanwhile, health authorities in a number of European countries have raised significant concerns regarding the potential harms associated with using puberty blockers and hormones to treat transgender minors. In 2020, Finland's Council for Choices in Health Care found that "gender reassignment of minors is an experimental practice" and that "the reliability of the existing studies" is "highly uncertain." That same year, England's National Institute for

Health and Care Excellence published reports finding that the evidence for using puberty blockers to treat transgender adolescents is of "very low certainty" and that the long-term risks associated with using hormones to treat adolescents with gender dysphoria are "largely unknown." In 2022, Sweden's National Board of Health and Welfare found that "the evidence on treatment efficacy and safety is still insufficient and inconclusive" and that the "risks" of puberty blockers and hormones "currently outweigh the possible benefits." And in 2023, the Norwegian Healthcare Investigation Board concluded that the "research-based knowledge" for hormonal sex transition treatments for minors is "insufficient," while the "long-term effects are little known."

In March 2023, Tennessee joined the growing number of States restricting sex transition treatments for minors by enacting the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity. Tenn. Code § 68-33-101(SB1). While the State's legislature acknowledged that discordance between a minor's gender identity and biological sex can cause "discomfort or distress," it identified concerns regarding the use of puberty blockers and hormones to treat gender dysphoria in minors. In particular, the legislature found that such treatments "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences," and that minors "lack the maturity to fully understand and appreciate" these consequences and may later regret undergoing the treatments. The legislature further found that sex transition treatments were "being performed on and administered to minors in the state with rapidly increasing frequency," notwithstanding the fact that the full range of harmful effects associated with the treatments were likely not yet known. The legislature also noted that guidelines regarding sex transition treatments for minors had "changed substantially in recent years," and that health authorities in Sweden, Finland, and the United Kingdom had "placed severe restrictions" on such treatments after determining that there was "no evidence" that their benefits outweigh their risks. Finally, the legislature determined that there is

evidence that gender dysphoria "can be resolved by less invasive approaches that are likely to result in better outcomes."

SB1 responds to these concerns by banning the use of certain medical procedures for treating transgender minors. In particular, the law prohibits a healthcare provider from "surgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being," or "prescribing, administering, or dispensing any puberty blocker or hormone" for the purpose of (1) "enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex," or (2) "treating purported discomfort or distress from a discordance between the minor's sex and asserted identity." Among other things, these prohibitions are intended to "protect minors from physical and emotional harm" by "encouraging minors to appreciate," rather than "become disdainful of," their sex.

SB1 is limited in two relevant ways. First, SB1 does not restrict the administration of puberty blockers or hormones to individuals 18 and over. Second, SB1 does not ban fully the administration of such drugs to minors. A healthcare provider may administer puberty blockers or hormones to treat a minor's congenital defect, precocious (or early) puberty, disease, or physical injury. The law defines the term "congenital defect" to include an "abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex," but excludes from the definitions of "congenital defect" and "disease" "gender dysphoria, gender identity disorder, and gender incongruence."

SB1 contains three primary enforcement mechanisms. The law authorizes Tennessee's attorney general to bring against any person who knowingly violates SB1 an action "to enjoin further violations, to disgorge any profits received due to the medical procedure, and to recover a civil penalty of [$25,000] per violation." SB1 further permits the relevant state regulatory authorities to discipline healthcare providers who violate the law's prohibitions. Finally, SB1 creates a private right of action that enables an

injured minor or nonconsenting parent of an injured minor to sue a healthcare provider for violating the law.

Three transgender minors, their parents, and a doctor (plaintiffs) brought a pre-enforcement challenge to SB1. Among other things, the plaintiffs asserted that SB1 violates the Equal Protection Clause of the Fourteenth Amendment. They moved for a preliminary injunction preventing the law's bans on sex transition treatments for minors from going into effect. The United States intervened where the Attorney General certifies that the case is of general public importance.

The District Court partially enjoined enforcement of SB1's prohibitions. The court concluded that the plaintiffs lacked standing to challenge the law's ban on sex transition surgery for minors. But the court held, as relevant, that the United States and plaintiffs were likely to succeed on their equal protection challenge to the law's prohibitions on puberty blockers and hormones. The court found that transgender individuals constitute a quasi-suspect class, that SB1 discriminates on the basis of sex and transgender status, and that SB1 was unlikely to survive intermediate scrutiny. Having concluded that SB1 was likely unconstitutional on its face, the District Court issued a statewide injunction enjoining enforcement of all provisions of SB1 except for the private right of action and the law's ban on sex transition surgery. Tennessee appealed, and the Sixth Circuit stayed the preliminary injunction pending appeal.

The Sixth Circuit reversed. As relevant, the Sixth Circuit held that the United States and plaintiffs were unlikely to succeed on the merits of their equal protection claim. The court first found that SB1 does not classify on the basis of sex because the law "regulates sex-transition treatments for all minors, regardless of sex," by prohibiting all minors from "receiving puberty blockers or hormones or surgery in order to transition from one sex to another." The court next declined to recognize transgender individuals as a suspect class, finding that transgender individuals are neither politically powerless nor a discrete group defined by obvious, immutable, or

distinguishing characteristics. Finally, the court concluded that the United States and plaintiffs had failed to establish that animus toward transgender individuals as a class was the operative force behind SB1. The Sixth Circuit held that SB1 was subject to and survived rational basis review, finding that Tennessee had offered "considerable evidence" regarding the risks associated with the banned medical treatments and the flaws in existing research.

Judge White dissented. Judge White would have held that the United States and plaintiffs were likely to succeed on the merits of their equal protection claim. In her view, SB1 triggered heightened scrutiny because it "facially discriminates based on a minor's sex as assigned at birth and on a minor's failure to conform with societal expectations concerning that sex." Judge White would have held that Tennessee had failed to "show an exceedingly persuasive justification or close means-ends fit" for the law's sex-based classifications.

We granted certiorari to decide whether SB1 violates the Equal Protection Clause of the Fourteenth Amendment.

II

We are asked to decide whether SB1 is subject to heightened scrutiny under the Equal Protection Clause. We hold it is not. SB1 does not classify on any bases that warrant heightened review.

On its face, SB1 incorporates two classifications. First, SB1 classifies on the basis of age. Healthcare providers may administer certain medical treatments to individuals ages 18 and older but not to minors. Second, SB1 classifies on the basis of medical use. Healthcare providers may administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence. Classifications that turn on age or medical use are subject to only rational basis review.

The plaintiffs argue that SB1 warrants heightened scrutiny because it relies on sex-based classifications. We disagree. Neither of the above classifications turns on sex. Rather, SB1 prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor's sex.

The plaintiffs resist this conclusion, arguing that SB1 creates facial sex-based classifications by defining the prohibited medical care based on the patient's sex. This argument takes two forms. At times, the plaintiffs suggest that SB1 classifies on the basis of sex because its prohibitions reference sex. Alternatively, the plaintiffs contend that SB1 works a sex-based classification because application of the law turns on sex. Neither argument is persuasive.

This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny. Such an approach, moreover, would be especially inappropriate in the medical context. Some medical treatments and procedures are uniquely bound up in sex. The Food and Drug Administration itself recognizes that "research has shown that biological differences between men and women (differences due to sex chromosome or sex hormones) may contribute to variations seen in the safety and efficacy of drugs, biologics, and medical devices." FDA, Sex as a Biological Variable (Jan. 30, 2025).

We also reject the argument that the application of SB1 turns on sex. The plaintiffs and the dissent contend that an adolescent whose biological sex is female cannot receive puberty blockers or testosterone to live and present as a male, but an adolescent whose biological sex is male can, while an adolescent whose biological sex is male cannot receive puberty blockers or estrogen to live and present as a female, but an adolescent whose biological sex is female can. So conceived, they argue, SB1 prohibits certain treatments for minors of one sex while allowing those same treatments for minors of the opposite sex.

The plaintiffs and the dissent, however, contort the meaning of the term "medical treatment." Notably absent from their framing is a key aspect of any

medical treatment: the underlying medical concern the treatment is intended to address. The Food and Drug Administration approves drugs and requires that they be labeled for particular indications—the diseases or conditions that they treat, prevent, mitigate, diagnose, or cure. See 21 C.F.R. §§ 201.57(c)(2), 314.50(a)(1) (2024). Different drugs can be used to treat the same thing (would you like Advil or Tylenol for your headache?), and the same drug can treat different things (take DayQuil to ease your cough, fever, sore throat, and/or minor aches and pains). For the term "medical treatment" to make sense of these various combinations, it must necessarily encompass both a given drug and the specific indication for which it is being administered.

When properly understood from the perspective of the indications that puberty blockers and hormones treat, SB1 clearly does not classify on the basis of sex. Both puberty blockers and hormones can be used to treat certain overlapping indications (such as gender dysphoria), and each can be used to treat a range of other conditions. These combinations of drugs and indications give rise to various medical treatments. When, for example, a transgender boy (whose biological sex is female) takes puberty blockers to treat his gender incongruence, he receives a different medical treatment than a boy whose biological sex is male who takes puberty blockers to treat his precocious puberty. SB1, in turn, restricts which of these medical treatments are available to minors: Under SB1, a healthcare provider may administer puberty blockers or hormones to any minor to treat a congenital defect, precocious puberty, disease, or physical injury; a healthcare provider may not administer puberty blockers or hormones to any minor to treat gender dysphoria, gender identity disorder, or gender incongruence. The application of that prohibition does not turn on sex.

Of course, a State may not circumvent the Equal Protection Clause by writing in abstract terms. See *Personnel Administrator of Mass. v. Feeney* (1979) (explaining that both overt and covert sex-based classifications are subject to heightened review). The anti-miscegenation law that this Court struck down in *Loving v. Virginia* (1967) , would not have shed its race-based

classification had it, for example, prohibited "*any* person from marrying an individual of a different race." Such a law would still have turned on a race-based classification: It would have prohibited Mildred Jeter (a black woman) from marrying Richard Loving (a white man), while permitting a white woman to do so. The law, in other words, would still "proscribe generally accepted conduct if engaged in by members of different races."

Here, however, SB1 does not mask sex-based classifications. For reasons we have explained, the law does not prohibit conduct for one sex that it permits for the other. Under SB1, *no* minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of *any* sex may be administered puberty blockers or hormones for other purposes.

Nor are we persuaded that SB1's prohibition on the prescription of puberty blockers and hormones to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to "treat purported discomfort or distress from a discordance between the minor's sex and asserted identity," reflects a sex-based classification. In the dissent's view, this language "plainly classifies on the basis of sex" because it "turns on inconsistency with a protected characteristic." The dissent analogizes to a hypothetical law that "prohibits minors from attending any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported identity inconsistent with the minor's religion." Such a law, the dissent argues, would plainly classify on the basis of religion. "Whether the law prohibits a minor from attending any particular religious service turns on the minor's religion: A Jewish child can visit a synagogue but not a church, while a Christian child can attend church but not the synagogue."

But a prohibition on the prescription of puberty blockers and hormones to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" is simply a prohibition on the prescription of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, or gender incongruence. A law prohibiting attendance at a religious service

"inconsistent with" the attendee's religion may trigger heightened scrutiny. A law prohibiting the administration of specific drugs for particular medical uses does not.

Finally, we reject the plaintiffs' argument that, "by design, SB1 enforces a government preference that people conform to expectations about their sex." The plaintiffs note that SB1's statutory findings state that Tennessee has a compelling interest in "encouraging minors to appreciate their sex" and in prohibiting medical care "that might encourage minors to become disdainful of their sex." They argue that these findings reveal that the law operates to force conformity with sex.

To start, the plaintiffs' allegations of sex stereotyping are misplaced. True, a law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes. But where a law's classifications are neither covertly nor overtly based on sex, we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose. No such argument has been raised here.

Regardless, the statutory findings to which the plaintiffs point do not themselves evince sex-based stereotyping. The plaintiffs fail to note that Tennessee also proclaimed a "legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm." And they similarly fail to acknowledge that Tennessee found that the prohibited medical treatments are experimental, can lead to later regret, and are associated with harmful—and sometimes irreversible—risks. Tennessee's stated interests in "encouraging minors to appreciate their sex" and in prohibiting medical care "that might encourage minors to become disdainful of their sex," simply reflect the State's concerns regarding the use of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, and gender incongruence.

The plaintiffs separately argue that SB1 warrants heightened scrutiny because it discriminates against transgender individuals, who the plaintiffs assert constitute a quasi-suspect class. This Court has not previously held

that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that question because SB1 does not classify on the basis of transgender status. As we have explained, SB1 includes only two classifications: healthcare providers may not administer puberty blockers or hormones to minors (a classification based on age) to treat gender dysphoria, gender identity disorder, or gender incongruence (a classification based on medical use). The plaintiffs do not argue that the first classification turns on transgender status, and our case law forecloses any such argument as to the second.

We have explained that a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination. In *Geduldig v. Aiello (*1974), for example, we held that a California insurance program that excluded from coverage certain disabilities resulting from pregnancy did not discriminate on the basis of sex. In reaching that holding, we explained that the program did not exclude any individual from benefit eligibility because of the individual's sex but rather "removed one physical condition—pregnancy—from the list of compensable disabilities." We observed that the "lack of identity" between sex and the excluded pregnancy-related disabilities became "clear upon the most cursory analysis." The California insurance program, we explained, divided potential recipients into two groups: "pregnant women and nonpregnant persons." Because women fell into both groups, the program did not discriminate against women as a class. We thus concluded that, even though only biological women can become pregnant, not every legislative classification concerning pregnancy is a sex-based classification. As such, "absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation … on any reasonable basis, just as with respect to any other physical condition."

By the same token, SB1 does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions. SB1 divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions. Because only transgender individuals seek puberty blockers and hormones for the excluded diagnoses, the first group includes only transgender individuals; the second group, in contrast, encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence—just as only biological women can become pregnant—there is a "lack of identity" between transgender status and the excluded medical diagnoses. The plaintiffs, moreover, have not argued that SB1's prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals. Under these circumstances, we decline to find that SB1's prohibitions on the use of puberty blockers and hormones exclude any individuals on the basis of transgender status.

Finally, *Bostock v. Clayton County* (2020), does not alter our analysis. In *Bostock*, we held that an employer who fires an employee for being gay or transgender violates Title VII's prohibition on discharging an individual "because of" their sex. We reasoned that Title VII's "because of" test incorporates the traditional but-for causation standard, which "directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." Applying that test, we held that, "for an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex." In such a case, the employer has penalized a member of one sex for a trait or action that it tolerates in members of the other.

The plaintiffs urge us to apply *Bostock*'s reasoning to this case. In their view, SB1 violates the Equal Protection Clause because it prohibits a minor

whose biological sex is female from receiving testosterone to live as a male but allows a minor whose biological sex is male to receive testosterone for the same purposes (and vice versa). Applying *Bostock*'s reasoning, they argue that SB1 discriminates on the basis of sex because it intentionally penalizes members of one sex for traits and actions that it tolerates in another.

We have not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context, and we need not do so here. For reasons we have already explained, changing a minor's sex or transgender status does not alter the application of SB1. If a transgender boy seeks testosterone to treat his gender dysphoria, SB1 prevents a healthcare provider from administering it to him. If you change his biological sex from female to male, SB1 would still not permit him the hormones he seeks because he would lack a qualifying diagnosis for the testosterone—such as a congenital defect, precocious puberty, disease, or physical injury. The transgender boy could receive testosterone only if he had one of those permissible diagnoses. And, if he had such a diagnosis, he could obtain the testosterone regardless of his sex or transgender status. Under the reasoning of *Bostock*, neither his sex nor his transgender status is the but-for cause of his inability to obtain testosterone.

The dissent counters that, whatever causal factors are at play, sex is at least one but-for cause of SB1's operation. To illustrate this argument, the dissent posits a minor girl with facial hair inconsistent with her sex. Under SB1, the dissent notes, a healthcare provider can prescribe puberty blockers or hormones to the minor to suppress her hair growth. Change the minor's sex to male, the dissent reasons, and SB1 prevents the minor from obtaining the same drugs for the same purpose. Any corresponding change in diagnosis, the dissent concludes, simply reveals that both sex and diagnosis are causal factors at play.

The dissent's reasoning overlooks a key distinction between the operation of SB1 and the logic of *Bostock*. Under *Bostock*'s reasoning, an employer who fires a homosexual male employee for being attracted to men

while retaining the employee's straight female colleague has discriminated on the basis of sex because it has penalized the male employee for a trait (attraction to men) that it tolerates in the female employee. *Bostock* held that, in such a circumstance, sex is the but-for cause of the employer's decision—change the homosexual male employee's sex and he becomes a straight female whose attraction to men the employer tolerates.

Not so with SB1. Consider again the minor girl with unwanted facial hair inconsistent with her sex. If she has a diagnosis of hirsutism (male-pattern hair growth), a healthcare provider may, consistent with SB1, prescribe her puberty blockers or hormones. But changing the minor's sex to male does not automatically change the operation of SB1. If hirsutism is replaced with gender dysphoria, the now-male minor may not receive puberty blockers or hormones; but if hirsutism is replaced with precocious puberty, SB1 does not bar either treatment. Unlike the homosexual male employee whose sexuality automatically switches to straight when his sex is changed from male to female, there is no reason why a female minor's diagnosis of hirsutism automatically changes to gender dysphoria when her sex is changed from female to male. Under the logic of *Bostock*, then, sex is simply not a but-for cause of SB1's operation.

The rational basis inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Under this standard, we will uphold a statutory classification so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there exist plausible reasons for the relevant government action, our inquiry is at an end.

SB1 clearly meets this standard. Tennessee determined that administering puberty blockers or hormones to a minor to treat gender dysphoria, gender identity disorder, or gender incongruence "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological

consequences." It further found that it was "likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term medical studies." Tennessee determined that "minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors." At the same time, Tennessee noted evidence that discordance between sex and gender "can be resolved by less invasive approaches that are likely to result in better outcomes for the minor." SB1's age- and diagnosis-based classifications are plainly rationally related to these findings and the State's objective of protecting minors' health and welfare.

The plaintiffs argue that SB1 fails even rational basis review because the law's classifications are "so far removed from Tennessee's asserted justifications that it is impossible to credit those interests." In their view, Tennessee has failed to explain why it has banned access to puberty blockers and hormones "*only* where they would allow a transgender minor to 'identify' or 'live' in a way 'inconsistent' with their 'sex.'"

This argument fails. As we have explained, there is a rational basis for SB1's classifications. Tennessee concluded that there is an ongoing debate among medical experts regarding the risks and benefits associated with administering puberty blockers and hormones to treat gender dysphoria, gender identity disorder, and gender incongruence. SB1's ban on such treatments responds directly to that uncertainty.

We also decline the plaintiffs' invitation to second-guess the lines that SB1 draws. It may be true, as the plaintiffs contend, that puberty blockers and hormones carry comparable risks for minors no matter the purposes for which they are administered. But it may also be true, as Tennessee determined, that those drugs carry greater risks when administered to treat gender dysphoria,

gender identity disorder, and gender incongruence. We afford States wide discretion to pass legislation in areas where there is medical and scientific uncertainty. The fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration

Recent developments only underscore the need for legislative flexibility in this area. After Tennessee enacted SB1, a report commissioned by England's National Health Service (NHS England) characterized the evidence concerning the use of puberty blockers and hormones to treat transgender minors as "remarkably weak," concluding that there is "no good evidence on the long-term outcomes of interventions to manage gender-related distress." H. Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* 13 (Apr. 2024). The report cautioned that "results of studies are exaggerated or misrepresented by people on all sides of the debate to support their viewpoint," and concluded that the "current understanding of the long-term health impacts of hormone interventions is limited and needs to be better understood." In response to the report, NHS England enacted prohibitions on the administration of puberty blockers to new patients under the age of 18 outside of research settings and instituted a process for reviewing referrals for hormones for adolescents under the age of 16.

We cite this report and NHS England's response not for guidance they might provide on the ultimate question of United States law but to demonstrate the open questions regarding basic factual issues before medical authorities and other regulatory bodies.

This case carries with it the weight of fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field. The voices in these debates raise sincere concerns; the implications for all are profound. The Equal Protection Clause does not resolve these disagreements. Nor does it afford us license to decide them as we see best. Our role is not to judge the wisdom, fairness, or logic of the law before us, but only to ensure that it does not violate the equal protection guarantee of the

Fourteenth Amendment. Having concluded it does not, we leave questions regarding its policy to the people, their elected representatives, and the democratic process.

The judgment of the United States Court of Appeals for the Sixth Circuit is affirmed.

It is so ordered.

JUSTICE THOMAS concurring.

The Court rightly rejects efforts by the United States and the private plaintiffs to accord outsized credit to claims about medical consensus and expertise. The United States asserted that "the medical community and the nation's leading hospitals overwhelmingly agree" with the Government's position that the treatments outlawed by SB1 can be medically necessary. The implication of these arguments is that courts should defer to so-called expert consensus.

There are several problems with appealing and deferring to the authority of the expert class. *First*, so-called experts have no license to countermand the "wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.* (1993). *Second*, contrary to the representations of the United States and the private plaintiffs, there is no medical consensus on how best to treat gender dysphoria in children. *Third*, notwithstanding the alleged experts' view that young children can provide informed consent to irreversible sex-transition treatments, whether such consent is possible is a question of medical ethics that States must decide for themselves. *Fourth*, there are particularly good reasons to question the expert class here, as recent revelations suggest that leading voices in this area have relied on questionable evidence, and have allowed ideology to influence their medical guidance.

Taken together, this case serves as a useful reminder that the American people and their representatives are entitled to disagree with those who hold

themselves out as experts, and that courts may not sit as a super-legislature to weigh the wisdom of legislation. By correctly concluding that SB1 warrants the paradigm of judicial restraint, the Court reserves to the people of Tennessee the right to decide for themselves.

The views of self-proclaimed experts do not shed light on the meaning of the Constitution. Thus, whether "major medical organizations" agree with the result of Tennessee's democratic process is irrelevant (opinion of Sotomayor, J.). To hold otherwise would permit elite sentiment to distort and stifle democratic debate under the guise of scientific judgment, and would reduce judges to mere spectators in construing our Constitution.

JUSTICE BARRETT, with whom JUSTICE THOMAS joins, concurring.

Because the Court concludes that Tennessee's Senate Bill 1 does not classify on the basis of transgender status, it does not resolve whether transgender status constitutes a suspect class. I write separately to explain why, in my view, it does not.

To determine whether a group constitutes a "suspect class" akin to the canonical examples of race and sex, we apply a test derived from the famous footnote 4 in *United States v. Carolene Products Co.* (1938). We consider whether members of the group in question "exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group," whether the group has, "as a historical matter, been subjected to discrimination," and whether the group is "a minority or politically powerless." The test is strict. In fact, as far as I can tell, we have *never* embraced a new suspect class under this test. Our restraint reflects the principle that "when social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

Transgender status is not marked by the same sort of obvious, immutable, or distinguishing characteristics as race or sex. In particular, it is

not defined by a trait that is definitively ascertainable at the moment of birth. The plaintiffs here, for instance, began to experience gender dysphoria at varying ages—some from a young age, others not until the onset of puberty. Meanwhile, the plaintiffs acknowledge that some transgender individuals "detransition" later in life—in other words, they begin to identify again with the gender that corresponds to their biological sex. Accordingly, transgender status does not turn on an immutable characteristic.

Nor is the transgender population a "discrete group," as our cases require. Instead, like classes we have declined to recognize as suspect, the category of transgender individuals is large, diverse, and amorphous. The World Professional Association for Transgender Health states that the term "transgender" can describe "a huge variety of gender identities and expressions." The American Psychological Association similarly uses the phrase "'transgender youth'" as an "umbrella term" "to describe varied groups" with "many diverse gender experiences." Underscoring the point, plaintiffs' counsel acknowledged at oral argument that "there are people who fall within a transgender identity who may not fit into a binary identity." The boundaries of the group, in other words, are not defined by an easily ascertainable characteristic that is fixed and consistent across the group.

Finally, holding that transgender people constitute a suspect class would require courts to oversee all manner of policy choices normally committed to legislative discretion. The parties agree that the States have a legitimate interest in regulating health care. They also agree that transgender status implicates physical and mental health—indeed, this case is about the medical treatment of children with gender dysphoria, which is "clinically significant distress resulting from the incongruence between gender identity and sex assigned at birth," and which "can result in severe anxiety, depression, self-harm, and even suicide." The question of how to regulate a medical condition such as gender dysphoria involves a host of policy judgments that legislatures, not courts, are best equipped to make.

The conclusion that transgender individuals do not share the "obvious, immutable, or distinguishing characteristics" of "a discrete group" is enough to demonstrate that transgender status does not define a suspect class. But the second factor—whether the group has, "as a historical matter, been subjected to discrimination" —also poses a problem for the plaintiffs' argument.

In addressing this factor, the plaintiffs assume that a history of private discrimination may satisfy this condition. This assumption is mistaken. For purposes of the Fourteenth Amendment, the relevant question is whether the group has been subject to a longstanding pattern of discrimination *in the law*. In other words, we ask whether the group has suffered a history of *de jure* discrimination.

The distinction between *de jure* discrimination and private animus is consistent with the Fourteenth Amendment's text and purpose. Most fundamentally, the Fourteenth Amendment constrains state action, not private conduct. And state actors are entitled to a presumption that their actions turn on constitutionally legitimate motivations rather than impermissible animus. Of course, this presumption can be defeated, and a widespread history of state action that reflects animus or stereotyping gives courts good reason to be suspicious of the government's motives. But because we presume that state actors abide by the Constitution, the fact of private discrimination—which is not itself unconstitutional, even if morally blameworthy—does not provide a basis for inferring that state actors are also likely to discriminate and thereby violate the Constitution.

Focusing the inquiry on *de jure* state action would also clarify the test for political powerlessness, which is another factor we have used to determine whether a classification is suspect. *Carolene Products*, the source of the "discrete and insular minority" test, equates political powerlessness with laws burdening those who lacked a vote…This kind of "political powerlessness," which leaves the affected persons altogether unable to

protect themselves in the political process, tracks the experience of the existing suspect classes.

We have said little, however, about what "political powerlessness" means for our recognition of *new* suspect classes.

Because the litigants assumed that evidence of private discrimination could suffice for the suspect-class inquiry, they did not thoroughly discuss whether transgender individuals have suffered a history of *de jure* discrimination as a class. And because the group of transgender individuals is an insufficiently discrete and insular minority, the question is largely academic. In future cases, however, I would not recognize a new suspect class absent a demonstrated history of *de jure* discrimination.

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, and with whom JUSTICE KAGAN joins as to all but Part V, dissenting.

Tennessee's law expressly classifies on the basis of sex and transgender status, so the Constitution and settled precedent require the Court to subject it to intermediate scrutiny. The majority contorts logic and precedent to say otherwise, inexplicably declaring it must uphold Tennessee's categorical ban on lifesaving medical treatment so long as "any reasonably conceivable state of facts" might justify it. Thus, the majority subjects a law that plainly discriminates on the basis of sex to mere rational-basis review. By retreating from meaningful judicial review exactly where it matters most, the Court abandons transgender children and their families to political whims. In sadness, I dissent.

Tennessee enacted SB1 to categorically prohibit physicians from prescribing puberty blockers and hormone therapy for the purpose of treating gender dysphoria in minors. Tennessee's blanket ban applies only when hormones and puberty blockers are prescribed to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to alleviate "discomfort or distress from a discordance between the minor's sex

and asserted identity." SB1 leaves untouched the use of the same drugs to treat any other medical condition, including delayed (or early) puberty and any other "physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex." In other words, SB1 allows physicians to help align adolescents' physical appearance with their gender identity (despite associated risks) if it is consistent with their sex identified at birth, but not if inconsistent. Indeed, Tennessee's stated interests in SB1 include "encouraging minors to appreciate their sex."

Tennessee's ban applies no matter what the minor's parents and doctors think, with no regard for the severity of the minor's mental health conditions or the extent to which treatment is medically necessary for an individual child.

For nearly half a century, the Court has applied a different standard, known as intermediate scrutiny, to all statutory classifications that distinguish between males and females. States can differentiate on the basis of sex only to serve important governmental objectives and only if the sex classification is substantially related to the achievement of those objectives. The standard is an intermediate one because it strikes an important balance. On the one hand, there are some genuine physical differences between men and women, so not all sex-based legislation is discriminatory or constitutionally proscribed. On the other hand, sex-based legislation always presents a serious risk of invidious discrimination that relies on overbroad generalizations about the different talents, capacities, or preferences of males or females. Intermediate scrutiny is the core judicial tool to differentiate innocuous sex-based laws from discriminatory ones.

SB1 plainly classifies on the basis of sex, so the Constitution demands intermediate scrutiny. Recall that SB1 prohibits the prescription of hormone therapy and puberty blockers only if done to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to alleviate "discomfort or distress from a discordance between the minor's sex and

asserted identity." Use of the same drugs to treat any other "disease" is unaffected. Physicians may continue, for example, to prescribe hormones and puberty blockers to treat any "physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex."

What does that mean in practice? Simply that sex determines access to the covered medication. Physicians in Tennessee can prescribe hormones and puberty blockers to help a male child, but not a female child, look more like a boy; and to help a female child, but not a male child, look more like a girl. Put in the statute's own terms, doctors can facilitate consistency between an adolescent's physical appearance and the "normal development" of her sex identified at birth, but they may not use the same medications to facilitate "inconsistency" with sex. All this, the State openly admits, in service of "encouraging minors to appreciate their sex."

Like any other statute that turns on inconsistency with a protected characteristic, SB1 plainly classifies on the basis of sex. A simple analogy illustrates the point. Suppose Tennessee prohibited minors from attending any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported identity *inconsistent* with the minor's religion. No one would seriously dispute that such a rule classifies on the basis of religion. Whether the law prohibits a minor from attending any particular religious service turns on the minor's religion: A Jewish child can visit a synagogue but not a church, while a Christian child can attend church but not the synagogue.

SB1 operates in the same way. Consider the mother who contacts a Tennessee doctor, concerned that her adolescent child has begun growing unwanted facial hair. This hair growth, the mother reports, has spurred significant distress because it makes her child look unduly masculine. The doctor's next step depends on the adolescent's sex. If the patient was identified as female at birth, SB1 allows the physician to alleviate her distress

with testosterone suppressants. What if the adolescent was identified male at birth, however? SB1 precludes the patient from receiving the same medicine.

This Court's decision in *Bostock v. Clayton County* confirms the classification on SB1's face. As *Bostock* explained in the context of Title VII's prohibition on employment discrimination, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." In deciding that discrimination based on incongruence between sex and gender identity was discrimination "because of sex," *Bostock* asked the very same question our equal protection precedents do: whether "changing the employee's sex would have yielded a different choice by the employer." Nor was it a defense to liability that the discrimination might apply equally to both sexes: "An employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine" in both cases "fires an individual in part because of sex." The same is true of SB1. By depriving adolescents of hormones and puberty blockers only when such treatment is "inconsistent with" a minor's sex, the law necessarily deprives minors identified as male at birth of the same treatment it tolerates for an adolescent identified as female at birth (and vice versa).

Notwithstanding that SB1 distinguishes between males and females in the medical treatments it authorizes, the Sixth Circuit declined to apply intermediate scrutiny. It believed SB1's treatment of both sexes to be "evenhanded," meaning (in the panel's judgment) the classifications were not "invidious" or "unfair." Intermediate scrutiny, of course, is how this Court determines whether a particular sex-based classification is invidious or unfair. The Sixth Circuit thus effectively held that intermediate scrutiny did not apply to SB1 because it thought SB1 might well pass such scrutiny. Even the majority today does not endorse this circular approach.

Though it skirts the Sixth Circuit's error, the majority rests its conclusion on an equally implausible ground: that SB1's prohibition on treatments

“inconsistent with a minor's sex” contains no sex classification at all. As the statute's text itself makes clear, that conclusion is indefensible.

How does the majority wriggle itself (and the Sixth Circuit) free of any obligation to take a closer look? It abstracts away the sex classification on SB1's face, asserting that the law classifies based only on “age” and “medical purpose.” The theory, apparently, is that SB1 is sex neutral because it simply allows doctors to “administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria.” Unlike a law that prohibits attendance at a religious service “inconsistent with” the attendee's religion, the majority says, “a law prohibiting the administration of specific drugs for particular medical uses” simply does not trigger heightened scrutiny.

The problem with the majority's argument is that the very “medical purpose” SB1 prohibits is defined by reference to the patient's sex. Key to whether a minor may receive puberty blockers or hormones is whether the treatment facilitates the “medical purpose” of helping the minor live or appear “inconsistent with” the minor's sex. That is why changing a patient's sex yields different outcomes under SB1. Again, take the adolescent distressed by newly developing facial hair. Was the patient identified female at birth? SB1 authorizes the prescription of medication. Male at birth? SB1 prohibits it.

As should be abundantly clear by this point, the majority's recharacterization of SB1 is impossible to reconcile with the statute's plain terms. SB1 allows physicians to prescribe hormones and puberty blockers to treat not just some defined category of cancers and rashes, but any “physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex.” If a minor has some physical “abnormality” (say, medically benign facial hair) typically perceived as “inconsistent” with her sex identified at birth (female), SB1 deems it a “congenital defect” that physicians can treat. Change the patient's sex from female to male, and the law now forbids providing the same drugs to rid the minor of the same facial hair. In other words, SB1 makes explicit that

the very reason why a doctor can treat an adolescent female for hirsutism (male-pattern hair growth), but not gender dysphoria, is that the former will promote consistency with sex, while the latter does the opposite. As was true in *Bostock*, then, the law deprives minors of medical treatment based, in part, on sex.

In a final bid to avoid applying our equal protection precedents, the majority asserts that "mere reference to sex" is insufficient to trigger intermediate scrutiny, especially in the "medical context." Of course, not every legislative mention of sex triggers intermediate scrutiny. A law mandating that no person, "regardless of sex," can consume a dangerous drug, for example, would be subject to rational-basis review. Yet SB1 does not just mention sex. It defines an entire category of prohibited conduct based on inconsistency with sex. And it is hard to imagine a law that prohibits conduct "inconsistent with" sex that could avoid intermediate scrutiny.

Having blithely dispensed with the notion that SB1 classifies on the basis of sex, the majority next asserts that "SB1 does not classify on the basis of transgender status." That too is contrary to the statute's text and plainly wrong…

The Court hinges its conclusion to the contrary on the by-now infamous footnote 20 of *Geduldig v. Aiello*, which declared that discrimination on the basis of pregnancy is not discrimination on the basis of sex. The footnote reasoned that, although "only women can become pregnant," "normal pregnancy is an objectively identifiable physical condition with unique characteristics" and "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation … on any reasonable basis, just as with respect to any other physical condition." The takeaway, according to the majority, is that "not … every legislative classification concerning pregnancy is a sex-based classification," and so (apparently) not every legislative classification concerning "gender incongruence" (at least in the context of medical treatments) classifies on the basis of transgender status.

Geduldig was "egregiously wrong" when it was decided, both "because pregnancy discrimination is inevitably sex discrimination" and because discrimination against women is so "tightly interwoven with society's beliefs about pregnancy and motherhood. That the majority must resuscitate so unpersuasive a source, widely rejected as indefensible even 40 years ago, is itself a telling sign of the weakness of its position. That the Court today extends *Geduldig*'s logic for the first time beyond pregnancy and abortion is more troubling still. Divorced from its fact-specific context, *Geduldig*'s reasoning may well suggest that a law depriving all individuals who "have ever, or may someday, menstruate" of access to health insurance would be sex neutral merely because not all women menstruate.

In any event, even *Geduldig*'s faulty reasoning cannot save the majority's conclusion that SB1 is innocent of transgender discrimination. Unlike pregnancy, a desire to "identify with, or live as, a purported identity inconsistent with one's sex," is not some "objectively identifiable physical condition" that legislatures can target without reference to sex or transgender status. And while not all women are pregnant, all transgender people, by definition, "identify with, or live as, a purported identity inconsistent with their sex." So, unlike the classes of pregnant persons and women, the class of minors potentially affected by SB1 and transgender minors are one and the same.

That SB1 discriminates on the basis of transgender status is yet another reason it must be subject to heightened scrutiny. For one, this Court already decided in *Bostock* that "it is impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex," and sex discrimination is of course subject to heightened scrutiny. Nor should there be serious dispute that transgender persons bear the hallmarks of a quasi-suspect class.

Transgender people have long been subject to discrimination in healthcare, employment, and housing, and to rampant harassment and physical violence. Individuals whose gender identity diverges from their sex

identified at birth (whether labeled as “transgender” at the time or not), moreover, have been subject to a lengthy history of *de jure* discrimination in the form of cross-dressing bans, police brutality, and anti-sodomy laws. In any event, those searching for more evidence of *de jure* discrimination against transgender individuals need look no further than the present. The Federal Government, for example, has started expelling transgender servicemembers from the military and threatening to withdraw funding from schools and nonprofits that espouse support for transgender individuals.

Transgender persons, moreover, have a defining characteristic (incongruence between sex and gender identity) that plainly bears no relation to the individual's ability to perform or contribute to society. As a group, the class is no more large, diverse, and amorphous than most races or ethnic groups, many of which similarly include individuals with a huge variety of identities and experiences. As evidenced by the recent rise in discriminatory state and federal policies and the fact that transgender people are underrepresented in every branch of government, moreover, the class lacks the political power to vindicate its interests before the very legislatures and executive agents actively singling them out for discriminatory treatment. In refusing to say as much, the Court today renders transgender Americans doubly vulnerable to state-sanctioned discrimination.

SB1's classifications by sex and transgender status clearly require the application of intermediate scrutiny. The majority's choice instead to subject SB1 to rational-basis review, the most cursory form of constitutional review, is not only indefensible as a matter of precedent but also extraordinarily consequential. Instead of scrutinizing the legislature's classifications with an eye towards ferreting out unconstitutional discrimination, the majority declares it will uphold Tennessee's ban as long as there is “*any* reasonably conceivable state of facts that could provide a rational basis for the classification.” That marks the first time in 50 years that this Court has applied such deferential review, normally employed to assess run-of-the-mill economic regulations, to legislation that explicitly differentiates on the basis of sex. As a result, the Court never even asks whether Tennessee's sex-based

classification imposes the sort of invidious discrimination that the Equal Protection Clause prohibits.

This case presents an easy question: whether SB1's ban on certain medications, applicable only if used in a manner "inconsistent with sex," contains a sex classification. Because sex determines access to the covered medications, it clearly does. Yet the majority refuses to call a spade a spade. Instead, it obfuscates a sex classification that is plain on the face of this statute, all to avoid the mere possibility that a different court could strike down SB1, or categorical healthcare bans like it. The Court's willingness to do so here does irrevocable damage to the Equal Protection Clause and invites legislatures to engage in discrimination by hiding blatant sex classifications in plain sight. It also authorizes, without second thought, untold harm to transgender children and the parents and families who love them. Because there is no constitutional justification for that result, I dissent.

JUSTICE KAGAN, dissenting.

I take no view on how SB1 would fare under heightened scrutiny…The record evidence here is extensive, complex, and disputed, and the Court of Appeals (because it applied only rational-basis review) never addressed the relevant issues. Still more, both the plaintiffs and the Government asked this Court not to itself apply heightened scrutiny, but only to remand that inquiry to the lower courts. So I would both start and stop at the question of what test SB1 must satisfy. As Justice Sotomayor shows, it is heightened scrutiny. I respectfully dissent.

[The concurring opinion of JUSTICE ALITO is omitted].

QUESTIONS: Should SB1 be reviewed under intermediate scrutiny rather than under the rational basis test? The dissenting Justices argued that SB1

expressly classifies on the basis of sex which has traditionally been reviewed under intermediate scrutiny. Noting that SB1 excludes some treatments only when used to allow minors to identify with a gender inconsistent with their biological sex, Justice Sotomayor wrote that "sex determines access to the covered medication." Justice Kagan, in a separate dissent, agreed that SB1 was subject to intermediate scrutiny but expressed no view on how SB1 would fare under heightened scrutiny. Not all states impose prohibitions on medical treatments similar to SB1. Does the Court's decision require states to adopt restrictions similar to SB1? Might the reasoning of the Court be invoked in cases addressing similar laws and policies that restrict access to medical services for adults? To what degree will the *Skrmetti* decision have implications for how lower courts analyze equal protection claims involving transgender persons outside the health care context such as the military service, athletics, and bathroom facilities?

WEST VIRGINIA V. B.P.J.

2026 WL 1868739 (2026)

[In 2021, West Virginia enacted the Save Women's Sports Act, which prohibits male students from playing on female teams. The law specifies that sex is determined by biology. The legislature expressly found that prohibiting biological male participation in female sports is necessary to promote equal athletic opportunities for women and girls. B. P. J., who identifies as female, is a biological male, sought to participate on the girls' cross-country and track-and-field teams at high school. The school would not allow B.P.J. to participate. B. P. J. sued West Virginia and relevant officials for alleged violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment. The U. S. District Court granted summary judgment for the State on both claims. On appeal, the Fourth Circuit reversed on the Title IX issue

and remanded for further fact-finding on the Equal Protection Clause claim. During the ongoing litigation, B. P. J. competed on the girls' teams, winning the West Virginia Class AAA high school state championship in girls' shot put and finished fourth in girls' discus. B. P. J. won the Region 2 championship in both events.

In 2020, the Idaho Legislature passed and Governor Little signed the Fairness in Women's Sports Act. Like the West Virginia law, the Idaho law prohibits male students from participating on female team. Lindsay Hecox is a biological male who identifies as female. Hecox attends Boise State University and has competed for the women's club soccer team and also tried out for the women's Division I track and cross-country teams. Shortly after Idaho enacted the Fairness in Women's Sports Act, Hecox sued Idaho officials and agencies, alleging a violation of the Equal Protection Clause (Hecox did not raise a Title IX claim). The U. S. District Court granted a preliminary injunction barring enforcement of the Fairness in Women's Sports Act, and the U. S. Court of Appeals for the Ninth Circuit affirmed].

Justice KAVANAUGH delivered the opinion of the Court.

I

The question is whether Title IX permits schools to maintain women's and girls' sports for biological females. The answer is yes. Title IX prohibits discrimination on the basis of sex. Title IX's implementing regulations expressly permit schools to maintain separate teams for "members of each sex." The term "sex" in the 1972 Title IX statute, the 1974 Javits Amendment, and the 1975 Title IX regulations cannot plausibly be interpreted to refer to anything other than biological sex. The ordinary meaning of the term "sex" at the time of enactment in the early 1970s was biological sex and not gender identity, particularly in the sports context. In addition, the Title IX regulations allowed separate sports teams precisely because of the biological differences between the sexes—namely, the inherent physical differences between

biological women and biological men. For example, the regulations authorized separate women's and girls' teams in sports when the teams are "based upon competitive skill or the activity involved is a contact sport." By referring to contact sports and competitive skill, the regulations plainly recognized the inherent physical differences between biological men and biological women—as well as the safety and competitive fairness concerns that would arise if males were allowed to compete in female sports.

Separate sports teams for biological males and biological females are reasonable. Given the inherent physical differences between the sexes, allowing only biological females to play on women's and girls' teams can reduce the risk of physical injury and ensure fair competition. True, some might prefer a different rule allowing biological males who identify as female to participate on women's and girls' sports teams, at least in certain circumstances. But it was surely "reasonable" to draw a biological line—a line where biological males play only on male sports teams and only biological females play on female sports teams.

In assessing the reasonableness of the regulations, we also must recognize the distinctiveness of competitive sports—and the safety and competitive fairness issues that can arise when females are forced to compete against males. With respect to safety, allowing biological males to play on women's and girls' sports teams can put women and girls at significant risk of injuries. The safety risks are particularly severe in contact sports.

And as to competitive fairness, allowing biological males to play on women's and girls' sports teams can put female athletes at a serious disadvantage. That is because sports are generally zero sum. Allowing a biological male athlete to compete on a girls' team *necessarily* displaces or disadvantages a female athlete—replacing her on the roster, knocking her out of the starting lineup, reducing her playing time, depriving her of a medal, and the like. That hard reality of sports cannot be ignored or swept under the rug.

We next address the constitutional challenges to the West Virginia and Idaho laws under the Equal Protection Clause of the Fourteenth Amendment.3 Under this Court's equal protection precedents, laws that classify by sex are subject to what is known as intermediate scrutiny: Sex-based classifications are permissible only when the classification is "substantially related" to achieving an "important" government objective. The West Virginia and Idaho laws authorize separate female and male sports teams. And the laws limit women's and girls' sports teams to biological females. In doing so, the laws make a sex-based classification that triggers intermediate scrutiny.

So the equal protection questions become: What are the States' interests in maintaining separate teams for males and females, and in limiting female teams to biological females? And is the States' sex-based classification—that is, the limitation of women's and girls' sports teams to biological females—substantially related to those interests?

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3 After this Court granted review, Hecox filed a suggestion of mootness stating that Hecox will "cease playing women's sports in any context covered by" the Idaho law. As the party asserting mootness, Hecox bears the "formidable burden of showing that it is absolutely clear the ... behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.* (2013). Hecox has been a student at Boise State University since 2019 and is still enrolled there. At Boise State, Hecox has competed on the women's club soccer team and has sought to try out for the Division I women's track and cross-country teams. In 2022, Hecox stated in a declaration to the Court of Appeals: "I intend to play for the BSU's Women's Club Soccer Team this semester, next semester, and *through the remainder of my time at BCU.* Only in September 2025, after this Court granted certiorari, did Hecox articulate a different view about playing competitive sports at Boise State. But that shift may not be permanent, particularly given Hecox's prior change in position. Cf. *Erie v. Pap's A. M.*, 529 U.S. 277 (2000). Moreover, post-certiorari actions that would "insulate a decision from review by this Court must be viewed with a critical eye." *Knox v. Service Employees* (2012). Hecox remains an enrolled student at Boise State. Hecox's case is not moot.

The States start with the undisputed proposition that biological males generally possess inherent physical advantages in sports—in height, weight, strength, speed, endurance, jumping ability, and the like. See *United States v. Virginia* ("Physical differences between men and women … are enduring"). Therefore, the States say, limiting women's and girls' sports to biological females (i) helps prevent serious physical injuries to female athletes and (ii) preserves opportunities for female athletes to fairly compete and succeed. And more broadly, the States articulate the objective of promoting "equal athletic opportunities for the female sex"—that is, to provide opportunities for biological women and girls to compete only against other biological women and girls.

With respect to safety, the States say that allowing biological males to play on women's sports teams puts women and girls at significant risk of sometimes severe injuries. The safety risks are at their apex in contact sports, such as soccer, basketball, field hockey, lacrosse, and ice hockey, among others. (Anyone who thinks that those women's and girls' sports, and other sports like them, are not contact sports has not witnessed a game recently.) And safety concerns also exist in ostensibly non-contact sports, such as volleyball, where spiked balls can cause serious injuries, and softball, where line drives can similarly cause significant harm.

As to competitive fairness, the States contend that allowing biological males to play women's and girls' sports would put female athletes at a debilitating disadvantage. Again, sports are generally zero sum. Every biological male who makes the team takes a roster spot from a female athlete. Every biological male who earns playing time reduces the playing time of a female athlete. Every biological male who starts takes a starting position from a female athlete. Every biological male who wins a race takes the gold medal away from a female athlete. And so on. Even if only one or a few males were to play on a women's or girls' team, that would still place specific individual female athletes at a significant competitive disadvantage.

What is more, forcing women and girls to play against biological males can deter some women and girls who would otherwise participate in sports from doing so—out of understandable concern about suffering serious injury or participating in what they view as an unfair competition. That second-order effect of allowing biological males to play women's and girls' sports cannot be papered over, so the States say.

The plaintiffs argue that the States have not established a substantial relationship between (i) the States' interests in safety and competitive fairness and (ii) limiting women's and girls' sports to biological females. They say that the States' interests in safety and competitive fairness do not justify excluding *all* biological males—including those who identify as female and have taken puberty blockers or hormones—from participation in women's and girls' sports.

But this Court's equal protection precedents allow general classifications like those made in the West Virginia and Idaho laws so long as there is at least a substantial relationship between the classification and the State's interests. Here, when analyzing the relationship between the classification based on biological sex and the asserted interests, the sports context is again crucial. Sports are different from, say, a typical employment or educational opportunity where equal protection often may require that the government generally treat an individual *without regard to the individual's sex*. In the sports context, by contrast, everyone agrees that the States may maintain separate women's and men's teams—in other words, that the States may make distinctions based on sex—because of the inherent physical differences between women and men. As long as the relationship is sufficient as a general matter, the State is not *constitutionally* required to grant individualized exemptions to specific athletes or subclasses.

Especially in the sports context, moreover, an enormous practical and administrability problem would arise if courts suddenly had to make such individualized exemptions. How would courts draw those lines? Individuals come in all shapes and sizes, with different height, weight, muscle mass,

heart capacity, lung capacity, strength, speed, endurance, jumping ability, and so on. Particularly in the sports context, determining the effects of the puberty blockers and hormones taken by transgender athletes—and then comparing each of those transgender athletes' abilities to those of other individual biological males and individual biological females in the relevant sport—would be an almost impossible task for a judge to perform on an equitable basis. The legislatures and the schools are better equipped—and under the Constitution, are the more appropriate entities—to assess the competing medical and scientific considerations and draw appropriate lines. Of course, no line that the States draw will satisfy everyone. But the Judiciary is not the proper institution to make what would often be arbitrary and highly intrusive athlete-by-athlete assessments.

The plaintiffs also argue that the States' laws unconstitutionally discriminate against transgender individuals—specifically, biological males who identify as female. That argument, too, is unavailing. To begin, under this Court's decision in *Skrmetti*, the laws do not classify based on gender identity or transgender status. The laws classify on the basis of biological sex. By contrast, if a school had a co-ed sports team but prohibited all transgender individuals from participating on the team, that would be a distinct transgender classification and, unlike today's cases, would presumably not be analyzed and justified as a classification based on biological sex.

We need not definitively resolve whether rational basis review or intermediate scrutiny applies to transgender classifications. In either event, the classification here readily satisfies rational basis review or intermediate scrutiny for the reasons already explained at some length above. The States' interests in ensuring safety and competitive fairness amply justify the States in maintaining women's and girls' sports for biological females. Under the Equal Protection Clause, therefore, schools may determine eligibility for women's and girls' sports based on biological sex.

Finally, the underlying medical and scientific premise of the plaintiffs' entire equal protection argument is that at least some biological males who

identify as female and take puberty blockers or hormones do not retain physical advantages over biological females. Even if true, that empirical claim would not alter the equal protection conclusion set forth above. Under intermediate scrutiny, there still would be a sufficient relationship between the States' classification based on biological sex and the States' asserted interests in safety and competitive fairness.

Some might ask: What is the harm in allowing an additional athlete to compete in women's or girls' sports? That sentiment, though understandable, misunderstands the nature and reality of sports.

Sports are highly competitive and generally zero sum. At almost every turn, someone wins and someone loses. Every athlete who makes a team takes a roster spot from another athlete. Every player who earns playing time reduces the playing time of a teammate. Every player who makes the starting lineup sidelines another who remains on the bench. Every competitor who wins a race or competition deprives another athlete of that victory, or medal, or prize. Every team that wins because of an added player means that another team has lost because of that added player. Every player who makes all-conference beats out another player who does not. Every student who earns an athletic scholarship takes that opportunity away from another student. And so on.

Women and girls who play sports care deeply about all of those things. They obsess about them. They spend extraordinary time and effort to train in the heat and in the cold, to work out early in the morning and late at night, to get a little faster, to become a little stronger, to jump a little higher, to shoot a little better, to watch a little more video, to make the lonely journey back from an ACL tear, to scrap for playing time, to start, to win the game, to win a championship, to hang a banner, to bring home a medal, to be all-tournament, all-county, all-State, or all-American. They put a championship trophy or all-league award on their bedroom shelf—and it stays there forever as a reminder of their love of the game and pride in their achievements. They learn to endure losses with grace, to lift up their teammates, and to respect

opponents who have beaten them fairly and squarely. They learn to win with class—to look a defeated opponent in the eye, shake her hand, and congratulate her on her effort. Whether the star of the team or the last player on the bench, they form lifelong friendships and lifetime memories. They savor their athletic accomplishments and cherish them for years, even decades, after their playing days are over. The two States here—along with 25 other States, the IOC, the USOPC, and the NCAA—have concluded at this time that women and girls should be allowed to compete for those life-changing opportunities on an equal playing field, without fear of physical injury from biological males or being forced to compete against biological males.

Consistent with Title IX and the Equal Protection Clause, we hold that the States may maintain women's and girls' sports for biological females. They may determine eligibility for women's and girls' sports based on biological sex. The Constitution and Title IX do not require an overhaul of women's and girls' sports throughout America. In B. P. J.'s case, we reverse the judgment of the U. S. Court of Appeals for the Fourth Circuit and remand the case for further proceedings consistent with this opinion. In Hecox's case, 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.

It is so ordered.

Justice THOMAS, concurring.

The Court correctly holds that neither Title IX nor the Equal Protection Clause prohibits States from offering sex-separated athletics. A man does not have a legal right to compete against women just because he believes that he is a woman. I join the Court's opinion in full. I write separately to make two points. First, transgender status is not a suspect class requiring heightened equal-protection scrutiny. Second, as the Court recognizes, this case concerns "biological men" and "boys who identify as girls." Men and boys with gender dysphoria are not women or girls, even if they believe that they are. Sex is an immutable "biological" characteristic.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, concurring in the judgment in part and dissenting in part.

Applying a form of heightened scrutiny divorced from this Court's cases, the majority holds that transgender girls like B. P. J. who wish to play girls' sports are not protected by the Constitution, even if B. P. J. is correct that neither of the State's interests is furthered by their exclusion. Yet the Equal Protection Clause demands much more when a State deploys a sex classification to achieve legislative aims. Perhaps West Virginia could meet those demands. Perhaps not. In either event, because unresolved factual questions prevent the Court from assessing the merits of B. P. J.'s equal protection claim at this time, the Court should allow the District Court to address those factual questions in the first instance. Yet in an opinion unencumbered by fact or law, the majority today cuts off that process prematurely, deciding instead that B. P. J.'s case must end now.

This litigation implicates deeply sensitive, contentious, and evolving issues. These circumstances demand exercising judicial restraint, not rushing to answer conclusively difficult questions without sufficient evidentiary development. In opting otherwise, the majority extends great sympathy to those it favors: the young cisgender girls and women who play sports. I share that sympathy. Playing sports can lead to benefits that are immeasurable, and many are understandably invested in ensuring that competition stays fair and safe. Because the majority, however, inflicts a hardship on those it disfavors without giving them the fair and full opportunity the Constitution requires to litigate their contentions, I respectfully dissent.

West Virginia's decision to separate sports teams based on an individual's sex identified at birth is a clear sex classification subject to heightened scrutiny. West Virginia justifies the classification by citing two interests: ensuring (1) competitive athletic opportunities and (2) safety in participation for women and girls in sports. As the majority stresses and no one disputes, when it comes to sex identified at birth, males generally have an

inherent athletic advantage over females in playing sports. B. P. J., however, contends that this generalization does not hold true for a discrete, easily identifiable group: transgender girls who have never experienced an endogenous male puberty, who receive gender-affirming treatment, and who are, she says, thus similarly situated to cisgender girls. For that group, she argues, neither of West Virginia's interests is furthered by excluding them from girls' and women's sports.

As all agree, the ban at issue classifies based on sex. West Virginia seeks to separate sports teams based solely on an individual's sex identified at birth. As a result, cisgender girls, whose sex identified at birth is female, can play on girls' teams whereas transgender girls, whose sex identified at birth is male, cannot. The difference, undoubtedly, is sex.

The key question here is whether that sex separation is constitutionally justified. Sex classifications like this one cannot be deployed unless they survive heightened scrutiny. This means that the State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. At its core, this inquiry works to distinguish laws based on overbroad generalizations about the different talents, capacities, or preferences of males and females from laws based on legitimate state interests, which reflect genuine inherent differences between men and women that make them differently situated.

The Court has closely scrutinized differences like this in others cases too. In *United States v. Virginia*, for example, the Court addressed the lawfulness of the Virginia Military Institute's (VMI's) male-only admissions policy. The Court held that Virginia could not "constitutionally deny to women who have the will and capacity the … opportunities that VMI uniquely affords," even if "most women" did not have that "will and capacity."

Here, B. P. J. is making a similar claim. Even though, she says, West Virginia's classification may substantially further the State's interests in most applications, as was the case for most of the women who did not want to and

could not attend VMI, the State's interests are not substantially furthered as applied to her subclass, as was the case for "some women" who did want to and could attend VMI. The Court's holding in *Virginia* thus shows that unresolved factual differences matter, even if the classes of people to whom they might be relevant are themselves small.

Stepping back from contending that the factual dispute does not matter at all, the majority suggests that even if it were relevant, B. P. J. could not prevail. That is because, the majority says, there is an ongoing scientific debate over whether transgender girls who have not experienced an endogenous male puberty and who receive gender-affirming treatment possess an athletic advantage inherent to cisgender men. In the majority's view, the Court should be "cautious about swooping in and invalidating laws" that implicate such uncertainty and should instead defer to the legislature's "considered policy judgments." Of course, even when applying heightened scrutiny, courts should give deference to what legislatures and experts have to say when dealing with scientific issues. Even so, the deference afforded is not conclusive. Nor does the mere existence of scientific debate end the matter.

To be clear, B. P. J. ultimately may not be able to show that the science is sufficiently on her side; this dissent takes no position one way or another on B. P. J.'s odds of success. In other words, West Virginia might be right that transgender girls retain some inherent athletic advantage over cisgender girls due to their sex identified at birth even after receiving the hormonal therapy B. P. J. identifies. All agree, moreover, that States do have some room to legislate around issues when there exists significant, and genuine, scientific debate. At this point, however, neither the District Court nor the Fourth Circuit has passed upon any of the available evidence or made the necessary factual findings about the state of the scientific debate. Given the lack of factual development, it is the majority that should heed its own word and be "cautious about swooping in," rather than resolving this kind of factual dispute in the first instance and in this slapdash manner. A restrained approach, based on all relevant facts, is particularly necessary when the Court is faced with a consequential decision of constitutional dimension.

The majority applies its diminished view of equal protection to the sports context today, relying on the parties' concessions that the State's asserted interests will be furthered in most applications, given the particularly close relationship between sex, sports, and those interests. One can only hope that the same misguided approach does not and will not extend to other contexts tomorrow, when any of these considerations are missing.

The concurring opinion of Justice GORSUCH, and the concurring an dissenting opinion of Justice JACKSON, are omitted

Section 8-3.24 – Access to the Ballot

At the end of *Notes and Questions* (p. 808), add the following:

Trump v. Anderson, 144 S. Ct. 662 (2024). A group of Colorado voters claimed that Section 3 of the Fourteenth Amendment to the Constitution prohibits former President Donald J. Trump, who seeks the Presidential nomination of the Republican Party in this year's election, from becoming President again. The Colorado Supreme Court agreed with that contention. It ordered the Colorado secretary of state to exclude the former President from the Republican primary ballot in the State. Former President Trump challenged that decision. In a *per curiam* opinion, the Court reversed, holding that the Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates. Section 3 of the Fourteenth Amendment states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or

> military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Proposed by Congress in 1866 and ratified by the States in 1868, "the Fourteenth Amendment expanded federal power at the expense of state autonomy" and thus "fundamentally altered the balance of state and federal power struck by the Constitution." The Amendment was designed to help ensure an enduring Union by preventing former Confederates from returning to power in the aftermath of the Civil War. Section 3 works by imposing on certain individuals a preventive and severe penalty—disqualification from holding a wide array of offices. "States may disqualify persons holding or attempting to hold *state* office but have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency." Federal officers, the Court noted, owe their existence and functions to the united voice of the whole, not of a portion, of the people. The powers over their election and qualifications must be specifically "delegated to, rather than reserved by, the States." *U. S. Term Limits, Inc. v. Thornton* (1995). But nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates. On the other hand, the Fourteenth Amendment grants new power to Congress to enforce the provisions of the Amendment against the States.

Moreover, as a policy matter, state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that the President represents *all* the voters in the Nation. Conflicting state outcomes concerning the same candidate might result not just from differing views of the merits, but from variations in state law governing the proceedings

that are necessary to make Section 3 disqualification determinations. Some States might allow a Section 3 challenge to succeed based on a preponderance of the evidence, while others might require a heightened showing. Certain evidence might be admissible in some States but inadmissible hearsay in others. Disqualification might be possible only through criminal prosecution, as opposed to expedited civil proceedings, in particular States. The "patchwork" that would likely result from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole." *U.S. Term Limits.*

Sotomayor, Kagan, and Jackson, JJ, concurred, but argued that the Court should not have determined how Section 3 must be applied. "Although federal enforcement of Section 3 is in no way at issue, the majority announces novel rules for how that enforcement must operate. It reaches out to decide Section 3 questions not before us, and to foreclose future efforts to disqualify a Presidential candidate under that provision. In a sensitive case crying out for judicial restraint, it abandons that course."

§ 8-4 The Second Amendment

At the end of *Notes and Questions* (p. 978), add the following:

UNITED STATES V. RAHIMI

144 S. Ct. 1889 (2024)

Chief Justice Roberts delivered the opinion of the Court.

A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that

he "represents a credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. 18 U.S.C. § 922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment.

I

In December 2019, Rahimi met his girlfriend, C. M., for lunch in a parking lot. C. M. is also the mother of Rahimi's young child, A. R. During the meal, Rahimi and C. M. began arguing, and Rahimi became enraged. Brief for United States 2. C. M. attempted to leave, but Rahimi grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard. When he realized that a bystander was watching the altercation, Rahimi paused to retrieve a gun from under the passenger seat. C. M. took advantage of the opportunity to escape. Rahimi fired as she fled, although it is unclear whether he was aiming at C. M. or the witness. Rahimi later called C. M. and warned that he would shoot her if she reported the incident.

Undeterred by this threat, C. M. went to court to seek a restraining order. In the affidavit accompanying her application, C. M. recounted the parking lot incident as well as other assaults. She also detailed how Rahimi's conduct had endangered A. R. Although Rahimi had an opportunity to contest C. M.'s testimony, he did not do so. On February 5, 2020, a state court in Tarrant County, Texas, issued a restraining order against him. The order, entered with the consent of both parties, included a finding that Rahimi had committed "family violence." It also found that this violence was "likely to occur again" and that Rahimi posed "a credible threat" to the "physical safety" of C. M. or A. R. Based on these findings, the order prohibited Rahimi from threatening C. M. or her family for two years or contacting C. M. during that period except to discuss A. R. It also suspended Rahimi's gun license for two years. If Rahimi was imprisoned or confined when the order was set to expire, the order would instead terminate either one or two years after his release date, depending on the length of his imprisonment.

In May, however, Rahimi violated the order by approaching C. M.'s home at night. He also began contacting her through several social media accounts.

In November, Rahimi threatened a different woman with a gun, resulting in a charge for aggravated assault with a deadly weapon. And while Rahimi was under arrest for that assault, the Texas police identified him as the suspect in a spate of at least five additional shootings.

The police obtained a warrant to search Rahimi's residence. There they discovered a pistol, a rifle, ammunition—and a copy of the restraining order.

Rahimi was indicted on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. § 922(g)(8).

Rahimi moved to dismiss the indictment, arguing that Section 922(g)(8) violated on its face the Second Amendment right to keep and bear arms. Concluding that Circuit precedent foreclosed Rahimi's Second Amendment challenge, the District Court denied his motion. Rahimi then pleaded guilty. On appeal, he again raised his Second Amendment challenge. The appeal was denied, and Rahimi petitioned for rehearing en banc.

While Rahimi's petition was pending, this Court decided *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022). In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction "is consistent with the Nation's historical tradition of firearm regulation."

In light of *Bruen*, the panel withdrew the prior opinion and ordered additional briefing. A new panel then heard oral argument and reversed. Surveying the evidence that the Government had identified, the panel concluded that Section 922(g)(8) does not fit within our tradition of firearm regulation. Judge Ho wrote separately to express his view that the panel's ruling did not conflict with the interest in protecting people from violent individuals.

II

When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition.

We have held that the right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty." *McDonald v. Chicago* (2010). Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense. *Bruen.* The spark that ignited the American Revolution was struck at Lexington and Concord, when the British governor dispatched soldiers to seize the local farmers' arms and powder stores. In the aftermath of the Civil War, Congress's desire to enable the newly freed slaves to defend themselves against former Confederates helped inspire the passage of the Fourteenth Amendment, which secured the right to bear arms against interference by the States. *McDonald*. As a leading and early proponent of emancipation observed, "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty."

"Like most rights," though, "the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller* (2008). In *Heller*, this Court held that the right applied to ordinary citizens within the home. Even as we did so, however, we recognized that the right was never thought to sweep indiscriminately. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." At the founding, the bearing of arms was subject to regulations ranging from rules about firearm storage to restrictions on gun use by drunken New Year's Eve revelers. Some jurisdictions banned the carrying of

"dangerous and unusual weapons." Others forbade carrying concealed firearms.

In *Heller*, our inquiry into the scope of the right began with "constitutional text and history." *Bruen.* In *Bruen*, we directed courts to examine our "historical tradition of firearm regulation" to help delineate the contours of the right. We explained that if a challenged regulation fits within that tradition, it is lawful under the Second Amendment. We also clarified that when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to "justify its regulation."

Nevertheless, some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit.

As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that "applying faithfully the balance struck by the founding generation to modern circumstances." Discerning and developing the law in this way is "a commonplace task for any lawyer or judge."

Why and how the regulation burdens the right are central to this inquiry. For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with he right if it does so

to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, "it still may be analogous enough to pass constitutional muster." The law must comport with the principles underlying the Second Amendment, but it need not be a "dead ringer" or a "historical twin."[1]

Bearing these principles in mind, we conclude that Section 922(g)(8) survives Rahimi's challenge.

Recall that Section 922(g)(8) provides two independent bases for liability. Section 922(g)(8)(C)(i) bars an individual from possessing a firearm if his restraining order includes a finding that he poses "a credible threat to the physical safety" of a protected person. Separately, Section 922(g)(8)(C)(ii) bars an individual from possessing a firearm if his restraining order "prohibits the use, attempted use, or threatened use of physical force." Our analysis starts and stops with Section 922(g)(8)(C)(i) because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others. We need not decide whether regulation under Section 922(g)(8)(C)(ii) is also permissible.

FN1: We also recognized in *Bruen* the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." We explained that under the circumstances, resolving the dispute was unnecessary to decide the case. The same is true here.

This Court reviewed the history of American gun laws extensively in *Heller* and *Bruen*. From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others. The act of "going armed to terrify the King's subjects" was recognized at common law as a "great offence." Parliament began codifying prohibitions against such conduct as early as the 1200s and 1300s, most notably in the Statute of Northampton of 1328. In the aftermath of the Reformation and the English Civil War, Parliament passed further restrictions. The Militia Act of 1662, for example, authorized the King's agents to "seize all Armes in the custody or possession of any person ... judge[d] dangerous to the Peace of the Kingdome."

The Glorious Revolution cut back on the power of the Crown to disarm its subjects unilaterally. King James II had "caused several good Subjects being Protestants to be disarmed at the same Time when Papists were ... armed." By way of rebuke, Parliament adopted the English Bill of Rights, which guaranteed "that the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." § 7, *id*., at 441. But as the document itself memorialized, the principle that arms-bearing was constrained "by Law" remained.

Through these centuries, English law had disarmed not only brigands and highwaymen but also political opponents and disfavored religious groups. By the time of the founding, however, state constitutions and the Second Amendment had largely eliminated governmental authority to disarm political opponents on this side of the Atlantic. But regulations targeting individuals who physically threatened others persisted. Such conduct was often addressed through ordinary criminal laws and civil actions, such as prohibitions on fighting or private suits against individuals who threatened others. By the 1700s and early 1800s, however, two distinct legal regimes had developed that specifically addressed firearms violence.

The first were the surety laws. A form of "preventive justice," these laws derived from the ancient practice of frankpledges.

Eventually, the communal frankpledge system evolved into the individualized surety regime. Under the surety laws, a magistrate could "oblige those persons, of whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance ... that such offence ... shall not happen, by finding pledges or securities." In other words, the law authorized magistrates to require individuals suspected of future misbehavior to post a bond. If an individual failed to post a bond, he would be jailed. If the individual did post a bond and then broke the peace, the bond would be forfeit.

Well entrenched in the common law, the surety laws could be invoked to prevent all forms of violence, including spousal abuse. As Blackstone explained, "wives could demand sureties against their husbands; or husbands, if necessary, against their wives." These often took the form of a surety of the peace, meaning that the defendant pledged to "keep the peace." Wives also demanded sureties for good behavior, whereby a husband pledged to "demean and behave himself well."

Importantly for this case, the surety laws also targeted the misuse of firearms. In 1795, for example, Massachusetts enacted a law authorizing justices of the peace to "arrest" all who "go armed offensively and require of the offender to find sureties for his keeping the peace." Later, Massachusetts amended its surety laws to be even more specific, authorizing the imposition of bonds from individuals "who went armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." At least nine other jurisdictions did the same.

These laws often offered the accused significant procedural protections. Before the accused could be compelled to post a bond for "going armed," a complaint had to be made to a judge or justice of the peace by "any person having reasonable cause to fear" that the accused would do him harm or breach the peace. The magistrate would take evidence, and—if he determined that cause existed for the charge—summon the accused, who could respond to the allegations. Bonds could not be required for more than six months at a time, and an individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason.

While the surety laws provided a mechanism for preventing violence before it occurred, a second regime provided a mechanism for punishing those who had menaced others with firearms. These were the "going armed" laws, a particular subset of the ancient common-law prohibition on affrays.

Derived from the French word "affraier," meaning "to terrify," the affray laws traced their origin to the Statute of Northampton (1328). Although the prototypical affray involved fighting in public, commentators understood affrays to encompass the offense of "arming" oneself "to the Terror of the People." Moreover, the prohibitions—on fighting and going armed—were often codified in the same statutes.

Whether classified as an affray law or a distinct prohibition, the going armed laws prohibited "riding or going armed, with dangerous or unusual weapons, to terrify the good people of the land." Such conduct disrupted the "public order" and "led almost necessarily to actual violence." *State v. Huntly* (N.C. 1843). Therefore, the law punished these acts with "forfeiture of the arms ... and imprisonment."

In some instances, prohibitions on going armed and affrays were incorporated into American jurisprudence through the common law…. Moreover, at least four States—Massachusetts, New Hampshire, North Carolina, and Virginia—expressly codified prohibitions on going armed.

Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.

Like the surety and going armed laws, Section 922(g)(8)(C)(i) applies to individuals found to threaten the physical safety of another. This provision is "relevantly similar" to those founding era regimes in both why and how it

burdens the Second Amendment right. Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do. Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not broadly restrict arms use by the public generally.

The burden Section 922(g)(8) imposes on the right to bear arms also fits within our regulatory tradition. While we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse, we note that Section 922(g)(8) applies only once a court has found that the defendant "represents a credible threat to the physical safety" of another. That matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon.

Moreover, like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi. Section 922(g)(8) only prohibits firearm possession so long as the defendant "is" subject to a restraining order. In Rahimi's case that is one to two years after his release from prison.

Finally, the penalty—another relevant aspect of the burden—also fits within the regulatory tradition. The going armed laws provided for imprisonment, 4 Blackstone 149, and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible.

Rahimi argues *Heller* requires us to affirm, because Section 922(g)(8) bars individuals subject to restraining orders from possessing guns in the home, and in *Heller* we invalidated an "absolute prohibition of handguns ... in the home." But *Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by "felons and the mentally ill," are "presumptively lawful."

Our analysis of the surety laws in *Bruen* also does not help Rahimi. In *Bruen*, we explained that the surety laws were not a proper historical analogue for New York's gun licensing regime. What distinguished the regimes, we observed, was that the surety laws "presumed that individuals had a right to ... carry," whereas New York's law effectively presumed that no citizen had such a right, absent a special need. Section 922(g)(8)(C)(i) does not make the same faulty presumption. To the contrary, it presumes, like the surety laws before it, that the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others.

While we also noted that the surety laws applied different penalties than New York's special-need regime, we did so only to emphasize just how severely the State treated the rights of its citizens. But as we have explained, our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not. The conclusion that focused regulations like the surety laws are not a historical analogue for a broad prohibitory regime like New York's does not mean that they cannot be an appropriate analogue for a narrow one.

In short, we have no trouble concluding that Section 922(g)(8) survives Rahimi's facial challenge. Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others. Section 922(g)(8) can be applied lawfully to Rahimi.

The dissent reaches a contrary conclusion, primarily on the ground that the historical analogues for Section 922(g)(8) are not sufficiently similar to place that provision in our historical tradition. The dissent does, however, acknowledge that Section 922(g)(8) is within that tradition when it comes to the "why" of the appropriate inquiry. The objection is to the "how." For the reasons we have set forth, however, we conclude that Section 922(g)(8) satisfies that part of the inquiry as well. As we said in *Bruen*, a "historical *twin*" is not required.

For its part, the Fifth Circuit made two errors. First, like the dissent, it read *Bruen* to require a "historical twin" rather than a "historical analogue." Second, it did not correctly apply our precedents governing facial challenges. As

we have said in other contexts, "when legislation and the Constitution brush up against each other, a court's task is to seek harmony, not to manufacture conflict." Rather than consider the circumstances in which Section 922(g)(8) was most likely to be constitutional, the panel instead focused on hypothetical scenarios where Section 922(g)(8) might raise constitutional concerns. That error left the panel slaying a straw man.2

Finally, in holding that Section 922(g)(8) is constitutional as applied to Rahimi, we reject the Government's contention that Rahimi may be disarmed simply because he is not "responsible." "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented.

In *Heller*, *McDonald*, and *Bruen*, this Court did not "undertake an exhaustive historical analysis of the full scope of the Second Amendment." Nor do we do so today. Rather, we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.

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

It is so ordered.

FN2: Many of the potential faults that the Fifth Circuit identifies in Section 922(g)(8) appear to sound in due process rather than the Second Amendment. As we have explained, unless these hypothetical faults occur in every case, they do not justify invalidating Section 922(g)(8) on its face. In any event, we need not address any due process concern here because this challenge was not litigated as a due process challenge and there is no such claim before us. See this Court's Rule 14.1(a

Justice SOTOMAYOR, with whom Justice KAGAN joins, concurring.

The Court today emphasizes that a challenged regulation "must comport with the principles underlying the Second Amendment," but need not have a precise historical match. I agree. I write separately to highlight why the Court's interpretation of *Bruen*, and not the dissent's, is the right one. In short, the Court's interpretation permits a historical inquiry calibrated to reveal something useful and transferable to the present day, while the dissent would make the historical inquiry so exacting as to be useless, a too-sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding.

The Court's opinion also clarifies an important methodological point that bears repeating: Rather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* should "consider whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." Here, for example, the Government has not identified a founding-era or Reconstruction-era law that specifically disarmed domestic abusers. Although § 922(g)(8) "is by no means identical" to the surety or going armed laws, it "restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws did." That shared principle is sufficient.

The dissent reaches a different conclusion by applying the strictest possible interpretation of *Bruen*. It picks off the Government's historical sources one by one, viewing any basis for distinction as fatal.

If the dissent's interpretation of *Bruen* were the law, then *Bruen* really would be the "one-way ratchet" that I and the other dissenters in that case feared, "disqualifying virtually any 'representative historical analogue' and making it nearly impossible to sustain common-sense regulations necessary to our Nation's safety and security." *Bruen* (Breyer, J., dissenting). Thankfully, the Court rejects that rigid approach to the historical inquiry. As the Court puts it today, *Bruen* was "not meant to suggest a law trapped in amber."

Under the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history, particularly history predating the inclusion of women and people of color as full members of the polity, impoverishes constitutional interpretation and hamstrings our democracy.

The Court today clarifies *Bruen*'s historical inquiry and rejects the dissent's exacting historical test. I welcome that development. That being said, I remain troubled by *Bruen*'s myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today. In my view, the Second Amendment allows legislators "to take account of the serious problems posed by gun violence." *Bruen* (Breyer, J., dissenting), not merely by asking what their predecessors at the time of the founding or Reconstruction thought, but by listening to their constituents and crafting new and appropriately tailored solutions. Under the means-end scrutiny that this Court rejected in *Bruen* but "regularly uses ... in cases involving other constitutional provisions," the constitutionality of § 922(g)(8) is even more readily apparent.

Although I continue to think that the means-end approach to Second Amendment analysis is the right one, neither party asks the Court to reconsider *Bruen* at this time, and that question would of course involve other considerations than whether *Bruen* was rightly decided. Whether considered under *Bruen* or under means-end scrutiny, § 922(g)(8) clears the constitutional bar. I join in full the Court's opinion, which offers a more helpful model than the dissent for lower courts struggling to apply *Bruen*.

Justice GORSUCH, concurring.

In this case, no one questions that the law Mr. Rahimi challenges addresses individual conduct covered by the text of the Second Amendment. So, in this facial challenge, the question becomes whether that law, in at least some of its applications, is consistent with historic firearm regulations. To prevail, the government need not show that the current law is a " 'dead ringer' " for some

historical analogue. But the government must establish that, in at least some of its applications, the challenged law "impose[s] a comparable burden on the right of armed self-defense" to that imposed by a historically recognized regulation. And it must show that the burden imposed by the current law "is comparably justified." *Bruen*.

Why do we require those showings? Through them, we seek to honor the fact that the Second Amendment "codified a *pre-existing* right" belonging to the American people, one that carries the same "scope" today that it was "understood to have when the people adopted" it. *Heller.* When the people ratified the Second Amendment, they surely understood an arms-bearing citizenry posed some risks. But just as surely they believed that the right protected by the Second Amendment was itself vital to the preservation of life and liberty.

Proceeding with this well in mind today, the Court rightly holds that Mr. Rahimi's facial challenge to § 922(g)(8) cannot succeed. It cannot because, through surety laws and restrictions on "going armed," the people in this country have understood from the start that the government may disarm an individual temporarily after a "judicial determination" that he "likely would threaten or ha[s] threatened another with a weapon." And, at least in some cases, the statute before us works in the same way and does so for the same reasons: It permits a court to disarm a person only if, after notice and hearing, it finds that he "represents a credible threat to the physical safety" of others. §§ 922(g)(8)(A), (g)(8)(C)(i). A court, too, may disarm an individual only for so long as its order is in effect. § 922(g)(8). In short, in at least some applications, the challenged law does not diminish any aspect of the right the Second Amendment was originally understood to protect.

I appreciate that one of our colleagues sees things differently. (Thomas, J., dissenting). But if reasonable minds can disagree whether § 922(g)(8) is analogous to past practices originally understood to fall outside the Second Amendment's scope, we at least agree that is the only proper question a court may ask. Discerning what the original meaning of the Constitution requires in this or that case may sometimes be difficult. Asking that question, however, at least keeps judges in their proper lane, seeking to honor the supreme law the people have ordained rather than substituting our will for theirs. And whatever

indeterminacy may be associated with seeking to honor the Constitution's original meaning in modern disputes, that path offers surer footing than any other this Court has attempted from time to time. Come to this Court with arguments from text and history, and we are bound to reason through them as best we can. As we have today. Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. Except the judges themselves. Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.

Among all the opinions issued in this case, its central messages should not be lost. The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*. And after carefully consulting those materials, the Court "conclude[s] *only* this": "An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." With these observations, I am pleased to concur.

Justice KAVANAUGH, concurring.

The American people established an enduring American Constitution. The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret that text according to its ordinary meaning as originally understood. The text of the Constitution is the "Law of the Land." Art. VI. As a general matter, the text of the Constitution says what it means and means what it says. And unless and until it is amended, that text controls.

In many important provisions, the Constitution is a document of majestic specificity with "strikingly clean prose." Two Houses of Congress. A House elected every two years. Senators serve 6-year terms. Two Senators per State. A State's equal suffrage in the Senate may not be changed without the State's consent. A two-thirds House vote to expel a Member of the House. The same for the Senate. Appropriations are made by law. Bicameralism and presentment. The Presidential veto. The Presidential pardon. The President serves a 4-year

term. A maximum of two elected terms for a President. The salary of a sitting President may not be increased or decreased. A vote of a majority of the House and two-thirds of the Senate to remove a President. The President nominates and the Senate confirms principal executive officers. One Supreme Court. Tenure and salary protection for Supreme Court and other federal judges. Two-thirds of each House of Congress together with three-fourths of the States may amend the Constitution. Congress meets at noon on January 3rd unless otherwise specified by Congress. The District of Columbia votes in Presidential elections. The list goes on.

Those and many other constitutional provisions are relatively clear. And when the "framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text." *McPherson v. Blacker* (1892).

Of course, some provisions of the Constitution are broadly worded or vague—to put it in Madison's words, "more or less obscure and equivocal." The Federalist No. 37. As Chief Justice Rehnquist explained, the Constitution is in some parts "obviously not a specifically worded document but one couched in general phraseology." W. Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 697 (1976).

That is especially true with respect to the broadly worded or vague individual-rights provisions. I will use the terms "broadly worded" and "vague" interchangeably in this opinion. For example, the First Amendment provides that "Congress shall make no law" "abridging the freedom of speech." And the Second Amendment, at issue here, guarantees that "the right of the people to keep and bear Arms" "shall not be infringed."

Read literally, those Amendments might seem to grant *absolute* protection, meaning that the government could never regulate speech or guns in any way. But American law has long recognized, as a matter of original understanding and original meaning, that constitutional rights generally come with exceptions.

With respect to the First Amendment, for example, this Court's "jurisprudence over the past 216"—now 233—"years has rejected an absolutist interpretation." From 1791 to the present, "the First Amendment has permitted restrictions upon the content of speech in a few limited areas"—including obscenity, defamation, fraud, and incitement. So too with respect to the Second Amendment: "Like most rights, the right secured by the Second Amendment is not unlimited"; it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *District of Columbia v Heller* (2008).

A recurring and difficult issue for judges, therefore, is how to interpret vague constitutional text. That issue often arises (as here) in the context of determining exceptions to textually guaranteed individual rights. To what extent does the Constitution allow the government to regulate speech or guns, for example?1

In many cases, judicial precedent informs or controls the answer (more on that later). But absent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy.

Generally speaking, the historical approach examines the laws, practices, and understandings from before and after ratification that may help the interpreter discern the meaning of the constitutional text and the principles embodied in that text. The policy approach rests on the philosophical or policy dispositions of the individual judge. History, not policy, is the proper guide.

FN1: There are two ways to frame this point—either (i) determining the exceptions to a constitutional right or (ii) determining the affirmative scope or contours of that constitutional right. Either way, the analysis is the same—does the constitutional provision, as originally understood, permit the challenged law? This opinion uses the term "exceptions," which underscores that the constitutional baseline is protection of the textually enumerated right.

For more than 200 years, this Court has relied on history when construing vague constitutional text in all manner of constitutional disputes. For good reason. History can supply evidence of the original meaning of vague text. History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.

Absent precedent, therefore, history guides the interpretation of vague constitutional text. Of course, this Court has been deciding constitutional cases for about 230 years, so relevant precedent often exists. As the Court's opinions over time amply demonstrate, precedent matters a great deal in constitutional interpretation.

I now turn to explaining how courts apply pre-ratification history, post-ratification history, and precedent when analyzing vague constitutional text.

Pre-ratification history. When interpreting vague constitutional text, the Court typically scrutinizes the stated intentions and understandings of the Framers and Ratifiers of the Constitution (or, as relevant, the Amendments). The Court also looks to the understandings of the American people from the pertinent ratification era. Those intentions and understandings do not necessarily determine meaning, but they may be strong evidence of meaning.

On the other hand, some pre-ratification history can be probative of what the Constitution does *not* mean. The Framers drafted and approved many provisions of the Constitution precisely to depart from rather than adhere to certain pre-ratification laws, practices, or understandings.

Post-ratification history. As the Framers made clear, and as this Court has stated time and again for more than two centuries, post-ratification history—sometimes referred to as tradition—can also be important for interpreting vague constitutional text and determining exceptions to individual constitutional rights. When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important. Indeed, absent precedent, there can be little else to guide a judge deciding a

constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences.

Importantly, the Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text. They understood that some constitutional text may be "more or less obscure and equivocal" such that questions "daily occur in the course of practice." The Federalist No. 37. Madison explained that the meaning of vague text would be "liquidated and ascertained by a series of particular discussions and adjudications." *Id*., at 229. In other words, Madison articulated the Framers' expectation and intent that post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text.

Precedent. With a Constitution and a Supreme Court that are both more than two centuries old, this Court and other courts are rarely interpreting a constitutional provision for the first time. Rather, a substantial body of Supreme Court precedent already exists for many provisions of the Constitution.

Courts must respect precedent, while at the same time recognizing that precedent on occasion may appropriately be overturned. In light of the significant amount of Supreme Court precedent that has built up over time, this Court and other courts often decide constitutional cases by reference to those extensive bodies of precedent.

Some say that courts should determine exceptions to broadly worded individual rights, including the Second Amendment, by looking to policy. Uphold a law if it is a good idea; strike it down if it is not. True, the proponents of a policy-based approach to interpretation of broadly worded or vague constitutional text usually do not say so explicitly (although some do). Rather, they support a balancing approach variously known as means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny. Whatever the label of the day, that balancing approach is policy by another name. It requires judges to weigh the benefits against the burdens of a law and to uphold

the law as constitutional if, in the judge's view, the law is sufficiently reasonable or important.

To begin, as I have explained, that kind of balancing approach to constitutional interpretation departs from what Framers such as Madison stated, what jurists such as Marshall and Scalia did, what judges as umpires should strive to do, and what this Court has actually done across the constitutional landscape for the last two centuries.

The balancing tests (heightened scrutiny and the like) are a relatively modern judicial innovation in constitutional decisionmaking. The "tiers of scrutiny have no basis in the text or original meaning of the Constitution." J. Alicea & J. Ohlendorf*, Against the Tiers of Constitutional Scrutiny, National Affairs 72, 73 (2019). And before the late 1950s,* "what we would now call strict judicial scrutiny did not exist." R. Fallon, *The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny* 30 (2019).

To be clear, I am not suggesting that the Court overrule cases where the Court has applied those heightened-scrutiny tests. But I am challenging the notion that those tests are the ordinary approach to constitutional interpretation. And I am arguing against extending those tests to new areas, including the Second Amendment.

One major problem with using a balancing approach to determine exceptions to constitutional rights is that it requires highly subjective judicial evaluations of how important a law is—at least unless the balancing test itself incorporates history, in which case judges might as well just continue to rely on history directly.

The subjective balancing approach forces judges to act more like legislators who decide what the law should be, rather than judges who "say what the law is." That is because the balancing approach requires judges to weigh the benefits of a law against its burdens—a value-laden and political task that is usually reserved for the political branches. And that power in essence vests judges with "a roving commission to second-guess" legislators and

administrative officers "concerning what is best for the country." W. Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 698 (1976). Stated otherwise, when a court "does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation." A. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1185 (1989).

Some respond that history can be difficult to decipher. It is true that using history to interpret vague text can require "nuanced judgments," *McDonald* (Scalia, J., concurring), and is "sometimes inconclusive," Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev., at 864. But at a minimum, history tends to narrow the range of possible meanings that may be ascribed to vague constitutional language. A history-based methodology supplies direction and imposes a neutral and democratically infused constraint on judicial decisionmaking.

The historical approach is not perfect. But "the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world." *McDonald* (Scalia, J., concurring). And the historical approach is superior to judicial policymaking. The historical approach "depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." Moreover, the historical approach "intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people."

This Court's Second Amendment jurisprudence has carefully followed and reinforced the Court's longstanding approach to constitutional interpretation—relying on text, pre-ratification and post-ratification history, and precedent.

As the Court's decision today notes, Second Amendment jurisprudence is still in the relatively early innings, unlike the First, Fourth, and Sixth

Amendments, for example. That is because the Court did not have occasion to recognize the Second Amendment's individual right until recently. Deciding constitutional cases in a still-developing area of this Court's jurisprudence can sometimes be difficult. But that is not a permission slip for a judge to let constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge's own policy beliefs.

Justice BARRETT, concurring.

Despite its unqualified text, the Second Amendment is not absolute. It codified a pre-existing right, and pre-existing limits on that right are part and parcel of it. Those limits define the scope of "the right to bear arms" as it was originally understood; to identify them, courts must examine our "historical tradition of firearm regulation." That evidence marks where the right stops and the State's authority to regulate begins. A regulation is constitutional only if the government affirmatively proves that it is "consistent with the Second Amendment's text and historical understanding."

Because the Court has taken an originalist approach to the Second Amendment, it *is worth pausing to identify the basic premises of originalism. The theory is built on two* core principles: that the meaning of constitutional text is fixed at the time of its ratification and that the "discoverable historical meaning has legal significance and is authoritative in most circumstances." K.Whittington, *Originalism: A Critical Introduction*, 82 Ford. L. Rev. 375, 378 (2013) (Whittington). Ratification is a democratic act that renders constitutional text part of our fundamental law, see Arts. V, VII, and that text "remains law until lawfully altered," S. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 782 (2022). So for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function. To be sure, postenactment history can be an important tool. For example, it can "reinforce our understanding of the Constitution's original meaning"; "liquidate ambiguous constitutional provisions"; provide persuasive evidence of the original meaning; and, if *stare decisis* applies, control the

outcome. See *Vidal v. Elster* (2024)(Barrett, J., concurring in part). But generally speaking, the use of postenactment history requires some justification other than originalism simpliciter.

"Original history"—*i.e.,* the generally dispositive kind—plays two roles in the Second Amendment context. It elucidates how contemporaries understood the text—for example, the meaning of the phrase "bear Arms." It also plays the more complicated role of determining the scope of the pre-existing right that the people enshrined in our fundamental law.* In Rahimi's case, the Court uses history in this latter way. Call this "original contours" history: It looks at historical gun regulations to identify the contours of the right.

Courts have struggled with this use of history in the wake of *Bruen*. One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?

Analogical reasoning" under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold. To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.

Here, though, the Court settles on just the right level of generality: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." Section 922(g)(8)(C)(i) fits well within that principle; therefore, Rahimi's facial challenge fails. Harder level-of-generality problems can await another day.

Justice JACKSON, concurring.

I write separately because we now have two years' worth of post-*Bruen* cases under our belts, and the experiences of courts applying its history-and-tradition test should bear on our assessment of the workability of that legal standard. This case highlights the apparent difficulty faced by judges on the ground. Make no mistake: Today's effort to clear up "misunderstandings" is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them.

When this Court adopts a new legal standard, as we did in *Bruen*, we do not do so in a vacuum. The tests we establish bind lower court judges, who then apply those legal standards to the cases before them. In my view, as this Court thinks of, and speaks about, history's relevance to the interpretation of constitutional provisions, we should be mindful that our common-law tradition of promoting clarity and consistency in the application of our precedent *also* has a lengthy pedigree. So when courts signal they are having trouble with one of our standards, we should pay attention.

The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness. It isn't just that *Bruen*'s history-and-tradition test is burdensome (though that is no small thing to courts with heavier caseloads and fewer resources than we have). The more worrisome concern is that lower courts appear to be diverging in both approach and outcome as they struggle to conduct the inquiry *Bruen* requires of them. Scholars report that lower courts applying *Bruen*'s approach have been unable to produce "consistent, principled results" and, in fact, they "have come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them." Given this, it appears indisputable that, after *Bruen*, "confusion plagues the lower courts."

No one seems to question that "history has a role to play in Second Amendment analysis." But, per *Bruen*, courts evaluating a Second Amendment challenge must consider history *to the exclusion of all else*. This means

legislators must locate and produce—and courts must sift through—troves of centuries-old documentation looking for supportive historical evidence.

This very case provides a prime example of the pitfalls of *Bruen*'s approach. Having been told that a key marker of a constitutional gun regulation is "a well-established and representative historical analogue." Rahimi argued below that "there is little or no historical evidence suggesting disarmament for those who committed domestic violence; and there is certainly no tradition of disarming people subject to a no-contact order related to domestic violence." The Government then proffered what it maintained were sufficient historical analogues to 18 U.S.C. § 922(g)(8), including surety and going armed laws. But the Fifth Circuit concluded that the federal statute was unconstitutional because the Government's analogues were not "relevantly similar."

I concur in today's decision applying *Bruen*. But, in my view, the Court should also be mindful of how its legal standards are actually playing out in real life. We must remember that legislatures, seeking to implement meaningful reform for their constituents while simultaneously respecting the Second Amendment, are hobbled without a clear, workable test for assessing the constitutionality of their proposals. And courts, which are currently at sea when it comes to evaluating firearms legislation, need a solid anchor for grounding their constitutional pronouncements. The public, too, deserves clarity when this Court interprets our Constitution.

Justice THOMAS, dissenting.

After *New York State Rifle & Pistol Assn., Inc. v. Bruen (2022),* this Court's directive was clear: A firearm regulation that falls within the Second Amendment's plain text is unconstitutional unless it is consistent with the Nation's historical tradition of firearm regulation. Not a single historical regulation justifies the statute at issue, 18 U.S.C. § 922(g)(8). Therefore, I respectfully dissent.

This case is not about whether States can disarm people who threaten others. States have a ready mechanism for disarming anyone who uses a firearm to threaten physical violence: criminal prosecution. Most States, including Texas, classify aggravated assault as a felony, punishable by up to 20 years' imprisonment. Assuming C. M.'s allegations could be proved, Texas could have convicted and imprisoned Rahimi for every one of his alleged acts. Thus, the question before us is not whether Rahimi and others like him can be disarmed consistent with the Second Amendment. Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order—even if he has never been accused or convicted of a crime. It cannot. The Court and Government do not point to a single historical law revoking a citizen's Second Amendment right based on possible interpersonal violence. The Government has not borne its burden to prove that § 922(g)(8) is consistent with the Second Amendment's text and historical understanding.

The Framers and ratifying public understood "that the right to keep and bear arms was essential to the preservation of liberty." (THOMAS, J., concurring in part and concurring in judgment). Yet, in the interest of ensuring the Government can regulate one subset of society, today's decision puts at risk the Second Amendment rights of many more. I respectfully dissent.

Notes

RIGHT TO CARRY GUNS ON PRIVATE PROPERTY OPEN TO PUBLIC. In *Wolford v. Lopez, 2026 WL 1825723* (2026), holders of concealed-carry permits and an organizational plaintiff with members who had such permits sought injunctive relief against the Attorney General of Hawaii, alleging Hawaii law prohibiting licensed concealed-carry permit holders from carrying handguns on private property open to the public unless the property owner gave express permission was unconstitutional. The United States District Court granted the motion and issued a temporary injunction. The United States Court of Appeals for the Ninth Circuit reversed.

In a 6-3 decision by Alito, J., the Court reversed, holding that Hawaii's law violates the Second Amendment. Hawaii's restrictions fall within the plain text of the Second Amendment, so the law is presumptively unconstitutional. No party disputes that petitioners are among "the people" protected by the Second Amendment or that they seek to "bear" "Arms." Therefore, "the plain text of the Second Amendment protects" what petitioners want to do: carry handguns for self-defense. To be sure, owners of establishments that are open to the public can admit or exclude people who are carrying guns for self-defense under either the common-law rule or Hawaii's law. But Hawaii's shift from the common-law rule unquestionably imposes a new and significant burden on the exercise of the right recognized in *Bruen*. For example, proprietors who do not object to entry by carry-permit holders may be reluctant to post welcoming signs for fear of alienating customers.

Thus, under Hawaii's new default rule, a proprietor in this category may only be willing to consent discreetly to the entry of permit holders who make the effort to inquire. This arrangement imposes a new burden on permit holders who will have to somehow obtain permission to carry a firearm on the property before stepping foot on it. The law severely hampers the ability of law-abiding citizens to exercise the right that *Bruen* recognized as they go about their daily lives. Hawaii's argument that its "particular customs and laws" support the new default rule fails because the Second Amendment has the same meaning in all parts of the United States. The Second Amendment cannot give way to "the spirit of Aloha" in Hawaii any more than it can yield to the spirit of the Big Apple (*Bruen*) or the Windy City (*McDonald*). Merely local attitudes can neither shrink nor inflate the meaning of fundamental Bill of Rights guarantees that apply to the States through the Fourteenth Amendment.

GUN POSSESSION BY DRUG USERS. In *United States v. Hemani,* 146 S. Ct. 1677 (2026), *d*efendant was indicted under a federal statute [18 § 922(g)(3)] prohibiting the possession of a firearm while being an unlawful user of a

controlled substance, on the basis that he regularly used marijuana. The U.S. District Court for the Eastern District of Texas granted the motion, the Court of Appeals for the Fifth Circuit affirmed, and the Supreme Court, in an opinion by Gorsuch, J., unanimously affirmed.

The government agreed that the unlawful user provision burdens conduct presumptively protected by the Second Amendment but construes the provision to automatically ban an individual from possessing a gun from the moment he becomes an unlawful user of any controlled substance and remains in effect until he ceases being one, regardless of what controlled substance an individual uses, in what amounts, whether his drug use has ever made him a danger to himself or others, why he keeps a gun, or how safely he does so. The government analogizes its construction of what it calls "habitual drunkard" laws, which it submits enjoy deep roots in the country's history and are "relevantly similar" to the regulation it wishes to enforce. But the government's analogy fails. The government's claim that historical laws targeted habitual drunkards for the same reason §922 targets unlawful users—because they regularly use intoxicants—is difficult to square with the historical record. Historical laws targeted habitual drunkards not merely because they regularly used intoxicants, but because their drinking rendered them practically incapacitated and incapable of managing their affairs. By contrast, § 922 automatically disarms anyone who regularly uses any amount of any controlled substance for anything other than its prescribed purpose, without requiring a showing that a particular individual is regularly incapacitated, incapable of conducting his affairs, or a threat to himself or others.

Moreover, the government's claim that §922 disarms unlawful drug users to protect the public from unusually dangerous individuals who will commit violent crimes, and that historical laws share a similar purpose, misapprehends the purposes animating those historical analogues. Vagrancy laws usually targeted those who "did not meet the societal expectation of work." Civil-commitment laws, by their own terms, generally did not seek to protect the public from violence so much as to protect habitual drunkards from themselves

and to protect their families from financial devastation. And the surety-of-good-behavior laws the government invokes did not normally require a showing that an individual posed a threat of violence; instead, they sought to protect the community from scandals “against good morals.” There are also reasons to doubt that the government has established even serves the purpose the government claims, of disarming categorically violent and unusually dangerous persons. The Court's decision is narrow. It does not address efforts to ban addicts or those presently intoxicated from possessing a firearm; other prophylactic laws Congress might adopt after determining that users of a particular drug pose a special risk of misusing firearms; the provision disarming individuals convicted of felonies; or whether the government could bring a prosecution under accompanied by individualized proof that the defendant's drug use renders him a danger to himself or others, or proof that a certain drug always renders its users dangerous

Chapter 9 – Free Speech

§ 9-2 Prior Restraint

At the end of *Note 10* (p. 1007), add the following:

12. *PUNISHING ADVOCACY. National Rifle Association of America v. Vullo,* 144 S.Ct.1316 (2024). Maria Vullo, former superintendent of the New York Department of Financial Services, is alleged to have contacted regulated financial entities that oversaw companies that administered insurance policies to the National Rifle Association (NRA), expressed her views in favor of gun control, and told executives of these companies to "cease providing insurance to gun groups." Several of these insurers admitted violations of New York's insurance laws but in response to the alleged tacit threats, paid multimillion dollar fines and agreed not to provide any NRA-endorsed insurance programs. In an opinion by Sotomayor, J., a unanimous Court held that the NRA plausibly alleged that New York violated the First Amendment by coercing regulated entities to terminate their business relationships with the NRA in order to punish or suppress gun-promotion advocacy.

As the Court observed, "A government official can share her views freely and criticize particular beliefs. What she cannot do, however. Is use the power of the State to punish or suppress disfavored expression." See *Bantom Books, Inc. v. Sullivan* (1963)(state commission blacklisted certain publications and reasonably communicated to publishers that it would use the power of the State to punish them if they continued to publish the disfavored materials). "The critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.

§ 9-6 Regulating the Media

At the end of Note 6 (p. 1056), add the following:

7. *REGULATING THE MEDIA*. *Moody v. NetChoice LLC,* 144 S. Ct. 2383 (2024)[together with *NetChoice, LLC. V. Paxton*]. Florida and Texas enacted statutes regulating large social media platforms and other internet platforms. The laws limit the platforms ability to engage in content modification, to filter, prioritize, and label third-party messages, videos, and other content their users seek to post. Both laws also require the platforms to provide reasons to a user if it removes or alters her posts. The Eleventh Circuit upheld an injunction to Florida's law, holding that the restrictions are unlikely to survive First Amendment scrutiny that protects "editorial discretion" from intruded by government. The Fifth Circuit ruled differently, holding that the content moderation policies were "not speech" but if it were, the state could regulate them to promote "diversity of ideas."

The Supreme Court, per Kagan, J., without any dissents, remanded because the Circuit Courts did not conduct a proper facial analysis of the First Amendment challenges. The Court went on to discuss the kinds of applications that might violate the First Amendment. For example, as the Court noted, it has repeatedly held that ordering a party to provide a forum for someone else's views if the regulated party is itself engaged in its own expressive activity which the mandated access would alter or disrupt. See *Miami Herald Publishing Co, v. Tornillo* (1974); *Pacific Gas & Electric Co. v. Public Util. Comm'n of Cal.* (1986); *Turner Broadcasting System, Inc. v. FCC* (1994); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995). From these cases, three general points emerge: (1) the First Amendment offers protection when an entity engaged in compiling and curating others' speech into an expressive product of its own is directed to include messages it would prefer to exclude; (2) it is irrelevant that the compiler includes most items and excludes only a few; and (3) government cannot get its way by simply by asserting an interest in better balancing the marketplace of ideas. The laws in question target the expressive choice of the

platform by forcing them to promote content they regard as objectionable. "On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana."

§ 9-9.6 Compelled Speech

At the end of *Janus v. American Federation, et al.* (p. 1144), add the following:

Chiles v. Salazar, 146 S. Ct. 1010 (2026). In 2019, Colorado adopted a law prohibiting licensed counselors from engaging in "conversion therapy" with minors, defining the term to include "any practice or treatment that attempts to change an individual's sexual orientation or gender identity. Kaley Chiles engages in counseling using talk therapy. She objected to Colorado's law only as it applies to her talk therapy, claiming that the law prohibits her from speaking in ways that help a client "realign his identity with his sex." She filed suit in federal court and sought a preliminary injunction prohibiting the State from enforcing the law against her. Both the district court and the Tenth Circuit denied Chiles's request for a preliminary injunction, reasoning that Colorado's law is best understood as regulating professional conduct, and regulating speech only incidentally, thus triggering no more than rational-basis review under the First Amendment. The Court, in an opinion by Gorsuch, J. reversed, with Justice Jackson dissenting. The Court held that Colorado's law banning conversion therapy, as applied to Chiles's talk therapy, regulates speech based on viewpoint and requires rigorous scrutiny. The fact that the State's viewpoint regulation falls only on licensed health care professionals does not change the equation. The First Amendment protects the right of all to speak their minds, and *National Institute of Family and Life Associates v. Becerra* (2018) expressly rejected the notion that professional speech is subject to "diminished constitutional protection." Colorado's argument that the law regulates speech only incidentally fails because the Court's speech-incident-to-conduct doctrine asks whether the law restricts speech only because it is integrally related to unlawful conduct, or whether the law restricts expressive

conduct only for reasons unrelated to its content. Colorado's law does neither: Chiles' speech does not bear a close causal connection to any separately unlawful conduct, and the State's law trains directly on the content of her speech, permitting some viewpoints but not others. "The First Amendment stands as a bulwark against any effort to prescribe an orthodoxy of views, reflecting a belief that each American enjoys an inalienable right to speak his mind and a faith in the free marketplace of ideas as the best means for finding truth. Laws like Colorado's, which suppress speech based on viewpoint, represent an egregious assault on both commitments."

§ 9-12 Campaign Speech and Financing

At the end of *Note 6,* (p. 1176, add the following:

National Republican Senatorial Committee v. Federal Election Commission, 2026 WL 1868932 (2026). The Republican Party's national senatorial campaign committee brought an action against the Federal Election Commission contending that the Federal Election Campaign Act's limits on political-party coordinated expenditures, meaning a party's expenditures in coordination with a candidate's campaign, violated the Free Speech Clause of the First Amendment. The United States District Court for the Southern District of Ohio granted plaintiffs' motion to certify question. The United States Court of Appeals for the Sixth Circuit, en banc, held that FECA's political-party coordinated-expenditure limits comported with First Amendment. The Supreme Court reversed. In an opinion by Kavanaugh, joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Barrett, the Court overruled *Colorado Republican Campaign Committee v. Federal Election Commission* (*Colorado II),* holding that the Federal Election Campaign Act's political-party coordinated-expenditure limits were not justified by the purported governmental interest in reducing wasteful and excessive campaign spending; were not justified by the purported governmental interest in preventing a political party from exercising undue

influence on its candidates; were not justified by the purported governmental interest in preventing ingratiation and access to elected officials; and were not justified by the governmental interest in preventing circumvention of base limits on contributions to candidates.

To analyze the Campaign Act's limits on political-party coordinated expenditures, the Court must first assess the asserted governmental interests justifying those limits. The Court's precedents recognize only one constitutionally permissible government objective for campaign finance restrictions: "preventing corruption or the appearance of corruption." *McCutcheon*. And "Congress may target only a specific type of corruption—'*quid pro quo*' corruption." Particularly relevant here, this Court has recognized the risk of *quid pro quo* corruption or its appearance when a donor's contributions to a political party are earmarked—that is, "are directed, in some manner, to a candidate or officeholder." The First Amendment question in this case boils down to whether the Act's limits on political-party coordinated expenditures are permissible in order to prevent circumvention of the base limits on contributions to candidates through earmarked contributions to parties. In *Colorado II* this Court said that they were. But *Colorado II* applied deferential scrutiny to Congress's political-party coordinated-expenditure limits. . Since *Colorado II*, however, the Court has emphasized that under the closely drawn test, judicial review must be "rigorous." *McCutcheon*. Under that more demanding standard, the Court agrees with petitioners that the political-party coordinated-expenditure limits are not proportionate, necessary, and narrowly tailored given the other less-speech-restrictive tools available to the Government to prevent circumvention—in particular, earmarking and disclosure laws.

§ 9-13.4 The Internet

At the end of *Notes and Questions* (page 1226), add the following:

Free Speech Coalition v. Paxton, 145 S. Ct. 2291 (2025). In 2023, Texas enacted H. B. 1181, requiring certain commercial websites publishing sexually explicit content that is obscene to minors to verify that visitors are 18 or older. Knowing violations can result in injunctions and civil penalties. Representatives of the pornography industry sued the Texas attorney general to enjoin enforcement of H. B. 1181 as facially unconstitutional under the First Amendment. They alleged that adults have a right to access the covered speech and that the statute impermissibly hinders them. The Fifth Circuit denied the injunction.

The Supreme Court, in an opinion by Thomas, J., joined by Roberts, C.J., & Alito, Gorsuch, Kavanaugh, and Barrett, JJ, upheld H. B. 1181. According to the Court, H.B. 1181 has only an "incidental effect on protected speech" and is therefore subject to intermediate scrutiny. The First Amendment leaves undisturbed the states' traditional power to prevent minors from accessing speech that is obscene from their perspective. That power includes the power to require proof of age before an individual can access such speech. It follows that no person—adult or child—has a First Amendment right to access such speech without first submitting proof of age. Age verification is common when laws draw age-based lines, *e.g.,* obtaining alcohol, a firearm, or a driver's license. Obscenity is no exception. Most States require age verification for in-person purchases of sexual material and petitioners concede that in-person requirements of this kind are "traditional" and "almost surely" constitutional. And as a practical matter, age-verification is necessary for an effective prohibition on minors accessing age-inappropriate sexual content, especially on the internet. Because H. B. 1181 simply requires proof of age to access content that is obscene to minors, it does not directly regulate adults' protected speech. Adults have the right to access speech that is obscene only to minors, and submitting to age verification does burden the exercise of that

right. But adults have no First Amendment right to avoid age verification. A burden on adults is therefore incidental to regulating activity not protected by the First Amendment. This makes intermediate scrutiny the appropriate standard under the Court's precedents.

Applying the more demanding standard of strict scrutiny would call into question *all* age-verification requirements. Strict scrutiny is designed to enforce the First Amendment's prohibition on content-based laws and as a practical matter is almost always fatal in fact. But precedent does not call for the application of strict scrutiny. The Court's decisions applying strict scrutiny in this context all involved laws that *banned* both minors and adults from accessing speech that was at most obscene only to minors. The Court has never before considered whether the more modest burden of an age-verification requirement triggers strict scrutiny. Strict scrutiny therefore is not the appropriate standard for laws that are traditional and widely accepted as legitimate.

H. B. 1181 survives intermediate scrutiny because it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than is necessary to further those interests. H. B. 1181 furthers Texas's important interest in shielding children from sexual content and is adequately tailored to that interest. States have long used age-verification requirements to reconcile their interest in protecting children from sexual material with adults' right to avail themselves of such material. H. B. 1181 simply adapts this traditional approach to the digital age. The specific verification methods that H. B. 1181 permits — government-issued identification and transactional data—are also plainly legitimate. Both are established methods of verifying age already in use by many pornographic websites and other industries with age-restricted services.

Kagan, J., with Sotomayor and Jackson, J.J., dissented. Under ordinary First Amendment doctrine, this Court should subject H. B. 1181 to strict scrutiny. That is because H. B. 1181 covers speech constitutionally protected

for adults; it impedes adults' ability to view that speech; and it imposes that burden based on the speech's content. H. B. 1181 imposes burdens on protected speech based on the speech's communicative content, making it a quintessential content-based law. And according to the Court's many cases, when reviewing statutes imposing similar content-based burdens on protected sexually explicit speech the standard has always been strict scrutiny. The only open question in this case should be whether H. B. 1181 can satisfy that test. Applying strict scrutiny in this context, however, need not be fatal. A State should be able to devise a regulatory means of achieving its objective consistent with the First Amendment. The majority is correct that a State has a compelling interest in shielding children from the obscene-for-children materials that H. B. 1181 covers. The critical question, then, is whether the State can show that it has limited no more adult speech than is necessary to achieve its goal. The dissenters would demand that Texas show more, to ensure that it is not undervaluing the interest in free expression. Texas can of course take measures to prevent minors from viewing obscene-for-children speech. But if a scheme other than H. B. 1181 can just as well accomplish that objective and better protect adults' First Amendment freedoms, then Texas should have to adopt it (or at least demonstrate some good reason not to).

Chapter 10 – Religion

§ 10-5 Burdening Free Exercise

At the end of *Notes and Questions* (p. 1313), add the following:

COMPELLED ATTENDANCE: *Mahmoud v. Taylor,* 145 S. Ct. 2332 (2025). During the 2022–2023 school year, the Montgomery County Board of Education (Board) introduced a variety of "LGBTQ+-inclusive" texts into the public school's curriculum. Those texts included five "LGBTQ+-inclusive" storybooks approved for students in kindergarten through fifth grade, which have story lines focused on sexuality and gender. When parents in Montgomery County sought to have their children excused from instruction involving those books, the Board initially compromised with the parents by notifying them when the "LGBTQ+-inclusive" storybooks would be taught and permitting their children to be excused from the instruction. That compromise was consistent with the Board's "Guidelines for Respecting Religious Diversity," which professed a commitment to making "reasonable accommodations" for the religious "beliefs and practices" of students. Less than a year after the Board introduced the books, however, it rescinded the parental opt out policy. Among other things, the Board said that it "could not accommodate the growing number of opt out requests without causing significant disruptions to the classroom environment."

A group of individual parents and an unincorporated association filed a lawsuit asserting that the Board's no-opt-out policy infringed on parents' right to the free exercise of their religion. They relied heavily on *Wisconsin v. Yoder* (1972), in which the Court recognized that parents have a right "to direct the religious upbringing of their children" and that this right can be infringed by laws that pose "a very real threat of undermining" the religious beliefs and practices that parents wish to instill in their children. They sought an injunction "prohibiting the School Board from forcing their children and other students—over the objection of their parents—to read, listen to, or discuss"

the storybooks. The District Court denied relief and a divided panel of the Fourth Circuit affirmed.

The Supreme Court, in an opinion by Alito, J., joined by Roberts, C.J., and Thomas, Gorsuch, Kavanaugh, and Barrett, JJ., reversed. According to the majority, the parents are entitled to an injunction because they are likely to succeed on their claim that the Board's policies unconstitutionally burden their religious exercise. The Court has "long recognized the rights of parents to direct the religious upbringing of their children." *Yoder*. Those rights are violated by government policies that substantially interfere with the religious development of children. For many people of faith, there are few religious acts more important than the religious education of their children. And the practice of educating one's children in one's religious beliefs receives a generous measure of constitutional protection. The Constitution protects, for example, a parent's decision to send his or her child to a private religious school instead of a public school. *Pierce v. Society of Sisters* (1925). And the Court has recognized limits on the government's ability to interfere with a student's religious upbringing in a public school setting. *West Virginia Bd. of Ed. v. Barnette* (1943).

The Board's introduction of the "LGBTQ+-inclusive" storybooks, combined with its decision to withhold notice to parents and to forbid opt outs, substantially interferes with the religious development of petitioners' children and imposes the kind of burden on religious exercise that *Yoder* found unacceptable. The books are unmistakably normative. They are designed to present certain values and beliefs as things to be celebrated, and certain contrary values and beliefs as things to be rejected. Like the compulsory high school education considered in *Yoder*, these books impose upon children a set of values and beliefs that are "hostile" to their parents' religious beliefs. And the books exert upon children a psychological "pressure to conform" to their specific viewpoints. The books therefore present the same kind of "objective danger to the free exercise of religion" that the Court identified in *Yoder*.

It is no answer, the Court said, that parents remain free to place their children in private school or to educate them at home. Public education is a public benefit, and the government cannot "condition" its "availability" on parents' willingness to accept a burden on their religious exercise. *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017). Moreover, given that education is compulsory in Maryland, the parents are not being asked simply to forgo a public benefit. They have an obligation—enforceable by fine or imprisonment—to send their children to public school unless they find an adequate substitute they can afford. Nor is it of any comfort to suggest that parents can educate their children at home after school. The parents in *Barnette* and *Yoder* were similarly capable of teaching their religious values "at home," but that made no difference in the First Amendment analysis in those cases. It is similarly unconvincing to suggest that the parents could have challenged the educational requirements via the democratic process. The parents tried and failed to obtain legislative change, and had every right to resort to judicial review to protect their rights.

Justice Sotomayor, joined by Kagan & Jackson, J.J., dissented. The logic of the Court's ruling will also apply to countless other topics, interactions, and activities that may conflict with a parent's religious preferences. What of the parent who wants his child's curriculum stripped of any mention of women working outside the home, sincerely averring that such activity conflicts with the family's religious beliefs? It blinks reality to suggest that the simple solution for schools is to create new discrete units of instruction to cover any set of material to which a parent objects. The Court's analysis thus reflects, all too well, the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the necessity of discrete aspects of a State's program of compulsory education. What is more, the point of the Board's program is to ensure that diverse groups of students are represented in reading materials across the curriculum. The Board cannot accomplish that purpose simply by consolidating all books involving LGBTQ characters into a single inclusivity hour and allowing opt outs, as the majority appears to believe. That approach would emphasize difference rather than sameness

and foster exclusion rather than inclusion. The point of inclusivity is to use books representing a diversity of identities and viewpoints the same way one might use any other book, communicating that one's LGBTQ classmates should be treated in the same manner as anyone else.

> “Today's ruling threatens the very essence of public education. The Court, in effect, constitutionalizes a parental veto power over curricular choices long left to the democratic process and local administrators. That decision guts our free exercise precedent and strikes at the core premise of public schools: that children may come together to learn not the teachings of a particular faith, but a range of concepts and views that reflect our entire society. Exposure to new ideas has always been a vital part of that project, until now. The reverberations of the Court's error will be felt, I fear, for generations.”

QUESTIONS: Under *Mahmoud v. Taylor*, could a parent opt out of their child’s learning about evolution when their religion teaches the world was created in 6 days? Where is the line between parental rights and an efficient use of school resources? Should every parent be able to opt their child out of any lesson if the subject matter or the way it is taught doesn’t strictly align with the parents’ beliefs? Should schools be required to inform and incorporate feedback from every parent annually to construct their curriculum? Should Mormon parents be allowed to opt students out of any lesson or book that mentions coffee?

At the end of *Notes and Questions* (p. 1350), add the following:

Oklahoma Statewide Charter School Board v. Drummond, 145 S. Ct. 1381 (2025). In *Drummond ex rel. State of Okla. v. Okla. Statewide Virtual Charter Sch. Bd.,* 558 P.3d 1 (Okla. 2024), affirmed by an equally divided court, the Oklahoma State Supreme Court issued a 4–4 divided opinion over whether St. Isadore of Seville Catholic Virtual Schools can qualify as a Charter School under the Oklahoma Charter Schools Act (OCSA) and the United States Constitution. Under the OCSA, charter schools are "public schools established by contract with a school district or other governmental entity." The Principal Opinion asserted that St. Isadore qualifies as a state actor under the "public function" test laid out in Justice Kavanaugh's majority opinion in *Manhattan Cmty. Access Corp. v. Halleck*, (2019), in which an entity is a state actor when it "performs a traditional, exclusive public function." The Oklahoma State Constitution describes public education as an exclusively public function. The court distinguished this case from *Oliver v. Hoffmeister* (Okla. 2016), where the state distributed scholarships to parents and the parents could choose to use that money on sectarian education, because the state was not directly funding any religious school. Here, the money would be distributed directly to St. Isadore, which openly mandates a Catholic curriculum throughout its K–12 program, thereby violating the Establishment Clause. The dissent argued that education is not an exclusively public function, and merely contracting with and being regulated by the state does not make charter schools a state actor. Adding that as long as St. Isadore meets the criteria that all charter schools must meet, barring the school from qualifying as a charter school violates the Free Exercise Clause.

In a *per curiam* order, the Supreme Court affirmed the decision by an equally divided Court. Justice Barrett took no part in the consideration or decision of the case.

QUESTIONS: The Oklahoma dissent argued that charter schools are not state actors and that the funding procedures under the OSCA effectively shift

financial support from traditional public schools to, in this case, a Catholic school. Does the analysis change when examining this issue under the Establishment Clause rather than the Free Exercise Clause? Where should the line be drawn as to which of the clauses to use?